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CIS

REGULATORY REFORM ACT—S. 1080

HEARING

BEFORE THE

SUBCOMMITTEE ON REGULATORY REFORM

OF THE

COMMITTEE ON THE JUDICIARY

UNITED STATES SENATE

NINETY-SEVENTH CONGRESS

FIRST SESSION

ON

S. 1080

MAY 14, 1981

Serial No. J–97–8

Printed for the use of the Committee on the Judiciary

U.S. GOVERNMENT PRINTING OFFICE

86-435 O WASHINGTON : 1982

S521-50

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REGULATORY REFORM ACT—S. 1080

THURSDAY, MAY 14, 1981

U.S. SENATE,
SUBCOMMITTEE ON REGULATORY REFORM
OF THE COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met, pursuant to notice, at 9:08 a.m., in room 2228, Dirksen Senate Office Building, Senator Paul Laxalt (chairman of the subcommittee) presiding.

Present: Senator Leahy, Senator Simpson, and Senator Thurmond [ex officio].

Also present: Senator Grassley.

Staff present: John F. Nash, Jr., chief counsel and staff director to Senator Laxalt; Robert J. Cynkar, general counsel to Senator Laxalt; Linden T. Heck, majority counsel to Senator Laxalt, Subcommittee on Regulatory Reform; Alex A. Beehler, majority counsel to Senator Dole; John Podesta, chief minority counsel to Senator Leahy; and Ann Harkins, minority counsel to Senator Leahy.

STATEMENT OF PAUL LAXALT, A U.S. SENATOR FROM THE STATE OF NEVADA, CHAIRMAN, SUBCOMMITTEE ON REGULATORY REFORM

Senator LAXALT. The subcommittee will come to order.

This subcommittee is today holding a hearing on S. 1080, the Regulatory Reform Act.

In the 88th Congress in 1964, the predecessor of this subcommittee, the Subcommittee on Administrative Practice and Procedure, held 3 days of hearings and heard from 36 witnesses on a bill which was intended to "update and improve the procedural rules that govern proceedings before the administrative departments and agencies." Hearings on this subject continued in the 89th, 94th, and 95th Congresses.

During the last Congress, the Subcommittee on Administrative Practice and Procedure embarked on an ambitious schedule of 10 days of hearings, receiving testimony from over 100 witnesses on all manner of regulatory reforms. In a very real sense, this hearing is a continuation of this 17-year saga.

The Subcommittee on Regulatory Reform has only part of the jurisdiction of its predecessor, focusing on the Administrative Procedure Act and the general procedural aspects of the regulatory process. The Subcommittee on Agency Administration, chaired by Senator Grassley, essentially exercises the remainder of the Administrative Practice Subcommittee's former jurisdiction, dealing with the legislative veto, matters involving congressional or judicial appeal of agency actions, and related issues.

Though this subcommittee is new, most of the faces here are familiar. Senator Dole, Senator Mathias, and Senator Leahy are old colleagues of mine from the Administrative Practice Subcommittee. Senator Simpson and Senator Robert Byrd are new members, and I extend a most cordial welcome to them.

S. 1080 was developed in a spirit of genuine cooperation among all the members of the subcommittee. It is the result of extensive negotiation and work and is, I believe, a reasonable compromise proposal. I want to especially express my appreciation to my colleague to my left here, Senator Leahy, for all of his effort and leadership on the minority side.

As can be expected, there are areas of the bill which I feel can be toughened. Yet overall this legislation is worthy of the support of all of our colleagues. I hope this proceeding today marks the end of the Senate's extensive hearings into certain aspects of regulatory reform and the beginning of our legislating those reforms. Judging by the broad support of this bill, I would guess that this is not a vain hope.

At the same time, it is important to keep in mind that this bill is only part of regulatory reform. Critically needed reforms will be achieved by changes in the various organic statutes which are within the jurisdiction of other committees. In addition, fundamental reform on the day-to-day operations of Federal agencies is brought about by the clear direction of the President, embracing new policies, and the enthusiastic labors of a new breed of regulators.

Our role is certainly significant. Establishing a structure for rational decisionmaking by the agencies will go far to control the ineffective and wasteful use of our resources by the Federal regulatory mechanism. This is a policy which has been embraced by President Reagan. The process of regulatory analysis, mandated in one form by Executive Order 12291, and a central part of this bill, is designed to provide public scrutiny of the tradeoffs inherent in any regulatory decision and to insure that agencies behave rationally in the face of those tradeoffs.

I would like to close my opening remarks by sharing an observation made during the last Congress by Frank Beal, director of the Illinois Institute of Natural Resources, which is an independent agency created under the Illinois Environmental Protection Act. Mr. Beal concluded:

> As individuals in society, we are called upon to make these kinds of decisions practically every day. That all of the consequences of our actions cannot be monetized does not make them devoid of value. Economic impact studies do not, nor can they, provide all the answers to the difficult problems of protecting public health and welfare. But they identify tradeoffs which characterize the solutions. I suggest that this represents an important contribution to the decisionmaking process.

Today we will hear from a most distinguished and informed group of witnesses. I welcome them all and look forward to an illuminating exchange with them.

Senator Leahy?

OPENING STATEMENT OF PATRICK J. LEAHY, A U.S. SENATOR FROM THE STATE OF VERMONT

Senator LEAHY. Thank you, Mr. Chairman.

I would like to begin by commending you for your own strong commitment to regulatory reform, especially your hard work in developing S. 1080.

I might say that this is a commitment that has been shown throughout time—certainly throughout the time both of us have been in the Senate.

I hope that the fact that we were able to put together what I think is a rather impressive bipartisan coalition of cosponsors reflects the kind of work that the two of us have done.

In my mind, I know that it reflects a kind of respect and friendship that I feel for you. I know your own commitment. Even when you have been in glorious spots—places that should keep your mind totally off this, like the State of Vermont—you were still able to talk about regulatory reform. That is a driven commitment.

I think that what we have demonstrated by the cosponsorship here is a true desire of the Senate to get on with the real work of regulatory reform and to move it from rhetoric into reality.

Mr. Chairman, as you pointed out, we in the subcommittee benefit from years of consideration of a wide variety of regulatory reform proposals. Many might say it has been long enough, and it is time to get on to real regulatory reform.

We have to use that extensive background and the wealth of experience that the members of our subcommittee—from both parties—have in the regulatory reform area, to attack the burdens Federal regulations have imposed on our economic and administrative resources.

We cannot sacrifice the recognized benefits of Federal regulation in making industrial workplaces safer and healthier for our workers, cleaning up the environment, or eliminating cancer-causing chemicals from our food and our homes. But we must provide the agencies with the procedural framework to achieve these benefits at lower costs to regulated industries and ultimately to the public and the consumer.

S. 1080 concentrates on the Federal rulemaking process. It will force the regulatory agencies to more thoroughly consider the potential costs and benefits of proposed major rules. It requires the agencies to consider the impact these rules will have on those regulated—the businesses, industries, and consumers who bear the brunt of Federal regulations.

The agencies must carefully explore less burdensome alternatives and develop rules designed to achieve the goals Congress has set for them in as cost effective a manner as possible. This is a rational approach to rulemaking.

Mr. Chairman, over the last few months, we have developed a very good compromise bill. I am sure we will be able to draft an even better bill after hearing the testimony today from those in the administration who will be overseeing the implementation of S. 1080, and the representatives of those we want to benefit from its reform of the rulemaking process—American business, workers, consumers, and the taxpayers at large who bear the costs, as well as enjoy the benefits, of Federal regulation.

One of our principal goals in developing this legislation is to free our human and capital resources from needless regulatory requirements so they can be used to get our economy moving.

I am looking forward to studying the views of the experts we have asked to address the Regulatory Reform Act's impact on the economy. I am equally anxious to review the testimony of the panel which will be analyzing the bill's practical effects on administrative law and the rulemaking process.

I do have some concerns about certain aspects of the bill, as each one of us does, and I am looking forward to exploring these concerns with the fine witnesses we have here today.

I would like to welcome all of you to the hearing. This is just the first step in the subcommittee's commitment to enacting meaningful regulatory reform legislation.

I think this subcommittee is more committed to that than any committee has ever been, certainly during the time I have been in the Senate.

Your own experience—each one of the panels—is invaluable to us.

In the short time we are going to have here, you will become the educators. We will become the students.

Thank you, Mr. Chairman.

Senator LAXALT. I thank my colleague.

First of all, without objection, I want to order a copy of S. 1080 and a summary of its provisions be inserted in the record.

I would also like to insert in the record the statement of Senator Thurmond, the chairman of the full Committee on the Judiciary.

[Material follows:]

97TH CONGRESS
1ST SESSION

S. 1080

To amend the Administrative Procedure Act to require Federal agencies to analyze the effects of rules to improve their effectiveness and to decrease their compliance costs; to provide for a periodic review of regulations, and for other purposes.

IN THE SENATE OF THE UNITED STATES

APRIL 30 (legislative day, APRIL 27), 1981

Mr. LAXALT (for himself, Mr. LEAHY, Mr. THURMOND, Mr. ROTH, Mr. BIDEN, Mr. EAGLETON, Mr. ROBERT C. BYRD, Mr. BENTSEN, Mr. MATHIAS, Mr. HATCH, Mr. DOLE, Mr. SIMPSON, Mr. EAST, Mr. GRASSLEY, Mr. DENTON, Mr. SPECTER, Mr. PERCY, Mr. STEVENS, Mr. DURENBERGER, Mr. MATTINGLY, Mr. KENNEDY, Mr. METZENBAUM, Mr. DECONCINI, Mr. BAUCUS, Mr. HEFLIN, Mr. CHILES, Mr. NUNN, Mr. SASSER, Mr. PRYOR, Mr. LEVIN, Mr. SCHMITT, Mr. HELMS, Mr. TOWER, Mr. HATFIELD, Mr. DOMENICI, Mr. WEICKER, Mr. GARN, Mr. BUMPERS, Mr. HARRY F. BYRD, JR., Mr. HUDDLESTON, Mr. DODD, Mr. GOLDWATER, Mr. LUGAR, Mr. COCHRAN, Mr. JEPSEN, Mr. KASTEN, Mr. HUMPHREY, Mrs. KASSEBAUM, Mr. BURDICK, Mr. HOLLINGS, Mr. PELL, Mr. ARMSTRONG, Mr. PRESSLER, Mr. WALLOP, Mr. ABDNOR, Mr. D'AMATO, Mr. ANDREWS, Mr. SYMMS, Mrs. HAWKINS, Mr. QUAYLE, Mr. HAYAKAWA, Mr. FORD, Mr. RIEGLE, Mr. DIXON, Mr. MITCHELL, Mr. ZORINSKY, Mr. JOHNSTON, Mr. BOREN, Mr. BOSCHWITZ, Mr. HEINZ, Mr. INOUYE, Mr. CHAFEE, Mr. NICKLES, Mr. GLENN, and Mr. MATSUNAGA) introduced the following bill; which was read twice and referred jointly, pursuant to the order of April 29, 1981, to the Committees on the Judiciary and Governmental Affairs

---

A BILL

To amend the Administrative Procedure Act to require Federal agencies to analyze the effects of rules to improve their effectiveness and to decrease their compliance costs; to

provide for a periodic review of regulations, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Regulatory Reform Act".

RULEMAKING PROCEDURES

SEC. 2. Section 551 of title 5, United States Code, is amended by adding at the end thereof the following new paragraphs:

"(15) 'emergency rule' means a rule that may be temporarily effective according to the provisions of subsection (b) of section 553 of this title without prior compliance with the provisions of subsections (c) through (g) of section 553 if the agency finds that a delay in the effective date of the rule would—

"(A) seriously injure an important public interest; or

"(B) seriously damage a person or class of persons without serving any important public interest;

"(16) 'major rule'—

"(A) means a rule or a series of closely related rules that causes or is likely to cause—

"(i) an annual effect on the economy of $100,000,000 or more in direct or indirect enforcement and compliance costs;

"(ii) a substantial increase in costs or prices for wage earners, consumers, individual industries, Federal, State, or local government agencies, or geographic regions; or

"(iii) significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of enterprises whose principal places of business are in the United States to compete in domestic or export markets;

"(B) but does not mean—

"(i) a rule of particular applicability that approves or prescribes for the future rates, wages, prices, services, or allowances therefor, corporate or financial structures or reorganizations thereof, or accounting practices bearing on any of the foregoing, or a rule that involves the internal revenue laws of the United States;

"(ii) a rule that authorizes the introduction into commerce or recognizes the marketable status of a product or service that, pursuant to statute, could not lawfully be introduced into commerce or marketed in the absence of the rule; or

"(iii) a rule that relates to the property or contracts of the Tennessee Valley Authority;

"(17) 'cost' or 'costs' means potential significant costs, including direct and indirect social costs and effects;

"(18) 'benefit' or 'benefits' means potential significant benefits, including direct and indirect social benefits and effects.".

SEC. 3. Section 553 of title 5, United States Code, is amended to read as follows:

"(a) This section applies to every rule making except as provided in subsection (b).

"(b)(1) This section does not apply, except when notice or hearing is otherwise required by statute, to any—

"(A) rule to the extent that such rule involves a military or foreign affairs function of the United States;

"(B) rule relating exclusively to internal personnel rules and personnel practices of an agency;

"(C) interpretive rule, general statement of policy, or rule of agency organization, procedure, or practice, other than an interpretive rule or general statement of policy that has general applicability and would have a substantial impact on the substantive rights or obligations of persons outside the agency;

"(D) rule for which the agency for good cause finds that notice and public comment are unnecessary due to the routine nature of the matter or the insignificant impact of the rule; or

"(E) emergency rule.

"(2) In the case of a rule for which an agency makes a finding under subparagraph (D) of paragraph (1) of this subsection, the agency shall publish the rule in the Federal Register with a statement of the finding of the agency under such subparagraph and the reasons therefor.

"(3) In any case in which an agency promulgates an emergency rule—

"(A) the agency shall publish the rule in the Federal Register with a statement which describes the emergency necessitating the promulgation of the rule, the reasons why the agency chose the rule promulgated as a response to the emergency, and the reasons why the agency was unable to comply with the provisions of subsections (c) through (g) of this section prior to the promulgation of the rule;

"(B) the agency shall comply with the provisions of subsections (c) through (g) of this section as soon as practicable after the promulgation of the emergency rule; and

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"(C) the emergency rule may not be effective longer than a reasonable period necessary to complete agency compliance with subsections (c) through (g) of this section.

"(c)(1) Notice of proposed rule making shall be published in the Federal Register, unless each person subject thereto is named and personally served with notice or otherwise has actual notice thereof in accordance with law. Such notice shall include—

"(A) a statement of the time, place, and nature of the public rule making proceedings;

"(B) a statement of the specific statutory authority under which the rule is proposed and the specific congressional intent sought to be achieved by the rule;

"(C) the proposed provisions of the rule, including a succinct statement of the need for, and the objectives of, the rule;

"(D) a statement that the agency seeks proposals from the public for alternative ways to accomplish the objectives of the proposed rule that are more effective or less burdensome than the approach used in the proposed rule;

"(E) a description of the data, methodology, reports, studies, or other information upon which the agency plans to substantially rely in the rule making,

and of the purposes for which the agency plans to rely on such information, including an identification of the authors or sources of such information;

"(F) a statement of where the file of the rule making proceeding maintained pursuant to subsection (f) of this section may be inspected or copies of the file may be obtained at a reasonable cost; and

"(G) a determination of whether the proposed rule is or is not a major rule and a short statement of the basis thereof.

"(2) When the agency publishes a notice of proposed rule making for a major rule, the agency shall also publish—

"(A) a description of the benefits of the proposed rule, including any beneficial effects that cannot be quantified; and an explanation of how the agency anticipates each such benefit will be achieved by the proposed rule, including a description of the persons or classes of persons likely to receive such benefits;

"(B) a description of the costs of the proposed rule, including any adverse effects that cannot be quantified; and an explanation of how the agency anticipates each such cost or adverse effect will result from the proposed rule, including a description of the persons or classes of persons likely to bear such costs or adverse effects;

"(C) a description of reasonable alternatives for achieving the identified benefits of the proposed rule, including alternatives that require no Government action; that will accommodate differences between geographic regions; and that employ standards which permit the greatest flexibility in achieving the identified benefits of the proposed rule; and

"(D) except where the enabling statute pursuant to which the agency is acting directs otherwise, an explanation of how the benefits of the proposed rule are likely to justify the costs and adverse effects of the proposed rule, and an explanation of why the proposed rule is likely to substantially achieve the rule making objectives in a more cost-effective manner than the alternatives to the proposed rule.

"(3) An agency shall describe the nature and extent of the nonquantifiable benefits, costs, and effects of the proposed rule required to be described under paragraph (2) in as precise and succinct a manner as possible. The description of the benefits, costs, and adverse effects of a proposed rule required under paragraph (2) shall include a quantification or numerical estimate of the quantifiable benefits, costs, and effects. Such quantification or numerical estimate shall include an explanation of the margins of error involved in the quantification methods and in the estimates used. The agency eval-

uations of the relationship of the benefits of a proposed rule to its costs and adverse effects required by this section shall be clearly articulated in accordance with the provisions of this section. An agency is not required to make such evaluation primarily on a mathematical or numerical basis.

"(4) Any supplement to or modification or revision of the notice of proposed rule making that is significant shall be published by the agency in the Federal Register and shall contain the information required by this section.

"(d)(1) After publishing the notice of proposed rule making required by subsection (c) of this section, the agency shall give interested persons not less than sixty days to participate in the rule making through the submission of written data, views, arguments, and statements. The agency may use such other procedures as it determines are appropriate for a particular rule making.

"(2) The agency, by timely notice in the Federal Register, shall extend the time for participation in the rule making for a period of not less than thirty days if—

"(A) such an extension is requested in writing by a participant whose personal rights or economic interests are directly and adversely affected by the proposed rule; and

"(B) such request is received by the agency no less than ten days before the sixty-day period for par-

ticipation in the rule making has expired, unless this limitation is waived by the agency:

Provided, That no extension of time need be granted if the administrative officer responsible for orderly participation in the proceeding makes a written finding that an extension of time is contrary to the public interest, transmits that finding to the participant requesting the extension, and publishes that finding in the Federal Register within ten days of the receipt of the request for an extension.

"(3) When the agency publishes a notice of proposed rule making for a major rule, the opportunity for participation in the rule making provided by paragraph (1) shall also include an opportunity to make oral presentations of data and information relevant to a significant controversy in the rule making. This opportunity for oral presentations shall include an opportunity for cross-examination only (i) when requested by interested persons for the resolution of material issues of fact and (ii) when other available procedures for the resolution of such issues, including oral and written rebuttal, are determined to be inadequate. The agency may establish reasonable procedures to regulate the course of oral presentations to ensure an orderly and expeditious proceeding.

"(4) When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title apply instead of this subsection.

"(5) Nothing in this section authorizes the use of appropriated funds available to any agency to pay the attorney's fees or other expenses of persons participating or intervening in agency proceedings.

"(e)(1) Except for rules which grant or recognize an exemption or relieve a restriction, a final rule shall be published in the Federal Register not less than thirty days before its effective date. Publication of a final rule shall be accompanied by a statement of its basis and purpose, which shall include—

"(A) a statement of the need for, and the objectives of, the rule;

"(B) a description of each of the alternatives to the rule which were considered by the agency, and a statement of reasons why each alternative was rejected;

"(C) a memorandum of law supporting the determination of the agency that the final rule is within the authority delegated by law and consistent with congressional intent;

"(D) a succinct explanation of how the factual conclusions upon which the rule is based are substantially supported in the rule making file, including a summary of the assessment made by the agency of the comments presented by the public; and

"(E) a description of the data, methodology, reports, studies, or other information upon which the agency is substantially relying in promulgating the final rule, and of the purposes for which the agency is relying on such information, including an identification of the author or sources of such information.

"(2) When a final major rule is published, the statement of basis and purpose shall also include—

"(A) a description and comparison of the benefits, costs, and adverse effects of the rule; and

"(B) except where the enabling statute pursuant to which the agency is acting directs otherwise, a reasonable determination, based upon the rule making file considered as a whole, that the benefits of the rule justify the costs and adverse effects of the rule, and that the rule will substantially achieve the rule making objectives in a more cost-effective manner than the alternatives described in the rule making.

"(3) The preparation of the notice required by subsection (c), and the preparation of the statement of basis and purpose required by this subsection, including any description or analysis of the benefits, costs, and adverse effects of a proposed rule, shall only be performed by an officer or full-time employee of the agency. This requirement shall not apply to the gathering of information to be used in such

notice or statement. If such information is gathered by a source outside of the agency, the agency shall specifically identify, in the notice of proposed rule making or in the statement of basis and purpose, the information gathered and such source, and shall describe the arrangement by which the information was procured by the agency, including the total amount of funds expended for such procurement.

"(4) In promulgating a final rule, the agency may not rely on any written material that was not identified in the notice of proposed rule making unless—

"(A) such material was placed in the rule making file; or

"(B) notice was otherwise given that the agency intends to take notice of information appearing elsewhere, and interested persons were given an adequate opportunity to comment upon such material prior to promulgation of the final rule.

"(f)(1) The agency shall maintain a public file for each rule making proceeding. The file and the material excluded from the file pursuant to paragraph (2) of this subsection shall constitute the rule making record for purposes of judicial review. Except as provided in paragraph (2) of this subsection, the file shall contain all the relevant matter before the agency as a result of the rule making, including—

"(A) the notice of proposed rule making and any supplement to or modification or revision of such notice;

"(B) copies or an identification of the place at which copies may be obtained, at a reasonable cost, of all studies and documentary material upon which the agency substantially relied in formulating the rule;

"(C) all written comments received on the proposed rule;

"(D) transcripts of any oral presentation or cross-examination taking place in the rule making;

"(E) all material that the agency by law is required to make public in connection with the rule making; and

"(F) any statement, description, or analysis required to be prepared by the agency in formulating the rule, including the statement of basis and purpose published by the agency with a final rule pursuant to subsection (e).

"(2) The file required by paragraph (1) of this subsection need not include any material that is exempt from public disclosure under section 552(b) of this title if the agency includes in such file a statement that notes the existence of such material and the basis upon which such material is exempt from public disclosure under such section.

"(3) No court shall hold unlawful or set aside an agency rule because of—

"(i) an inadequacy in the statement required to be published pursuant to paragraphs (2) and (3) of section 553(c) and paragraph (2) of section 553(e), or

"(ii) a failure by the agency to afford an opportunity for cross-examination pursuant to subsection (d)(3) of this section,

unless the court finds, upon review of the whole rule making record, that such inadequacy or failure renders the rule unlawful under section 706(a)(2) (A), (B), or (C) of this title.

"(4) Any analysis of a proposed or a final rule required by another provision of this title or by another statute may be included in the notice of proposed rule making and in the statement of basis and purpose published with a final rule under this section to the extent that such analysis satisfies, or is not inconsistent with, the requirements of this section.

"(g) Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.".

REGULATORY REVIEW

SEC. 4. (a) Subchapter II of chapter 5 of title 5, United States Code, is amended by adding at the end thereof the following new section:

"§560. Review of agency rules

"(a)(1) Not later than nine months after the effective date of this section, each agency shall prepare and publish in the Federal Register for comment by interested persons a proposed schedule for the review, within a ten-year period beginning on the effective date of this section, of each major rule in effect on such date.

"(2) At least ninety days before publishing the proposed schedule in the Federal Register, each agency shall make the proposed schedule available to the President or an officer designated by him. Each proposed schedule shall contain a brief explanation of the reasons the agency considers each rule on the schedule to be a major rule and shall include a date set by the agency for the completion of the review of each such rule. The agency shall set a date for initiation of review of each item on the schedule in a manner to ensure the simultaneous review of related items and to achieve a reasonable distribution of reviews over the period of time covered by the schedule. The President or an officer designated by him may select additional rules to be reviewed pursuant to subsection (c) of this section.

"(3) Not later than one year after the effective date of this section, each agency shall publish in the Federal Register a final schedule for the review of the rules referred to in paragraphs (1) and (2). Each agency shall publish the re-

sponse of the agency to comments received concerning the proposed schedule with the final review schedule.

"(4) Except where explicitly provided otherwise by statute or where an extension has been granted pursuant to subsection (f), each major rule that is in effect on the date of enactment of this section shall be reviewed by the agency within ten years of the date of enactment of this section. Pursuant to such review, the agency shall determine to renew, amend, or rescind that rule.

"(b)(1) Except where explicitly provided otherwise by statute or where an extension has been granted pursuant to subsection (f), each major rule promulgated, amended, or otherwise renewed by an agency after the date of enactment of this section shall be reviewed by the agency within ten years of the date on which such a rule becomes effective. Pursuant to such review, the agency shall determine to renew, amend, or rescind that rule.

"(2) The President or an officer designated by him may select additional rules that were promulgated by an agency after the date of enactment of this section to be reviewed pursuant to subsection (c) of this section.

"(c) An agency shall publish in the Federal Register a notice of its proposed action regarding a rule being reviewed. The notice shall include—

"(1) an identification of the specific statutory authority under which the rule was promulgated and a determination of whether the rule continues to fulfill the intent of Congress enacting that authority;

"(2) an assessment of the benefits, costs, and adverse effects of the rule during the period in which it has been in effect;

"(3) an explanation of the proposed agency action with respect to the rule;

"(4) for a rule that the agency determines no longer falls within the definition of a major rule, or for a rule that the agency proposes to renew with modifications that would exclude the rule from the definition of a major rule, an explanation of the determination or proposal; and

"(5) a statement that the agency seeks proposals from the public for modifications or alternatives to the rule which may accomplish the objectives of the rule in a more effective or less burdensome manner.

"(d) If an agency proposes to rescind or amend the rule, after issuing the notice required by this subsection the agency shall comply with the provisions of section 553 of this chapter; and the requirements of that section and related requirements of law shall apply to the same extent, and in the same

manner, as in the case of a proposed agency action which is not taken pursuant to the review required by this section.

"(e) If an agency proposes to renew the rule without amendment, the agency shall—

"(1) give interested persons not less than sixty days after the notice required by this subsection to comment on the renewal; and

"(2) publish the renewed rule in the Federal Register at least thirty days prior to the date on which the renewal of the rule is to become effective with an explanation of the reasonable determination of the agency that the rule continues to comply with the provisions of subsection (e)(2)(B) of section 553.

"(f)(1) Any agency, which for good cause finds compliance with this section with respect to a particular rule to be impracticable during the period provided in subsection (a) or (b), may request the President, or an officer designated by him, to establish a period longer than ten years for the completion of the review of such rule. The President or an officer designated by him may extend the period for review of a major rule to a total period of not more than fifteen years. Such extension shall be published in the Federal Register with an explanation of the reasons therefor.

"(2) An agency may, with the concurrence of the President or an officer designated by him, amend any schedule

required by this section for the review of rules if such amendment is published in the Federal Register.

"(g) In any case in which an agency has not completed the review of a major rule within the period prescribed by subsection (a), (b), or (f), the agency shall immediately publish a notice proposing to withdraw or renew the rule under subsection (c), and shall complete proceedings pursuant to subsection (d) within one hundred and eighty days of the date on which the review was required to be completed under subsection (a), (b), or (f).".

(b) The table of sections for such chapter is amended by inserting after the item relating to section 559 the following new item:

"560. Review of agency rules.".

JUDICIAL REVIEW

SEC. 5. Section 706 of title 5, United States Code, is amended to read as follows:

"§ 706. Scope of review

"(a) To the extent necessary to decision and when presented, the reviewing court shall independently decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

"(1) compel agency action unlawfully withheld or unreasonably delayed; and

"(2) hold unlawful and set aside agency action, findings and conclusions found to be—

"(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

"(B) contrary to constitutional right, power, privilege, or immunity;

"(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

"(D) without observance of procedure required by law;

"(E) unsupported by substantial evidence in a proceeding subject to sections 556 and 557 of this title or otherwise reviewed on the record; or

"(F) without substantial support in the rule making file, viewed as a whole, for the asserted or necessary factual basis, as distinguished from the policy or legal basis, of a rule adopted in a proceeding subject to section 553 of this title; and

"(G) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

"(b) In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

"(c) In making determinations under clause (2)(C) of subsection (a) of this section, the court shall require that action by the agency is within the scope of the agency jurisdiction or authority on the basis of the language of the statute or, in the event of ambiguity, other evidence of legislative intent. In making determinations on other questions of law, the court shall not accord any presumption in favor of or against agency action.".

VENUE

SEC. 6. Section 2112 of title 28, United States Code, is amended by deleting the last three sentences of subsection (a); redesignating subsections (b), (c), and (d) as subsections (c), (d), and (e), respectively; and inserting the following as new subsection (b):

"(b)(1) If proceedings have been instituted in two or more courts of appeals with respect to the same order and the first such proceeding was instituted more than ten days before the second, the record shall be filed in that court in which the proceeding was first instituted. If the first such proceeding was not instituted more than ten days before the institution of a second proceeding with respect to the same order, the agency, board, commission, or officer concerned shall promptly advise in writing the Administrative Office of the United States Courts that such multiple proceedings have been instituted. Pursuant to a system of random selection

devised for this purpose, the Administrative Office thereupon shall select the court in which the record shall be filed. Upon notification of such selection, the agency, board, commission, or officer concerned shall promptly file the record in such court.

"(2) Where proceedings have been instituted in two or more courts of appeals with respect to the same order and the record has been filed in one of such courts pursuant to paragraph (1), the other courts in which such proceedings are pending shall promptly transfer such proceedings to the court of appeals in which the record has been filed. Pending such transfer, any court in which a proceeding has been instituted shall have jurisdiction to grant preliminary relief. Any order granting such relief shall be subject to reconsideration in the court to which the proceeding is transferred.

"(3) Any court in which a proceeding with respect to any order is pending, including any court selected pursuant to paragraph (1), may transfer such proceeding to any other court of appeals for the convenience of the parties or otherwise in the interest of justice.".

REGULATORY AGENDA AND CALENDAR

SEC. 7. (a) Subchapter II of chapter 5 of title 5, United States Code, is further amended by adding at the end thereof the following new section.

"§ 561. Regulatory agenda and calendar

"(a) Each agency shall publish in the Federal Register in April and October of each year an agenda of the rules that the agency expects to propose, promulgate, renew, or withdraw in the succeeding twelve months. For each such rule, the agenda shall contain, at a minimum, and in addition to any other information by law—

"(1) a general description of the rule, including a citation to the authority under which the action is to be taken, or explanation of the specific congressional intent to which its objectives respond;

"(2) a statement of whether or not the rule is a major rule within the meaning of paragraph 16 of section 551 of this title;

"(3) an approximate schedule for the significant action dates relating to the rule, including the dates for any notice of proposed rule making, hearing, and final action on the rule; and

"(4) the name, address, and telephone number of an agency official responsible for answering questions from the public concerning the rule.

"(b) The President or his designee shall publish in the Federal Register in May and November of each year a Calendar of Federal Regulations listing each of the major rules identified in the regulatory agendas published by agencies in the preceding months. Each rule listed in the calendar shall

be accompanied by a summary of the information relating to the rule that appeared in the most recent regulatory agenda in which the rule was identified.

"(c) An agency may propose or promulgate a major rule that was not listed in the regulatory agenda required by subsection (a) of this section only if it publishes with the rule an explanation of the omission of the rule from such agenda and otherwise complies with this section with respect to that rule.

"(d) Any determination by an agency concerning the applicability of this section to any action of the agency shall not be subject to judicial review.".

(b) The table of sections for such chapter is amended by inserting at the end thereof the following new item:

"561. Regulatory agenda and calendar.".

EFFECTIVE DATE

SEC. 8. (a) The amendments made by sections 2, 3, and 5 of this Act shall take effect on January 1, 1983, and shall apply to any rule making proceeding for which a notice of proposed rule making has been issued after such date.

(b) The amendment made by section 4 of this Act shall take effect six months after the date of enactment of this Act and shall apply according to the provisions thereof.

(c) The amendment made by section 6 of this Act shall take effect three months after the date of enactment of this

Act and shall apply, according to the provisions thereof, to review proceedings instituted after such date.

(d) The amendment made by section 7 of this Act shall take effect six months after the date of enactment of this Act and shall apply according to the provisions thereof.

Summary of The Regulatory Reform Act

Introduction

The "Regulatory Reform Act" contains a series of amendments to certain provisions of the Administrative Procedure Act. This legislation is not intended to be a comprehensive "regulatory reform" bill, but is focused on the procedures for rule making and for judicial review of agency actions. It is expected that legislation addressing such areas as agency adjudication, agency subpoena power, and the role of administrative law judges will be developed for future consideration.

Overview

In brief, the major changes to the A.P.A. proposed in this bill--

- require agencies to evaluate on a non-mathematical basis the trade-offs of "major rules" and to determine that such rules are worth their costs and are cost-effective;
- allow oral presentations in major rule makings, including cross-examination where needed to resolve factual issues;
- require agencies to review major rules every ten years to determine if they should be revised or withdrawn;
- prohibit the courts from presuming that agency interpretations of law are valid and require agency factual determinations in rule making to have substantial support;
- address the "race-to-the-courthouse" problem in review of agency action by assigning a case randomly where review proceedings have been instituted in different courts within ten days of each other; and
- require agencies to publish a semi-annual agenda of regulatory actions.

Rule Making Provisions

Sections 2 and 3 of the bill amend the definitions and the "informal rule making" provisions of the A.P.A. (5 U.S.C. §§551, 553). The major amendments are:

- A "major rule" is defined as a rule, or a series of related rules, which will impose compliance costs of $100 million, which will substantially increase prices or costs for wage earners, consumers, etc., or which will have significant adverse effects on employment, productivity, etc. (Bill pp. 2-4)
- "Benefit" and "cost" are defined to mean significant benefits and costs, including direct and indirect social benefits and costs. (Bill p. 4)
- In the notice of proposed rule making an agency must include:
  - -- a statement of the objectives of the rule,
  - -- a description of the substantive material on which the rule is based, and

-- a solicitation of proposals for alternatives to the rule. (Bill pp. 6-7)

- For a major rule making, the notice shall also include:

  -- a description of the quantifiable and nonquantifiable benefits and costs of the proposed major rule;

  --a description of alternatives to the rule; and

  -- except where another statute directs otherwise, an explanation of how the agency expects the benefits of the rule to justify its costs and why the rule is more cost-effective than the alternatives. (Bill pp. 7-8)

  (Agency evaluations of the effects of a major rule are explicitly not required to be done mathematically.) (Bill pp. 8-9)

- Interested persons are given sixty days to submit written comments on the proposed rule. For a major rule making, interested persons are also given an opportunity to make oral presentations. This may include cross-examination if requested to resolve a material issue of fact and if other procedures are inadequate to resolve such issue. (Bill pp. 9-11)

- In promulgating the final rule, the "statement of basis and purpose" must include:

  -- a statement of the objectives of the rule;

  -- a description of alternatives considered and the reasons for their rejection;

  -- a legal memorandum showing that the rule is within the authority of the agency;

  -- an explanation of the agency's factual conclusions; and

  -- a description of the material on which the rule is based. (Bill pp. 11-12)

- For a major rule, the statement of basis and purpose also includes:

  -- a description and comparison of the benefits and costs of the rule; and

  -- except where another statute directs otherwise, the agency's determination that the benefits of the rule justify its costs, and that the rule is more cost-effective than the alternatives considered. (Bill p. 12)

- The analysis of the effects of a major rule cannot be contracted outside of the agency. However, data gathering can be contracted if the source is identified. (Bill pp. 12-13)

- A file of the rule making, which is the record for review, must be maintained. The file includes the notice of proposed rule making, the statement of basis and purpose, and other documents of the rule making. (Bill pp. 13-14)

- Judicial review of the agency's descriptions and analyses of the effects of the rule and of the use of cross-examination is limited. A rule can be set aside only if an error in these areas violates three of the present

standards for review (i.e., such error renders the rule "arbitrary;" such error violates a constitutional right; or such error amounts to the agency exceeding its statutory jurisdiction). (Bill p. 15)

Regulatory Review Provisions

Section 4 of the bill adds a new section to the A.P.A. requiring agencies to review major rules every ten years. The major features of Section 4 are:

- One year after the effective date of this section, each agency must publish a schedule for review of existing major rules within a ten-year period. (Bill pp. 16-17)
- New major rules must be reviewed within ten years of their effective date. Amended major rules and major rules which have been reviewed must be reviewed ten years after their amendment or review. (Bill p. 17)
- The review is initiated by a notice which explains the proposed agency action, assesses the effects of the rule while it was in operation, determines if the rule is still a major rule, and invites suggestions for improvements in the rule. (Bill pp. 17-19)
- Pursuant to the review, the agency amends, rescinds, or renews the rule.
  - -- If the agency plans to amend or rescind the rule, the normal rule making procedures apply.(5 U.S.C § 553.)
  - -- If the agency plans to renew the rule without change, if must allow sixty days for public comment and publish the renewed rule with a determination that the rule continues to comply with the rule making provisions (5 U.S.C. § 553). (Bill p. 19)
- If it is impracticable for the agency to review a rule within ten years, the President or his designee may grant an extension for up to an additional 5 years. (Bill p. 19)
- If an agency fails to review a rule within the prescribed period, it must immediately publish a notice proposing to withdraw or renew the rule and complete rule making proceedings within 180 days. (Bill p. 20)

Judicial Review Provisions

Section 5 of the bill makes two major changes in the A.P.A. provision outlining the scope of judicial review of agency actions. They are:

- A court is prohibited from presuming that agency interpretations of law are valid. No burden of proof is shifted. (Bill p. 22)
- Agency factual determinations made during informal rule making must have substantial support in the rule making record. (Bill p. 21)

Venue ("Race-to-the-Courthouse") Provisions

Section 6 of the bill amends the venue provisions of the U.S. Code to deal with the so-called "race-to-the-courthouse" problem. Title 28 U.S.C. §2112 provides that when proceedings to review an agency order have been filed in two or more courts

of appeals, the agency must file the record for review in the court where such proceedings were first filed. Though the filing of the record is not legally determinative of where venue lies, as a practical matter proceedings are rarely transferred from the court where the record has been filed.

Thus, parties often "race" to file a review proceeding in what they consider to be a favorable court. This bill essentially adopts a proposal of the Administrative Conference of the U.S. to randomly select a court when review proceedings have been instituted in two or more courts of appeals within ten days of each other. (Bill pp. 22-23)

Regulatory Agenda and Calendar Provisions

Section 7 of the bill adds a new section to the A.P.A. requiring agencies to publish an agenda of regulatory actions they expect to take.

- Each agency must publish an agenda in April and October of rules that the agency will be acting on during the following twelve months. (Bill p. 24)
- In May and November, the President or his designee must publish a calendar of major rules on which agencies will be acting in the following twelve months. (Bill pp. 24-25)
- An agency may propose a major rule that was not included in an agenda if it publishes an explanation for the omission. (Bill p. 25)
- The provisions of this section are not subject to judicial review. (Bill p. 25)

OPENING STATEMENT OF HON. STROM THURMOND, CHAIRMAN, COMMITTEE ON THE JUDICIARY

MR. CHAIRMAN:

I am pleased to assist in opening today's hearing on S. 1080, the Regulatory Reform Act. I would like to take this opportunity to commend and to thank Senator Laxalt and his staff for their very fine work on this legislation. I think the quality of that work is reflected in the fact that S. 1080 currently enjoys the support of 78 cosponsors, which number includes the entire membership of the Judiciary Committee. I would also like to recognize and thank Senator Leahy for his interest in and his significant contributions to the bill which we have before us today.

The need for passage of this legislation is clear. As all of us are aware, the number and complexity of Federal regulations have grown phenomenally in recent years. Not only has the amount of Federal regulation and government interference in our economy greatly expanded, but the character of that regulation has significantly changed. The newer Federal agencies were established to achieve a variety of social goals--such as a cleaner environment, safer products, and a safer and healthier workplace. These are all very desirable goals, but the agenices charged with translating them into reality have too often failed to understand or have simply ignored the costs or other adverse effects of the regulations they promulgated. The cumulative effects of this phenomenon, however, can no longer be ignored. The economic results of such "overregulation" include a higher inflation rate, lower productivity, and less innovation on the part of the private business sector. Moreover, the evidence is mounting that, despite the flurry of regulatory activity, these social goals are not being achieved.

S. 1080 responds to this situation by requiring that agencies take a much closer look at the benefits and costs or other adverse effects of undertaking a particular regulatory action. More

specifically, agencies are directed, for "major" rules as defined in the bill, to determine that a rule they wish to promulgate is cost/benefit-justified and is the most cost-effective alternative. This type of analysis can and should be used in a reasoned fashion to add some measure of objectivity to the decisionmaking processes of government regulators.

Many of the principles of S. 1080 are currently embodied in Executive Order 12291 which President Reagan issued on February 17 of this year. While we have representatives of the Administration present, I would like to commend President Reagan for his prompt and effective action in the regulatory reform area--such as the creation of a cabinet-level Task Force on Regulatory Relief the day after his Inauguration, his review of the numerous "midnight" regulations promulgated by Carter Administration officials, the issuance of E.O. 12291, and his designation of a number of existing rules for agencies to review and possibly modify.

These actions, plus appointment of government officials dedicated to reform in this area, will surely provide the most immediate improvement in the quality and quantity of agency regulations. There is still a need, however, for legislative action --both in the area of procedural reform, which S. 1080 addresses, and in the area of substantive reform by revising statutes such as the Clean Air Act. Procedural legislation is necessary, in my view, to codify some of the excellent principles of E.O. 12291, to extend such principles to independent agencies, and to accomplish other reforms which cannot be achieved through executive action. We should take advantage of this opportunity to make permanent some of the very beneficial procedural changes which have been debated in the last several Congresses. As Dr. Weidenbaum and Dr. Miller have pointed out in testimony before other committees, however, any procedural legislation must maintain flexibility in the administrative process and must not be counterproductive to the Administration's current regulatory relief efforts. I

believe that S. 1080 comports with these principles, and any further Administration concerns along these lines can be dealt with.

Finally, I would like to emphasize, as I did in my floor statement when S. 1080 was introduced, that this legislation is not intended to be an omnibus regulatory reform measure. It does not attempt to deal with adjudicatory provisions of the APA, nor does it deal with the important issue of agencies' adjudicatory and investigatory subpoena authority. Also, there are no provisions concerning administrative law judges. These are all areas, however, in which the Judiciary Committee may be focusing its attention in the future.

I would like to welcome all of the witnesses who are to testify today and to thank them in advance for their helpful comments and suggestions. I understand that our first panel of witnesses consists of three distinguished representatives of the Administration--Murray Weidenbaum, Jim Miller, and Boyden Gray. Gentlemen, I look forward to hearing your testimony.

Senator LAXALT. Our first panel this morning consists of three representatives of the administration. Murray Weidenbaum is Chairman of President Reagan's Council of Economic Advisers. James Miller is the Administrator for Information and Regulatory Affairs, Office of Management and Budget, and Executive Director of the Presidential Task Force on Regulatory Relief. Finally, C. Boyden Gray is Counsel to the Presidential Task Force on Regulatory Relief.

Gentlemen, welcome to the hearing. Without objection, your full prepared statements are ordered to be inserted in the record at the completion of your oral presentation. In addition, I have here a collection of the writings of Mr. Weidenbaum and Mr. Miller on various aspects of regulation. Without objection, these materials are also ordered to be entered in the record.

At the outset, I want to congratulate you on the fine work you have been doing putting President Reagan's regulatory relief program into operation. One of the items I just put into the record, "Progress Report on Regulatory Relief," written by Mr. Weidenbaum, shows the solid achievements of the administration in this area.

Those accomplishments, I know, are due not only to President Reagan's leadership but also to your hard work. I think it is an excellent effort.

In addition, I want to thank you too for the time and effort you have devoted to this bill. Your work with the subcommittee staff

has provided real guidance to our drafting effort. As Senator Leahy indicated, we would not be here considering this bill if it were not for the tremendous cooperation we have enjoyed from the business community, from the administration, and from Members here on the Hill.

The last count that I have indicates that we have some 79 cosponsors of this legislation—probably the most cosponsorship that has ever been able to be corralled on a major piece of legislation. As I told the President the other day, if we blow this bill, he'll know where to look. [Laughter.]

I want to thank all of you for that cooperation, because you have contributed tremendously.

We realized all along the possibilities of conflict with the direction that you are moving within the agencies and within the administration. I think we have reconciled those reasonably well. If we haven't, this is the purpose of the hearing.

Now you may proceed to your opening statements, gentlemen, in any manner that you may prefer. Mr. Weidenbaum, would you like to go first?

STATEMENT OF MURRAY L. WEIDENBAUM, CHAIRMAN, COUNCIL OF ECONOMIC ADVISERS

Mr. WEIDENBAUM. Thank you, Mr. Chairman, for those very kind remarks.

It is a pleasure, indeed, to testify on S. 1080 and to discuss with you the administration's program of regulatory relief, as well as our mutual efforts to maintain that momentum.

The hearings before this distinguished committee are helping to create the receptive atmosphere from which needed initiatives can be considered fairly and seriously.

The public will gain from the conscientious and thorough examination of regulatory reform proposals that you and the committee members have embarked upon.

I believe we would also benefit from greater attention, as you stated in your opening statement, to reviewing the mass of generic legislation which all too often limits our ability to reform regulation.

I believe that we are in broad agreement with the Congress on many points.

One, the regulatory apparatus must be brought under better control so that responsible Federal regulation, where it is clearly necessary, is once more the servant of the public interest and not its master.

Two, we need to put the burdens of overregulation into perspective so that in the future the benefits derived from regulation will be at least commensurate with the costs imposed.

Three, regulatory reform is a key component of the President's economic recovery program and must be successfully carried out as part of the fight against inflation and economic stagnation.

I assure you that this administration, from the President on down, is dedicated to achieving meaningful and lasting regulatory reform.

Since January 20, an unprecedented program of regulatory relief has been launched by the Reagan administration. It seems appropriate to take stock now of the changes made.

According to my regulatory scoreboard, we are taking 34 specific actions and proposing one legislative change that will save the American motorist $9.3 billion and free up $1.3 billion in automobile industry capital outlays.

We have withdrawn, postponed, or rescinded seven major regulatory proposals that we inherited. We have postponed an additional 36 rules that were caught up in the initial freeze of midnight regulations.

We have ordered intensive reviews of 27 major existing rules.

We have revoked two Presidential directives which imposed onerous burdens.

We have abolished the Council on Wage and Price Stability's wage-price standards program, eliminating the paperwork and regulatory burdens resulting from that agency.

We have issued an Executive order decontrolling crude oil prices.

We have taken three major procedural actions: the initial regulatory freeze; the establishment of the regulatory task force, chaired by the Vice President; and an Executive order that specifies the use of cost-effective alternatives for achieving regulatory objectives.

By my estimate, we have now taken 107 regulatory actions which are listed in the scoreboard attached to my statement. That is better than one a day, including Sundays, which indicates, surely, the dedication of all those involved.

Our philosophy is to halt decisively the intrusion of the Federal Government into the lives of our citizens, into the decisions of our business executives, and into the choices faced by tens of thousands of State and local officials and administrators.

Regulatory reform is good economics—less costly and more sensible regulation will help to make American industry more productive and competitive. It will reduce the prices charged to American consumers and, thus, lower the rate of inflation.

Our initial efforts are only a beginning. There is so much that needs to be done after long years of neglect. Our efforts are just scratching the surface.

Since this is a new process, the mechanisms for carrying out regulatory reform are still being developed. We need to improve and build upon what we have available.

I would like to share with this committee three lessons from our work so far that relate to the legislative initiative before you.

All of these lessons are derived from one basic point: Regulatory reform is a learning process. Thus, there is great need for flexibility in order to incorporate new insights and develop better tools.

Lesson No. 1 is that we need administrative flexibility. Otherwise, a promising set of requirements could degenerate into unproductive paperwork, using resources better put to more productive uses.

An example is OMB's waiver power, allowing it to exempt agencies and regulations from parts of the Executive order. It is every bit as important as its power to review regulatory analyses. Otherwise, OMB could be overwhelmed by trivia.

If the President is to be able to control the process of regulation, then he and his appointees must have the ability to tailor reviews to the appropriate level.

The second lesson is that we are in the midst of an evolutionary process. It would be unfortunate if legislation were to freeze this process of growth prior to its full development. We must be alert to insist upon the use of new and more productive techniques in reviewing regulation and to remove procedures when we find they are no longer appropriate.

The third lesson is to be wary of unintended consequences. Well-intended legislation adopted in reaction to the shortcomings of the past could hinder the President's current efforts at deregulation.

We are concerned that inflexible legislative requirements could block new initiatives by agencies which could result in less regulation.

Turning to the details of S. 1080, this important bill impresses me as a very constructive proposal on these regulatory reform matters about which we all feel so deeply.

We are all extremely appreciative of the time and effort put in by the chairman, the members of the committee, and their staff on this important piece of legislation.

I hope that S. 1080 in its present form, as well as our remarks this morning, can be seen as part of a needed dialogue about the best ways to effect significant reform.

With that in mind, I would like to make a few key points.

I am concerned about a possible permanent locking-in of regulatory analysis procedures. For example, there is no provision for OMB waiver power.

In addition, the emphasis on benefit-cost analyses is most welcome; we must recognize however, that such analytical techniques have not yet been developed to the extent necessary to make them the exclusive basis for evaluating regulatory proposals.

I am troubled about the potential for uncertainty and extended court intervention inherent in the revision of the Administrative Procedure Act, both with regard to presumptions of agency expertise and the prospective review by courts of agency compliance with legislative requirements.

Section 3(f)(3) of the bill might be clarified to address those concerns directly.

On the positive side—and I wish to emphasize the great amount of positive work in this bill—the sunset review provisions are most promising and most constructive.

Also, the venue provisions are an excellent way of dealing with the race to the courthouse problem.

In summary, I believe that S. 1080 is an important step forward in developing improved regulatory procedures, and we in the Reagan administration look forward to working with the Congress to improve the statutory basis for issuing and reviewing Government regulations.

Mr. Chairman, I hope that these points are helpful to you and taken in the spirit of cooperation in the regulatory reform effort. This is a vital effort that surely will benefit from the continued cooperation of all branches of Government.

Thank you very much.

Senator LAXALT. Thank you, Mr. Weidenbaum.

[Mr. Weidenbaum's prepared statement and additional material follows:]

PREPARED STATEMENT OF MURRAY L. WEIDENBAUM

Mr. Chairman and Members of the Committee:

It is a pleasure to discuss with you the Administration's ambitious program of regulatory relief, and our mutual efforts to maintain this momentum. The hearings before this and other Congressional Committees are helping to create the receptive atmosphere in which needed initiatives can be considered fairly and seriously.

The American public stands to gain from the kind of conscientious and thorough examination of regulatory reform proposals that you have embarked upon. It seems to me that we would all also benefit from greater attention to reviewing the mass of generic enabling legislation which all too often limits our ability to implement regulation in the most effective manner.

We are in broad agreement with the Congress on a greate number of points.

1. The regulatory apparatus must be brought under better control, so that responsible Federal regulation -- where it is clearly necessary -- is once more the servant of the public interest, not its master.

2. We need to put the burdens of over regulation into perspective so that in the future the benefits derived from regulation will be at least commensurate with the costs imposed.

3. Regulatory reform is a key component of the President Economic Recovery Program and must be successfully carried out as part of the fight against inflation and economic stagnation. This Administration from the President on down is dedicated to achieving meaningful and lasting regulatory reform. We view this effort as an equal partner with budgetary and monetary restraint in restoring our economic health.

Since January 20, 1981, an unprecedented program of regulatory relief has been launched by the Reagan Administration. After nearly four months, it seems appropriate to take stock of the changes that have been made.

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The Regulatory Scoreboard

Let us look at the facts as shown in what we can call our regulatory scoreboard:

- We are taking 34 specific regulatory actions and proposing one legislative change that will save the American motorist $9.3 billion and free up $1.3 billion in automobile industry capital outlays over the next five years.
- We have withdrawn, postponed, or rescinded 7 major regulatory proposals of the previous administration. Two of those rules alone would have imposed costs in excess of $100 million a year.
- We have postponed an additional 36 rules that were caught up in our initial freeze of some 172 "midnight" regulations developed by the previous Administration.
- We have ordered 13 departments and agencies to conduct intensive reviews of 27 major existing rules, ranging from testing procedures for new drugs to waste water treatment standards.
- We have revoked two Presidential directives, one of which imposed onerous burdens on American exporters and another mandating an extraordinarily inefficient approach to building temperature control.
- We have abolished, by Executive Order, the prior Administration's Council on Wage and Price Stability, eliminating the paperwork and regulatory burdens resulting frm that agency.
- We have issued an Executive Order decontrolling crude oil prices and abolishing the cumbersome and and inefficient entitlements programs.
- We have taken three major procedural actions: our initial 60-day regulatory freeze, the establishment of the Vice President's Regulatory Task Force, and and Executive Order that specifies the use of cost- effective alternatives for achieving regulatory objectives.

All in all, by my estimate we have taken 107 significant regulatory actions, revoked or issued five Presidential directives involving regulatory relief, and established an on-going high level Administration Task Force. That surely is an unprecedented set of actions in a four-month period. More fundamentally, it provides a striking change from previous Administrations which were characterized by rapid growth of regulatory activites. A copy of our April 23 Progress Report on Regulatory Relief is attached, along with a list of 107 actions.

The Principles of Regulatory Relief

Our philosophy is to halt decisively the intrusion of the Federal government into the lives of our citizens, into the decisions of our businessmen, and into the choices faced by ten of thousand of state and local government officials and administrators. As a general rule, we simply do not believe that workers, managers, investors and administrators need the Federal government to make reasoned and intelligent decisions about how best to organized and run their own lives and their daily activities.

By our actions we are removing Federal mandates forcing business firms, educational institutions, and state and local governments to spend billions of dollar of scarce revenues to provide services and products for which there is little or no genuine demand. By removing these mandates, we are providing the average citizen with greater freedom to choose, a lower rate of inflation and the potential for larger after-tax incomes. Let no one say that regulatory reform is playing second fiddle in the President's economic recovery program.

Regulatory reform is good economics: less costly and more sensible regulation will reduce uncertainty and shorten delay in investment decisions. We will also be reducing business operating expenses which in turn means helping to make American industry more productive and competitive, reducing the prices of goods and services to American consumers, and helping to lower the rate of inflation.

Our initial efforts are only a beginning. There is so much that needs to be done after long years of neglect, that our efforts so far are just scratching the surface. Since this is a new process, the tools and institutional mechanisms for carrying out regulatory reform are still being developed. So we need to improve and build upon what we have available to do the jobs as we go along.

I have drawn three lessons from our work so far that relate to the legislative initiative before this Committee which I would like to share with you. All of these lessons are derived from the same basic point: regulatory reform is a learning process and thus there is great need for flexibility in order to incorporate new insights and develop more sophisticated tools.

Lesson number one is that we need administrative flexibility. Otherwise, a promising set of requirements could degenerate into meaningless paperwork using resources which could be put to more productive uses. For example, OMB's waiver power in the Executive Order -- allowing it to exempt certain agencies and regulations from parts of the Executive Order -- is every bit as important as its power to review Regulatory Impact Analyses. Otherwise, OMB could be overwhelmed by trivia to the detriment of exercising effective oversight. If the Presidnet is to be able to control the process of regulation, then he and his appointees must have the ability to tailor reviews to the appropriate level on a case-by-case basis.

The second lesson is that we are in the midst of an evolutionary process. It would be most unfortunate if legislation were to freeze this process of growth prior to its ultimate development. We must be alert to insist upon the use of new and more productive techniques in reviewing regulation and to remove procedures which are no longer appropriate.

The third lesson is to be wary of unintended consequences. Well intended legislation adopted in reaction to the shortcomings of previous Administrations could actually hinder the President's efforts at deregulation. We are concerned that inflexible

legislative requirements could block new regulatory initiatives by agencies which could result in less regulation.

Turning to the details of the legislation now before you, S. 1080 impresses me as a constructive proposal on these regulatory reform matters about which we all feel so deeply. I hope that S. 1080 in its present form, as well as my remarks, can be seen as part of a needed dialogue about the best ways to effect significant reform. With that in mind, I would like to make a few quick points:

o I am concerned about a possible permanent "locking-in" of regulatory analysis procedures. For example there is no provision here for an OMB waiver power. In addition, although the emphasis on benefit-cost analyses is welcome, such analytical techniques have not been developed to the extent necessary to make them the exclusive basis for evaluating regulatory proposals.

o I am troubled about the potential for uncertainty and extended court intervention inherent in the revision of the Administrative Procedure Act, both with regard to presumptions of agency expertise and the prospective review by courts of agency compliance with legislative requirements. Section 3(f)(3) of the bill might be clarified to address those concerns directly.

o On the positive side, the sunset review provisions are most promising and constructive. Also the venue provisions are an excellent way of dealing with the "race to the courthouse" problem.

In summary, I believe that S. 1080 is an important step forward in developing improved regulatory procedures and we look forward to working with the Congress to improve the statutory basis for issuing and reviewing government regulations.

I hope that these points are helpful and taken in the spirit of cooperation in the regulatory reform effort. This is a vital effort that requires the cooperation of all branches of government to succeed. Since I understand that you are interested in reviewing helpful material dealing with regulatory reform, I am submitting a number of my previous writings done on the subject done as a private citizen, for your consideration.

A PROGRESS REPORT ON REGULATORY RELIEF

by

Murray L. Weidenbaum, Chairman
President's Council of Economic Advisers

Since January 20, 1981, an unprecedented program of regulatory relief has been launched by the Reagan Administration After approximately three months, it seems appropriate to take stock of the changes that have been made.

The Regulatory Scoreboard

Let us look at the facts as shown in what we can call our regulatory scoreboard:

- We are taking 34 specific regulatory actions and proposing one legislative change that will save the American motorist $9.3 billion and free up $1.3 billion in automobile industry capital outlays over the next five years.
- We have withdrawn, postponed, or rescinded 7 major regulatory proposals of the previous administration. Two of those rules alone would have imposed costs in excess of $100 million a year.
- We have postponed an additional 36 rules that were caught up in our initial freeze of some 172 "midnight" regulations developed by the previous Administration.
- We have ordered 13 departments and agencies to conduct intensive reviews of 27 major existing rules, ranging from testing procedures for new drugs to waste water treatment standards.
- We have revoked two Presidential directives, one of which imposed onerous burdens on American exporters and another mandating an extraordinarily inefficient approach to building temperature control.
- We have abolished, by Executive Order, the prior Administration's Council on Wage and Price Stability, eliminating the paperwork and regulatory burdens resulting from that agency.

- We have issued an Executive Order decontrolling crude oil prices and abolishing the cumbersome and inefficient entitlements program.
- We have taken three major procedural actions: our initial 60-day regulatory freeze, the establishment of the Vice President's Regulatory Task Force, and an Executive Order that specifies the use of cost-effective alternatives for achieving regulatory objectives.

All in all, by my estimate we have taken 105 significant regulatory actions, revoked or issued five Presidential directives involving regulatory relief, and established an on-going, high level Administration Task Force ~~(see Appendix)~~. That surely is an unprecedented set of actions in a three-month period. More fundamentally, it provides a striking change from previous Administrations which were characterized by rapid growth of regulatory activities.

The Principles of Regulatory Relief

Our philosophy is to halt decisively the intrusion of the Federal government into the lives of our citizens, into the decisions of our businessmen, and into the choices faced by tens of thousands of state and local government officials and administrators. As a general rule, we simply do not believe that workers, managers, investors and administrators need the Federal government to make reasoned and intelligent decisions about how best to organize and run their own lives and their daily activities.

By our actions we are removing Federal mandates forcing business firms, educational institutions, and state and local governments to spend billions of dollars of scarce revenues to provide services and products for which there is little or no genuine demand. By removing these mandates, we are providing the average citizen with greater freedom to choose, a lower rate of inflation and the potential for larger after-tax incomes. Let no one say that regulatory reform is playing second fiddle in the President's economic recovery program.

Regulatory reform is good economics: less costly and more sensible regulation will reduce uncertainty and delays in investment decisions. We also will be reducing business operating expenses which in turn means helping to make American industry more productive and competitive, reducing the prices of goods and services to American consumers, and helping to lower the rate of inflation.

The Accomplishments of Regulatory Relief - -

A few examples of the specific regulatory actions we have taken illustrate the breadth and character of our regulatory relief program.

Auto Industry Regulations

The Administration's program to help the auto industry demonstrates the enormous potential impact on the American economy of regulatory relief. Specifically, the Environmental Protection Agency and the National Highway Traffic Safety Administration published in the Federal Register notices of intent to rescind, revise, or repropose a total of 34 specific regulations, ranging from rules specifying bumper strength to those governing exhaust emissions standards and certification procedures.

In addition, as part of the proposed amendments to the Clean Air Act, EPA will ask Congress to eliminate the requirement that all passenger cars meet 1984 emissions standards at higher altitudes.

Over a five year period, these actions alone will save the American motorist $9.3 billion in the cost of buying and operating cars and trucks. It will also release $1.3 billion in company funds which otherwise would have been invested in federallymandated equipment and facilities.

Regulatory relief for the auto industry will be an ongoing activity. In addition to our announced actions, the Administration is committed to review a variety of additional regulations that affect the auto industry as well as the statutes governing auto regulatory programs.

Labor Regulation

Another example of regulatory relief now being provided is the Labor Department's withdrawal of proposed rules requiring that chemicals in the workplace be labelled. Like so many regulations, the proposed rule was motivated by the best of intentions: protecting workers from hazardous materials. But the rule was excessive. Each and every container in a workplace with as little as one percent of a dangerous chemical -- including all drums, pipes, and reaction vessels -- would have needed an extensive label describing the contents and the possible hazards.

This rule, if issued in final form, would have cost between $643 million and $900 million initially and between $338 and $473 million a year thereafter, according to Labor Department figures. Industry sources contended that the true costs were substantially higher, and that in some factories the rule was wholly impractical. The Labor Department is now searching for a less costly and more effective means of assuring worker protection.

Environmental Regulation

Another example of regulatory relief is EPA holding up a new rule setting noise emissions standards for garbage trucks. This rule was not among EPA's most costly: only about $25 million a year would have been required to bring garbage trucks into compliance. But these costs, however, modest, are excessive relative to the benefits gained.

More important, garbage truck noise is a prime example of a problem where there is no compelling reason for Federal intervention. It is a local problem, varying from city to city. Local governments should be responsible for determining what, if anything, to do about it. Moreover, they should have flexibility in deciding how to respond. For example, altering truck routes and schedules to avoid residential neighborhoods in the early morning hours may be a better and cheaper solution in many cities than ordering expensive

soundproofed trucks, as the EPA rule would have required nationwide.

Oil Decontrol

In energy, as in other areas, the Administration's policy is to rely wherever possible on the efficiency and discipline of the free market to achieve public purposes. Thus one of our first regulatory changes was to accelerate the decontrol of oil prices.

The crude oil entitlements program, which we terminated, was a classic example of a regulation that both harmed the economy as a whole and actually worked against our national energy goals. The entitlements program holds down domestic oil prices, subsidized the least efficient producers, discouraged the development of new sources of supply, frustrated energy conservation efforts, and wasted literally millions of barrels of oil in inefficient refinery operations. That program simultaneously increased our dependence on foreign oil.

Household Appliance Efficiency Standards

Other energy-related actions include the Department of Energy's withdrawal of proposed standards for the minimum energy efficiency of major household appliances, such as refrigerators and air conditioners. This proposed rule would have made a relatively minimal contribution at best to our overall energy consumption. Rising energy prices already give consumers strong incentives to reduce appliance use and to buy more energy efficient models. In addition, the government and industry have instituted an appliance labelling program, which facilitates informed consumer choice by providing information on expected lifetime energy costs for individual models.

Any energy savings that might have been achieved by this rule would have come at an enormous cost. The standards would have requried the complete redesign of virtually every appliance model by 1986. Appliance purchase prices would increase by $500 million a year, and this added expense

would probably be only partly offset by lower lifetime energy costs. Finally, DOE estimated that many of the smaller manufacturers would not have the financial resources to make such rapid model changes, so that the rule would have eliminated perhaps the most competitive and innovative segment of the industry. Clearly there are more cost-effective ways to save energy.

Other Regulatory Relief

Additional concrete examples of the Administration's determination to move forward swiftly on the regulatory relief program include the following:

- On January 29, the President terminated the so-called "voluntary" wage and price standards program of the Council on Wage and Price Stability, thereby eliminating the paperwork and regulatory burdens imposed by that agency, which is being phased out entirely.
- DOE also withdrew proposed standby energy conservation rules that would have interfered excessively in the daily life of workers and businesses and reduced their flexibility in devising means of conserving energy.
- The President revoked Executive Order 12264, which established a duplicative, cumbersome, and unnecessarily strict regulatory policy regarding the export of hazardous substances.
- The President rescinded mandatory Federal controls on non-residential building temperatures, to allow building operators to choose the methods of conserving energy that best suit their circumstances.
- The Secretary of Labor postponed implementation of new rules under the Service Contract Act which would have extended Davis-Bacon "prevailing wage" principles to employees in timber sales, data processing, and R&D and would have cost the government over $68 million a year.

- The Secretary of Education withdrew proposed rules that would have required all school systems to offer a particular form of bilingual instruction to children whose primary language is other than English, at an estimated cost of up to $1 billion over the first five years and between $72 and $157 million a year thereafter.
- The Department of Transportation delayed four regulations which would have imposed costly requirements on state and local governments, dictating how they conduct urban transportation planning, design traffic control devices, and rehabilitate or stockpile buses purchased with Federal aid.
- The Treasury Department postponed for reconsideration rules that would have imposed extensive new obligations on local governments that receive revenue sharing funds to prevent discrimination against the handicapped in services, employment, and access to facilities.
- The Interior Department halted the proposed listings of the Hawaiian tree snail, Gypsum Wild Buckwheat, and Todsens Pennyroyal as endangered species. Our overriding concern is that the American taxpayer not become an endangered species!

Three Procedural Reforms

In the first few months of his Administration, the President instituted three important procedural reforms to establish an effective process of regulatory relief. First, to provide leadership for the entire effort, he created a Cabinet-level Task Force on Regulatory Relief, chaired by Vice President George Bush. The Task Force has the principal responsibility for overseeing the entire process of regulatory reform, including reviewing existing and proposed regulations and evaluating the basic legislation authorizing regulatory programs.

Second, the President signed a new Executive Order requiring federal agencies to choose the most cost-effective alternative for achieving each regulatory objective. The Vice President's

Task Force and the Office of Management and Budget are responsible for assuring that the agencies comply with this Order. Of course, the heads of the regulatory agencies very properly retain the basic responsibility for ensuring that regulations are appropriate and not burdensome. But additional support for this goal is now available from OMB and the Task Force on Regulatory Relief.

Third, the President ordered a sixty-day freeze on the horde of "midnight" regulations issued by the previous Administration. This suspension allowed time for us to determine which of those last minute rules were really warranted.

Looking Ahead

Our initial regulatory actions have been, by necessity, selective. We have concentrated on procedural changes, on the "midnight" regulations, and on rules that both threaten to impose immediate costs and can be changed quickly and administratively. Now we are beginning to broaden the scope of our regulatory relief efforts.

A particularly important future effort, will be our review of the Clean Air Act, which comes up for reauthorization this year. We are studying some key questions: To what extent can responsibilities for air pollution standard setting and enforcement be delegated to State and local governments? How can we streamline the regulatory process so as to improve its effectiveness? To what extent can the scientific base for the ambient air standards be improved? How can we encourage (or perhaps more realistically, do less to discourage) economic growth and energy development while furthering our environmental objectives? How can we in a practical way incorporate measures of benefits and costs in the regulatory process?

Quite clearly, these are not questions that lend themselves to easy or quick answers. But it may well be that the review of the Clean Air Act will lead to a fundamental rethinking of the entire process of social regulation,

because the issues involved are, in various ways, also pertinent to clean water and hazardous waste disposal rules, toxic substances directives, and occupational safety and health regulation.

A Mistaken Concern about Regulatory Relief

The Administration's firm intention to review statutes and provide regulatory relief should not be mistaken for a lack of commitment to a cleaner environment on water or consumer safety. We will not "gut" the Clean Air Act or other worthwhile regulatory statutes. Regulation will continue under the Reagan Administration, because there are many worthwhile public goals that cannot be achieved without it. But we need to make the regulatory programs work better. And thus respond constructively to the legitimate criticism which has been leveled at the entire regulatory apparatus. The fact is that our current system of regulation is often so perverse and heavy handed that significant regulatory relief can be provided without compromising safety or a clean environment.

Some examples from the auto regulatory relief package may help clarify how this can occur. One change which EPA proposed will allow auto manufacturers to meet diesel exhaust emissions standards by using sales-weighted averages of the results from different model lines. Thus a manufacturer need not bring all models exactly to the standard, but could sell some models that emitted slightly more and others slightly less. The environmental consequences of this reform are negligible, since the average vehicle will meet the standard and total emissions will be the same. But the added flexibility will save the manufacturers and consumers millions of dollars and provide car buyers with a wider range of models to choose from.

In the same vein and contrary to some allegations, DOT's proposal for a one-year delay in the passive restraint standard will not compromise traffic safety. This standard would have required the installation of passive restraints

(such as airbags or automatic seat belts) in large cars by September 1981, in medium-size cars by September 1982, and small cars by September 1983. Only large cars would be affected by the delay; large cars are by far the safest of the three sizes and, "due" to rising gas prices, account for only a small fraction of new car sales. Moreover, most manufacturers would comply with the standard by using automatic seat belts rather than air bags. Since the automatic belts must be detachable, for safety reasons, many car buyers who find them uncomfortable will disconnect them and there may be little increase in seat belt usage.

Finally, the automatic seat belts are no more safe -- indeed there is some contention that they provide less safety than regular belts and cost $50 to $100 more per car. Thus by requiring passive restraints this rule will make the motorists who already choose to buckle up worse off, since they will have to pay for equipment they do not need. Personally, I find it very difficult to sympathize with those "consumer advocates" who vehemently support an action that would penalize consumers who demonstrate a concern for their safety in order to try to protect those who do not care. Clearly, a year delay is warranted to review this rule.

The Gains From Regulatory Relief

Over a number of years, we expect that regulatory relief will be a fundamental tonic for the economy. Some of the gains will be obvious and easily measured, such as the reductions in the budgets of federal agencies. The Administration has proposed to reduce expenditures on regulatory activities by the federal government by $114 million in fiscal 1981 and by $395 million in fiscal 1982, compared to the Carter budgets. As a result of these cuts, and Congress willing, the fiscal year 1982 will witness the first year-to-year decline (after adjusting for inflation) in many years in spending for federal regulatory activities (see Table 1).

Table 1

Federal Outlays for Regulatory Activities, 1970-1982

Fiscal Year	Current Dollars (billions of dollars)	Constant Dollars (billions of dollars)
1970	$0.9	$0.9
1971	1.2	1.2
1972	2.0	1.8
1973	2.3	2.0
1974	2.8	2.2
1975	3.3	2.3
1976	3.6	2.5
1977	4.1	2.6
1978	4.9	3.0
1979	5.5	3.1
1980	6.5	3.3
1981 estimate	7.1	3.4
1982 estimate	7.4	3.3

Source: Based on a study of U. S. Government budgets by the Center for the Study of American Business, Washington University in St. Louis.

More important, regulatory relief will also produce substantial and measurable reductions in the costs of producing goods and services -- the $10 billion reduction in the cost of automobile regulation providing a current case in point.

But, especially over time, the most important gains from the regulatory relief program will probably be more subtle and less obvious. While another Administration might have continued the further expansion of federal regulation into new areas, this Administration will achieve significant savings by simply being more skeptical about the desirability of launching costly new regulatory initiatives. Rather than blithely assuming that every problem has a federal answer, we will be proceeding from the opposite presumption -- that

individual decision-making in the private sector more often than not is the most effective response. The result will be a basic improvement in the climate in which innovation and risk bearing take place, which will translate into a more productive economy and a higher standard of living.

We will not discard regulation which thoughtfully serves the public interest. But resort to regulation should always be the last step in dealing with a problem, not the first or second. Further, before regulating, we should be certain that the world will be in better shape with that regulation than without it. Any time the government resorts to regulation, we run the risk that the market system (which works so well in most regards) will suffer unintended, incremental damage as a side-effect. The presumption should be in favor of private decision-making. If we can not demonstrate that regulation will lead to a superior outcome than the present state of affairs, we should refrain from loading yet another requirement or prohibition onto the American economic system.

In short, regulatory reform will be a cornerstone of our overall economic program. Together with tax cuts, budget reductions, and monetary restraint, regulatory relief will reduce inflation, enhance domestic productivity and international competitiveness, revive economic growth, and restore confidence in the future of the American economy.

On a final note, for those who measure the intrusiveness of the Federal government by activity in the Federal Register, here are some heartening statistics. Compared to January's edition, in the Federal Register for March 1981:

- The number of final rules published dropped by 47 percent.
- The number of proposed rules dropped by 54 percent.
- The number of published pages dropped by 60 percent.

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REGULATORY SCOREBOARD

34 ACTIONS TO HELP THE AUTO INDUSTRY

(For more detailed descriptions see "Actions to Help the Auto Industry," Fact Sheet, April 6, 1981):

EPA

1. Revise the statutory HC and CO standards for heavy-duty trucks to a level that would not require catalysts.
2. Relax the 10 percent Acceptable Quality Level to 40 percent for assembly-line testing of light and heavy trucks.
3. Delay assembly-line testing for heavy-duty engines.
4. Relax the statutory NO_x emissions limits for heavy-duty engines.
5. Institute NO_x emission averaging for light and heavy trucks.
6. Institute emission averaging for diesel particulate emissions.
7. Adopt a self-certification program for vehicles to be sold at high altitude.
8. Forgo assembly-line testing at high altitudes.
9. Initiate consolidated NO_x waiver proceedings for light-duty diesel-powered vehicles.
10. Initiate consolidated CO waiver proceedings for light-duty vehicles.
11. Adopt equivalent non-methane hydrocarbon standards as an option for all vehicles.
12. Do not require use of onboard technology for the control of hydrocarbon emissions resulting from the fueling of motor vehicles.
13. Further streamline the motor vehicle certification program.
14. Relax test vehicle exemption requirements.
15. Reduce the annual number of assembly line test orders.
16. Explore deferring standards for paint shops.
17. Provide sufficient leadtime for compliance with emission regulations.

NHTSA

18. Delay implementation of first phase of "208 Standard".
19. Review requirement that manufacturers install automatic occupant restraints, e.g., air bags or automatic belt systems to protect all front seat occupants beginning in Model Year 1983.

20. Modify the existing bumper standard to meet the statutory requirements that such a standard be as cost effective as possible.

21. Rescind the "Fields of Direct View" requirements for passenger cars.

22. Terminate rulemaking on "Fields of Direct View" for trucks, buses and multipurpose passenger vehicles (MPVs).

23. Withdraw the ANPRM on post-1985 fuel economy standards.

24. Amend the regulation creating the Uniform Tire Quality Grading System.

25. Amend the regulation on Safety Belt Comfort and Convenience.

26. Terminate rulemaking on safety problems associated with Multipiece Rims.

27. Rescind the Standard on Speedometers and Odometers.

28. Propose a one-year deferral of the effective date of the Theft Protection Standard and deletion of the key removal provisions.

29. Propose modifications to the recently issued Hydraulic Brake Performance Standard for light trucks, buses and vans.

30. Propose termination of the rulemaking on Low Tire Pressure Warning Indicators.

31. Propose eliminating information requirements on Tire Reserve Load, and reducing the minimum advance notice required before tire production may start.

32. Terminate rulemaking on design testing and labelling of batteries.

33. Streamline and reduce fuel economy reporting requirements.

34. Propose changing Federal Vehicle Identification Number requirements from a Federal Motor Vehicle Safety Standard to an administrative regulation.

8 ADDITIONAL REGULATORY CHANGES

(For more details see "President Reagan's Initiatives to Reduce Regulatory Burdens," White House Fact Sheet, February 18, 1981):

Department of Education

35. Withdraw proposed bilingual education rules.

36. Propose recision of federal regulations governing school dress codes (See Department of Education Press Release).

EPA

37. Asked D.C. Court of Appeals to remand to it for reconsideration rule on garbage truck noise.

Department of Labor

38. Withdraw proposed rule requiring that chemicals in the workplace be labeled.

OMB

39. Withdraw policy memorandum establishing federal review of unnecessary hospital construction.

40. Revoke the Department of Energy's clearance for the collection of industrial energy consumption data.

Department of Energy

41. Postpone issuing final energy efficiency standards for major household appliances pending review.

42. Withdraw standby energy conservation measures.

36 REGULATIONS POSTPONED FOR FURTHER REVIEW

(For more detailed descriptions see "Statement by the Vice President Regarding Actions Taken by the President's Task Force on Regulatory Relief," press release, March 25, 1981):

Department of Agriculture

43. Revision and redesignation of section 502 Rural Housing Loan Policies, Procedures, and Authorization (46 FR 4681).

Department of Commerce

44. Federal Interaction with Voluntary Standards Bodies; Procedures (46 FR 1574).

45. The Channel Islands National Marine Sanctuary (45 FR 65198).

46. The Point Reyes-Farallon Islands National Marine Sanctuary (46 FR 7936).

Department of Education

47. Assistance to States for Education of Handicapped Children (46 FR 4912).

Department of Interior

48. Prime Farmlands (rule governing whether mined lands must be reclaimed, 46 FR 7208).

49. Prime Farmlands (grandfather clause for mining, 46 FR 7894).

50. Extraction of Coal, Two Acres or Less (46 FR 7902).

51. Tribal Government Elections (46 FR 1668, 1674).

52. FLPMA Exchange Authority for Public Land (46 FR 1634).

53. Land Withdrawal Procedures Amendments (46 FR 5794).

54. Revisions of Rules on Leases, Permits, Easements Through Public Lands (46 FR 5773).

55. Hawaiian Tree Snail (endangered species, 46 FR 3178).

56. Gypsum Wild Buckwheat and Todsens Pennyroyal (endangered species, 46 FR 5730).

57. Glacier Bay National Monument; Protection of Humpback Whale (45 FR 85741).

Department of Justice

58. The Effect of a Strike on the Admission and Continued Employment of Certain Nonimmigrants (46 FR 4856).

Department of Labor

59. Walkaround Compensation (46 FR 3582).

60. Occupational Exposure to Lead (46 FR 6134).

61. Procedures for Pre-determination of Wage Rate under Davis-Bacon (46 FR 4306).

62. Payment of Membership Fees (46 FR 3892).

63. Service Contract Act (expansion of provisions, 46 FR 4398).

64. Salary Test Levels to Determine Eligibility for Exemption from Overtime Provisions (46 FR 3010).

65. Government Contractors: Affirmative Action Requirements (46 FR 9084).

66. Labor Standards Provisions: Construction Contracts (46 FR 4380).

67. Certification Process and Adverse Effect Wage Rate (46 FR 4568).

Department of Transportation

68. Urban Transportation Planning (46 FR 5702).

69. Addition of Water to Pipelines Transporting Anhydrous Ammonia (46 FR 39).

70. Traffic Control Devices (46 FR 2038).

71. Carpool and Vanpool Projects (46 FR 2298).

72. Bus Rehabilitation Program Policy and Procedures (46 FR 9862).

73. Emergency Stockpiling of Buses (46 FR 5480).

74. Urban Initiatives Program (46 FR 5820).

Department of Treasury

75. Revenue Sharing Handicapped Discrimination Regulations (46 FR 1120).

EPA

76. Timber Products Effluent Guidelines: BPT and BCT (46 FR 8260).

77. Amendments to General Pretreatment Standards (46 FR 9404).

78. Pesticides: Classification of Uses of Active Ingredients and State Registration of Pesticide to Meet Local Needs (46 FR 2008 and 5696).

27 EXISTING REGULATIONS OR REGULATORY PROGRAMS TARGETTED FOR REVIEW

(For a more detailed description see "Statement by the Vice President Regarding Actions Taken by the President's Task Force on Regulatory Relief," press release, March 25, 1981):

Department of Agriculture

79. Mechanically processed (species) product.

80. Marketing orders for fruits and veggtables.

81. National Forest Service planning regulations.

Department of Commerce

82. Regulations implementing various fishery management plans.

Department of Education

83. Education of handicapped children regulations.

Department of Energy

84. Coal conversion program regulations.

85. Residential conservation service regulations.

EPA

86. BCT wastewater effluent guidelines.

87. Hazardous waste disposal regulations.

88. Electroplating pretreatment and general pretreatment standards.

Department of Health and Human Services

89. New drug application requirements.

90. Medicaid regulations affecting states.

91. Health care institution certifications and surveys.

Department of Housing and Urban Development

92. Minimum property standards for Federally-assisted one- and two-family dwellings and multi-family dwellings.

Department of Interior

93. Surface mining rules.

94. Federal coal management program.

Department of Justice

95. Rules implementing Executive Order 12250 to coordinate the implementation of Federal laws that prohibit discrimination.

Department of Labor

96. Occupational noise regulatory program.

97. Office of Federal Contract Compliance Policy (regulations imposing specification standards on government contractors).

98. Prevailing wage regulations for government contractors (authorized under the Davis-Bacon and Service Contract Act).

99. OSHA policies on personal protective devices.

100. OSHA carcinogen policy.

OMB

101. Urban/Community impact analyses.

102. Circular 73-7 requirements for administration of university research programs.

103. Circular 73-3 requiring universities to share in the cost of research projects.

Department of Treasury

104. Access to handicapped.

Department of Treasury

105. Use of published price indices to determine value of inventories.

ADDITIONAL ACTIONS SINCE APRIL 23, 1981

106. Department of Treasury, Bureau of Alcohol, Tobacco and Fireams -- withdrawal of regulation requiring the labelling of wine, beer and other alcoholic beverages.

107. Department of Labor, OSHA -- review of occupational exposure to cotton dust standards.

REPRINT № 88
May 1978

The Cost of Federal Regulation of Economic Activity

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The Cost of Federal Regulation of Economic Activity

Murray L. Weidenbaum and Robert DeFina

Government regulatory activities generate costs that are incurred by government and by economic units in order to comply with regulation. Although these costs are not easily summed up for an overall estimate of the resources devoted to carrying out regulatory programs, such information could contribute to more informed decision making by providing a basis for setting priorities in relation to the resource costs involved. The information that is currently available on costs of regulatory programs is piecemeal, often incomplete, and contingent on the reliability of estimation methods. Despite these limitations, this information forms a basis for a rough estimate of the overall cost of federal regulation of economic activity. The purpose of this paper is to assemble the best available evidence to develop such an estimate.

The basic approach followed in the study was to cull from the available literature the more reliable estimates of the costs of specific regulatory programs, to put those estimates on a consistent and reliable basis, and to aggregate the results for 1976. Where a range of costs was available for a given regulatory program, the lower end of the range was generally used. In many cases no cost estimates were available. Thus, the numbers in this study are low and surely underestimate the actual cost of federal regulation in the United States.

From 1887 to the present, the character of government regulation of business in the United States has undergone significant change. The industry-specific nature of much of our early regulation (for example, the Interstate Commerce Commission established in 1887) has been augmented by a new functional type of regulation in areas ranging from product hazards to job discrimination.

Regulatory activities, both the older type and the newer cross-industry agencies, are a costly endeavor for the federal government and for the economic units under its jurisdiction. Regulation is also a rapidly growing phenomenon.

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Funds allocated in the 1978 federal budget for regulation total $3.8 billion, an 85 percent increase over the fiscal 1974 figure of $2 billion. At present the government considers only those expenditures specifically accounted for in the budget when making allocations for program funding. In addition to government expenditures for the administrative operation of a regulatory program, however, costs are usually incurred by the private sector to comply with the regulations and to operate under a regulatory system. Though it is common knowledge that such costs exist, both in the form of direct outlays by business and distortions in the competitive pricing mechanism, little has been done to incorporate these outlays in policy analyses. This study attempts to show how that gap can be closed.

The estimates of regulatory costs developed in this study include costs incurred by the federal government and by economic units in response to regulation. In the first category, administrative costs arise from the operation of a regulatory activity by the federal government and include salaries of government workers, office supplies, and so on. These outlays for regulatory purposes are reported in the federal budget and are included in this report. Second, compliance costs are incurred mainly by the private sector (and also by state and local governments) in the process of complying with the federal regulatory mandates. These expenditures do not show up in the federal budget, and they have been estimated for this report.

This paper deals with these compliance costs within the framework of the existing body of knowledge in the regulation area, so that they can be included in measures of the overall cost of federal regulation. Both the number and scope of the estimates presented for regulatory programs are necessarily limited by the

TABLE 1

ANNUAL COST OF FEDERAL REGULATION, BY AREA, 1976
(millions of dollars)

Area	*Administrative Cost*	*Compliance Cost*	*Total*
Consumer safety and health	1,516	5,094	6,610
Job safety and working conditions	483	4,015	4,498
Energy and the environment	612	7,760	8,372
Financial regulation	104	1,118	1,222
Industry specific	484	19,919	20,403
Paperwork	—[a]	25,000	25,000
Total	3,189	62,906	66,095

[a]Included in other categories.

SOURCE: The estimates of administrative costs shown in this and the following tables are adapted from Murray L. Weidenbaum and Robert DeFina, *The Rising Cost of Government Regulation* (St. Louis, Mo.: Center for the Study of American Business, January 31, 1977). The estimates of compliance cost shown in this and the following tables are adapted from the various sources described in the text.

extent of the available research. Thus, the study also provides an inventory of the present state of knowledge in this area and indicates where reliable information on regulatory-induced expenditures is lacking.

The focus of the study is only on costs; no judgments are expressed on the value of the many regulatory efforts. The methodology used to assemble the cost estimates is described in detail in the body of this report, and the empirical studies that represent the sources of estimates of compliance costs are also discussed and listed.

Overview of Costs of Federal Regulation

The results of the study are summarized in this section. On the basis of the methodology employed and the estimates that are available, the cost imposed on the American economy by federal regulatory activities in 1976 totaled $66.1 billion. This estimate comprises $3.2 billion in administrative costs and $62.9 billion in compliance costs. These costs are summarized in Table 1.

Some comparisons may be useful: The $66 billion devoted to meeting federal regulatory requirements in 1976 were equivalent to:

- 4 percent of the gross national product
- $307 per person living in the United States
- 18 percent of the federal budget
- twice the amount that the federal government spends on health
- 74 percent of the amount devoted to national defense
- over one-third of all private investment in new plants and equipment.

Cost of Regulation, by Program. Each of the program areas shown in Table 1 may be further subdivided into specific federal activities to provide more detail (see Tables 2 through 6). Regulation in the area of consumer safety and health

TABLE 2
ANNUAL COST OF REGULATION,
CONSUMER SAFETY AND HEALTH, 1976
(millions of dollars)

Agency	*Administrative Cost*	*Compliance Cost*	*Total*
Department of Agriculture	408	986	1,394
Department of Health, Education and Welfare	229	360	589
Department of Justice	184	NA	184
Department of Transportation	183	3,748	3,931
Department of the Treasury	458	NA	458
Consumer Product Safety Commission	42	NA	42
National Transportation Safety Board	12	NA	12
Total	1,516	5,094	6,610

NA: Not available.

cost the economy $6.6 billion in 1976. The available estimates of the compliance expenditures for this area totaled $5.1 billion, while the administrative outlays amounted to $1.5 billion. The annual costs of consumer safety and health regulation are shown, by agency, in Table 2.

The largest component of compliance cost in the area of consumer safety and health is attributable to the Department of Transportation. These outlays to comply with auto safety and damage regulations amounted to $3.7 billion in 1976. The estimate for the Department of Agriculture ($986 million) represents only one regulatory activity, namely federal milk regulation.

With respect to job safety and working conditions, agencies such as the Department of Labor and the Equal Employment Opportunity Commission issue regulations which concern workers in general, regardless of their industrial affiliation, while some programs are specific to certain fields, notably those conducted by the Department of the Interior. In 1976 the total outlays for regulation of job safety and working conditions were $4.5 billion (see Table 3). Of this amount, compliance costs for the year amounted to $4.0 billion, while administrative costs were $483 million. The majority of the compliance costs for 1976 in this area originates in the Department of Labor. The department's regulatory activities include the Occupational Safety and Health Administration (compliance cost of $3.2 billion in 1976) and implementing Davis-Bacon legislation dealing with prevailing wages in federal construction projects.

Outlays for environmental regulation were incurred for the most part for the purchase of plant and equipment necessary to meet federally mandated standards. In 1976 these compliance costs amounted to $7.8 billion, compared with administrative costs of $602 million. Thus, total environmental regulation is estimated to cost about $8.4 billion for the year. The data on environmental regulation are summarized in Table 4.

The total cost to the economy of financial regulation in 1976 is estimated at approximately $1.2 billion. The major part of the total is attributable to

TABLE 3
ANNUAL COST OF REGULATION,
JOB SAFETY AND OTHER WORKING CONDITIONS, 1976
(millions of dollars)

Agency	*Administrative Cost*	*Compliance Cost*	*Total*
Department of Labor	253	3,670	3,923
Equal Employment Opportunity Commission	64	345	409
Department of the Interior	92	NA	92
National Labor Relations Board	74	NA	74
Total	483	4,015	4,498

NA: Not available.

TABLE 4
ANNUAL COST OF REGULATION,
ENERGY AND THE ENVIRONMENT, 1976
(millions of dollars)

Agency	*Administrative Cost*	*Compliance Cost*	*Total*
Environmental Protection Agency	416	7,760	8,176
Federal Energy Administration	186	NA	186
Total	602	7,760	8,362

NA: Not available.

compliance costs, which amounted to $1.1 billion or 91 percent of the total. Administrative costs were $104 million (see Table 5).

The costs shown in Table 5 are for only a small part of the total regulations which affect credit markets. The largest component of the compliance cost shown is for the Federal Trade Commission rulings on the Holder-in-Due-Course Doctrine. With regard to the Federal Reserve System, only the costs due to Regulation B are given, while cost estimates of other regulations under the system's jurisdiction (for example, Regulation E which implements the Fair Credit Billing Act of 1974 and Regulation C implementing the Home Mortgage Act of 1975) are at present unavailable. Nor are compliance costs of disclosure requirements of the Securities and Exchange Commission included since no credible estimates exist. Thus, the estimated total cost of $1.2 billion is an understatement of the cost of financial regulation for the agencies considered.

Industry-specific regulatory agencies such as the Federal Communications Commission (FCC) are examples of the older type of regulation. The total cost for this category was $26.8 billion in 1976. As in most other instances, the compliance cost comprised the majority of this total, amounting to an estimated $26.3 billion for the activities studied. The administrative cost amounted to $484 million (see Table 6).

TABLE 5
ANNUAL COST OF REGULATION,
FINANCIAL REGULATION, BY AGENCY, 1976
(millions of dollars)

Agency	*Administrative Cost*	*Compliance Cost*	*Total*
Cost Accounting Standards Board	1	NA	1
Federal Trade Commission	49	1,000	1,049
Federal Reserve System	NA	118	118
Securities and Exchange Commission	54	NA	54
Total	104	1,118	1,222

NA: Not available.

TABLE 6
ANNUAL COST OF REGULATION,
INDUSTRY SPECIFIC, 1976
(millions of dollars)

Agency	*Administrative Cost*	*Compliance Cost*	*Total*
Interstate Commerce Commission	52	11,004	11,056
Civil Aeronautics Board	94	2,697	2,791
Federal Power Commission	39	58	97
Federal Communications Commission	54	1,460	1,514
International Trade Commission	11	4,700	4,711
Commodity Future Trading Commission	12	NA	12
Nuclear Regulatory Commission	208	NA	208
Renegotiation Board	6	NA	6
Federal Maritime Commission	8	NA	8
Total	484	19,919	20,403

NA: Not available.

Of the total cost to the economy in this area, outlays attributable to Interstate Commerce Commission regulation of surface transportation were the largest single component, inducing an estimated compliance cost of $11 billion for 1976. The estimated cost of FCC regulation, $1.5 billion, represents only the cost of regulating cable television, a minor portion of the total cost of that commission's activity.

The figure given for the Federal Power Commission is also only a small part (rate case reviews) of total expenditures as is the figure for the International Trade Commission. Estimates of costs induced by import quotas were available for only a few specific commodities, yielding a figure which substantially underestimates the total expenditures due to this regulatory activity. The $20 billion total given in Table 6 is thus a very conservative estimate.

Regulation and National Priorities. To state that a certain amount of government resources is devoted to a specific function, such as regulation of agriculture, does not tell the full story. Such conventional calculations exclude the resultant expenditures for private sector compliance with government mandates. Table 7 attempts to illustrate the importance of including the relevant private sector outlays when assessing costs. Column 1 contains the amount of federal funds devoted to each major function (including the cost of administering regulations as well as all other federal activities). Column 2 shows the rank order of each function. Then the indirect or private costs of regulation are added in (column 3), and the resultant implicit priorities are calculated (column 4). The rankings of five of the implicit priorities change when the compliance costs are included. The most dramatic change occurs in the category of commerce and transportation, which moves from 7 to 3.

TABLE 7
FEDERAL OUTLAYS AND RANKINGS, 1976
(billions of dollars)

Function	*Administrative Outlay (1)*	*Rank (2)*	*Total Outlay[a] (3)*	*Rank (4)*
National defense	94.0	2	94.0	2
International affairs	6.3	11	6.3	11
General science, space, and technology	4.6	13	4.6	13
Natural resources, environment, and energy	10.0	8	17.8	7
Agriculture	1.8	16	1.8	16
Commerce and transportation	13.7	7	38.5	3
Community and regional development	5.9	12	5.9	12
Education, manpower, and social science	14.6	6	18.3	6
Health	28.0	4	29.3	5
Income security	118.7	1	118.7	1
Veterans' benefits and services	15.6	5	15.6	8
Law enforcement and justice	3.3	14	3.6	14
General government	3.2	15	3.2	15
Revenue sharing and general purpose assistance	7.2	10	7.2	10
Interest	34.4	3	34.4	4
Allowances	8.0	9	8.0	9
Undistributed offsetting receipts	–20.2	17	–20.2	17
Total	349.1		386.9	

[a]Excludes paperwork estimate.

Need for Additional Research. A final point to stress is the work that still needs to be done. The estimates in this study cover only a fraction of the regulations in force and in some cases only a part of the regulatory activities. The need for further research is emphasized by listing the many areas in which no cost estimate was available for any part of the regulatory activity:

- Animal and Plant Health Inspection Service
- Packers and Stockyards Administration
- Department of Housing and Urban Development
- Antitrust Division
- Drug Enforcement Administration
- Federal Railroad Administration
- Bureau of Alcohol, Tobacco and Firearms
- Customs Service
- Consumer Product Safety Commission
- National Transportation Safety Board
- Mining Enforcement and Safety Administration
- Department of Energy

- Federal Maritime Commission
- Commodity Future Trading Commission
- Nuclear Regulatory Commission
- Comptroller of the Currency
- Federal Deposit Insurance Corporation.

Another application of the data developed in this paper could be in governmental program analysis, especially those approaches that use benefit-cost or cost-effectiveness calculations. In determining whether a federal program is worthwhile in an economic sense, costs and benefits are often compared. This study highlights the magnitude of the compliance costs which should be included in those calculations.

Supporting Detail

The remainder of this report contains the conceptual framework used in deriving the estimated costs of regulation as well as the detailed estimates themselves. As stated previously, the study attempts to determine the portion of private sector expenditures attributable to regulation. The task is a difficult one, and several problems arise because of the nature of the objective.

Conceptual Framework. A major constraint is that the estimates and data used are those already published in the economics literature. The scope, number, and precision of these estimates necessarily reflect the state of the present body of information on the cost of regulation. Though the data presented may not therefore always be definitive, the best available data were used. Any theoretical shortcomings are recognized, though they must remain unresolved because of the lack of adequate research in this field.

A major step toward credible estimates is the development of a consistent estimation procedure. The focus of the study is on the difference in expenditures before and after the existence of regulation. A comparison of a regulated state with a state of "optimal regulation" is not intended, although that approach would be useful. This study is not limited to the question of inefficiency costs but focuses on the magnitude of the total cost, of which inefficiency costs are only a part.

When dealing with transfer payments, a distinction is made between transfers that arise as a side effect of regulation and costs that are in the nature of tax collections and are redistributed as transfers (for example, social security). Given the need to compare gross expenditures induced by regulation with the gross expenditures included in the federal budget, the former type of transfers are included. This procedure is in contrast to economists' traditional treatment of transfers, in which the social cost is calculated at zero since the cost to one group is the gain to another.

A particularly difficult area with which to cope is the effect of federal regulation on the character of the product supplied by the regulated industry. An example might help to clarify this point. When regulation takes the form of price or fare controls, competition may shift from pricing to quality. With the resulting increase in quality, average costs may rise. The question then is whether to regard all of the increased price as a cost to the private sector. The answer is probably no. Essentially, a new product is being offered, presumably one of higher quality, so that a pure comparison of prices before and after regulation in this instance is not valid. The difference must be adjusted for quality increases, though in practice this is very difficult. The problem becomes compounded by the fact that people's preferences are not identical. Quality adjustments are not viewed the same way by everyone, and hence the net result is impossible to ascertain. We have in these instances contributed toward adjusting the differentials by taking the lower end of any range of estimates.

The distinction between stocks and flows should be recognized. Often regulation entails outlays for plant and equipment, as in the case of regulations of the Environmental Protection Agency. By definition the useful life of capital exceeds one year, but for the purpose of this study the incremental expenditure is viewed as a one-time use of resources in a particular year. In addition, the operating and maintenance costs of previously acquired capital must be included. This method of treatment of capital outlays is consistent with the treatment given these gross expenditures in the National Income Accounts and in the federal budget.

In this study, once estimates are obtained, they are simply summed to yield an aggregate figure for a regulatory function. By aggregating in this manner, apples and oranges are indeed being added. This procedure is valid, however, since the gross expenditures to which we relate the estimates are the budget outlays and ultimately the gross national product, which have also been arrived at by adding apples and oranges. The argument is, then, that since this aggregation occurs in the denominator, a consistent and meaningful comparison dictates that a similar approach be used to calculate the numerator—that is, using "pieces of fruit" in both cases.

A definition of regulation is very important since the consistency of the estimates is dependent upon it. Regulation has been taken to mean legislative or administrative controls affecting prices, costs, entry and exit, production and distribution patterns, and other aspects of economic activity. Taxes and subsidies have been excluded since they already are included in the budget. An effort was made to differentiate between direct market intervention in the economic sphere and more general social controls over personal action, such as traffic laws. The former are included and the latter, although they may also affect business activities, are excluded. The definition was formulated by observing the types of activities which were considered regulatory in the present literature.

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Statistical Analysis. In the following sections, the derivation of the estimates presented earlier are described in detail.

Federal regulation of milk markets. The Agricultural Act of 1937 authorizes federal regulation of the marketing of fluid milk. The act allows marketing controls on bottlers or dairies to be imposed by producers of milk which will eventually be sold as fresh milk.

A federal milk regulation administrator formulates and enforces marketing agreements, called orders, and sets prices that dairies must pay at certain locations for fresh milk and for milk used in manufacturing. The latter is cheaper mainly because the sanitary standards are lower and less costly. Under competition, it would be expected that such a differential would be dissipated over time so that the difference in price would reflect only differences in production costs. Under a system of federal regulation, the competitive result is not achieved. As Reuben Kessel states, "Maintaining prices for milk to be used for fluid purposes that are higher than manufacturing milk prices and higher than the cost difference associated with differences in sanitary standards for grades A and B milk, is the *raison d'être* for marketing orders." [1]

This system causes inefficiencies because it gives farmers an incentive to produce some milk at marginal costs in excess of marginal revenues, thus raising the price of fluid milk above its true economic cost and lowering the price of milk for manufacturing below its economic cost. The regulation thus works to the detriment of the producers of approximately half of all milk.[2] Consumers are also affected by this federal regulation. In the final product market, as a result of regulation, fresh milk, becomes more expensive than manufactured milk products.

Kessel's results are extended by Richard Posner.[3] He combines Kessel's estimate that federal milk regulation causes an 11 percent price increase with an estimate of the demand elasticity for food credited to Houthakker—0.399. Citing a study done by Robert Ayanian, Posner notes that the demand elasticity for dairy products is not significantly different from that for the entire food category.[4] On this basis, Posner states that federal regulation of milk costs amounts to 10 percent of industry sales. In 1976 total industry sales amounted to $9,856 million; according to Posner's calculation, the loss due to federal milk regulation therefore amounted to $985 million.

In addition to the Posner study, further evidence is brought to bear on the subject by Paul MacAvoy, who discusses two additional studies of the social costs of federal milk regulation, one by Richard Ippolito and Robert Masson and the other by John Kwoka.[5] These studies break down the costs into two categories, deadweight loss and transfer payments. Ippolito and Masson estimate the total deadweight loss at $125–245 million a year and the total transfer payments at $250–500 million a year. This amounts to a total of $375–745 million a year.[6] Kwoka, in a 1975 study, estimates a total deadweight loss from

regulation at $202 million a year and gross transfer payments at $805 million a year.[7] This amounts to a total cost of $1 billion a year.

In light of the range of estimates presented, the Posner figure will be used since it falls in the range of plausible estimates and serves as a credible approximation.

Regulation of drugs. In contrast to other American industries, the ethical drug industry is unique in that both the final salable product and the research process employed in the development of new products are under federal regulation. This industry has a long history of regulation dating back to the Food and Drug Act of 1906, which was replaced when the Food, Drug, and Cosmetic Act of 1938 introduced laws similar to the statutes of the present time.

In 1962 the Kefauver-Harris Amendments were introduced to strengthen the 1938 act. In addition, two new areas were covered: a requirement of proof of efficacy before a new drug application (NDA) could be approved; and regulation of the clinical investigation (pre-NDA) phase of drug development, including specification of the preclinical (animal) toxicology testing requirements. For the purpose of implementing the testing requirement, the investigational new drug (IND) procedure was developed which, as William Wardell states, "is a permit to begin clinical testing of a new drug."[8]

The process of regulation of the ethical drug industry, as with any other industry, creates both costs and benefits, the quantification of which Sam Peltzman and Wardell have investigated in detail. A major concern is the effect of regulation on innovation. Wardell, along with J. Richard Crout, argues that specific regulation of drug research and rising constraints on human experimentation are the most important controls which currently affect the development and innovation of drugs. Wardell develops the argument linking regulation and decreased innovation.[9]

In 1976 Grabowski and Vernon studied this effect using international comparisons. The depletion of research opportunities would be expected to affect all countries in the same manner, leaving any difference to be attributed to differences in regulatory structure. In a comparison of the United States and the United Kingdom the focal point was new chemical entities discovered and developed in each country per dollar of research and development (R & D) invested. It was found that "both countries experienced significant increases in the total R & D investment expenditures needed to produce a new chemical entity in the postamendment period. However, the increase was relatively greater in the U.S. where regulatory controls were much more extensive." Grabowski and Vernon estimate that "increased regulation, by itself, roughly doubled the cost of producing and introducing a new chemical entity in the post-amendment period." [10] Table 8 gives the total research and development expenditures for the postamendment period.

A final cost to be considered is that of lost time. The more stringent testing

TABLE 8
PHARMACEUTICAL INDUSTRY RESEARCH AND DEVELOPMENT EXPENDITURES AFTER THE KEFAUVER-HARRIS AMENDMENTS
(millions of dollars)

Year	*Research and Development Expenditures*
1962	251
1963	282
1964	298
1965	351
1966	402
1967	448
1968	485
1969	549
1970	619
1971	684
1972	726
1973	824
1974	930

SOURCE: Pharmaceutical Manufacturers Association Annual Survey Reports, 1962–1972. From 1969 on, the total includes U.S. government grants and contracts for company-conducted R & D (approximately $10 million a year). Prior to 1969 U.S. government grants and contracts were excluded.

requirements of the 1962 amendments delay the introduction of new drugs into the market. If a new drug is developed which is in fact safe by Food and Drug Administration (FDA) standards, all therapeutic value is not available during the testing period.

A study done by Peltzman focused on three major aspects of regulatory effects: efficacy, innovation, and competition. With regard to efficacy, Peltzman tried to determine whether the Kefauver-Harris Amendments reduced the spending of consumers by reducing exaggerated claims of efficiency. After determining that the initial demand for new drugs in the period preceding the amendments was close to the "true demand," a comparison was made with the post-1962 demand, and the new demand curve was found to be lower. This decline was attributed to the decreased amount of information available to consumers after the initial weeding out of unsubstantiated claims by the FDA. Given that increased demand generates increased consumer surplus, the amendments decrease consumer surplus. On the other hand, there is benefit to be gained from a decrease in expenditure on ineffective drugs.

> Reduced waste on ineffective new drugs is trivial as deduced from the behavior of ordinary consumers or more sophisticated buyers (hospitals). An ungenerous interpretation of the drug evaluations of the A.M.A. Council on Drugs and pessimistic assumptions about prescribing practice yields an estimated annual waste reduction of

> $100–$150 million. But this must be reduced by more than half in light of the decline in demand experienced by ineffective drugs over time.[11]

Peltzman also concludes that because of a change in market structure, specifically a reduction in competition caused by amendment-induced barriers to entry, the price of existing drugs has risen. Peltzman states that "Reduced price rivalry attributable to reduced innovation costs consumers about $50 million annually."[12]

The third major cost of the amendments which Peltzman cites is that of retarded innovation. In this case, various drugs are not marketed, which would be marketed in the absence of regulation. This cost, however, will be excluded here since it does not really fit the criteria being used. It is a lack of an expenditure rather than an expenditure, and as such cannot be compared with other gross expenditures.

As can be seen in Table 9, in 1970 the total cost to the economy of FDA regulation of pharmaceuticals was $213 million. Given total annual consumer expenditures on drugs of $5 billion in 1970, this amounts to a tax of approximately 4 percent on consumer purchases. At the 1976 level of outlays on pharmaceuticals of $7.8 billion, the cost of this aspect of FDA regulations amounts to $312 million.

Automobile safety and damage regulation. From 1968 to 1976, the federal government has required numerous changes in automobile manufacturing. Such actions have increased the cost of producing motor vehicles and thus also raised the price paid by consumers.

In that eight-year period the mandatory changes have led to an increase in the retail price of passenger cars that averaged approximately $449 a car. When this figure is adjusted for the inflation which occurred in the period, the estimated increase in the cost of a typical 1976 car comes to $557. A detailed

TABLE 9
ESTIMATED COST OF FDA REGULATION OF PHARMACEUTICALS, 1970
(millions of dollars)

Origin of Cost	*Amount*
Decreased competition	50
Decreased sale of inefficient drugs	−100
Increased cost of R & D	263[a]
Total	213

[a]From Table 8, average expenditure per year divided by two (using estimate of Grabowski and Vernon, "Consumer Protection Regulation in Ethical Drugs," that regulation doubled the cost of R&D).

SOURCE: Sam Peltzman, "An Evaluation of Consumer Protection Legislation: The 1962 Drug Amendments," *Journal of Political Economy* (October 1973), pp. 1049–1091.

TABLE 10
INCREASE IN RETAIL PRICE OF AUTOMOBILES
DUE TO FEDERAL REQUIREMENTS, 1968–1975
(dollars)

Model Year	*Action*	*Initial Retail Price*	*Year Total*	*Total Adjusted for Inflation*[a]
1968	Seat- and shoulder-belt installations	11.51		
	HEW standards for exhaust emissions systems	16.00	27.51	44.92
1968–1969	Windshield defrosting and defogging systems	.70		
	Windshield wiping and washing systems	1.25		
	Door latches and hinge systems	.55		
	Lamps, reflective devices, and associated equipment	6.30	8.80	13.64
1969	Head restraints	16.65	16.65	25.80
1970	Lamps, reflective devices, and associated equipment	4.00		
	Standards for exhaust emissions systems	5.50	9.50	13.87
1968–1970	Theft protection (steering, transmission, and ignition locking and buzzing system)	7.85		
	Occupant protection in interior impact (glove box door remains closed on impact)	.35	8.20	11.97
1971	Fuel evaporative systems	19.00	19.00	26.60
1972	Improved exhaust emissions standards required by Clean Air Act	6.00		
	Warranty changes resulting from federal requirement that all exhaust emissions systems be warranted for five years or 50,000 miles	1.00		
	Voluntarily added safety features in anticipation of future safety requirements	2.00		
	Seat-belt warning system and locking device on retractors	20.25	29.25	39.78

TABLE 10 *(continued)*

Model Year	*Action*	*Initial Retail Price*	*Year Total*	*Total Adjusted for Inflation*[a]
1972–1973	Exterior protection (standard no. 215)	69.90	69.90	89.47
1973	Improvements in location, identification, and illumination of controls	.60		
	Reduced flammability of interior materials	5.80	6.40	8.19
1969–1973	Improved side-door strength	15.30	15.30	19.58
1974	Interlock system and other changes to meet federal safety requirements	107.60		
	Improved exhaust emissions systems to comply with the Federal Clean Air Act	1.40	109.00	125.35
1975	Additional safety features associated with federal motor vehicle safety standards no. 105, no. 208, and no. 216	10.70		
	Installation of catalytic converter	119.20	129.90	137.69
	Total	449.41	449.41	556.86

[a]Year totals are adjusted for inflation using the consumer price index to give 1976 dollars.

SOURCE: Murray L. Weidenbaum, *Business, Government, and the Public* (Englewood Cliffs, N.J.: Prentice-Hall, 1977), p. 48; and data supplied by the U.S. Department of Labor, Bureau of Labor Statistics.

breakdown of the price increases is projected in Table 10. For the 6,731,000 automobiles sold in 1975, these federally mandated requirements have cost consumers $3.7 billion in the form of higher prices in that year.

The compliance costs of OSHA. The Williams-Steiger Occupational Safety and Health Act (OSHA) of 1970 directs the secretary of labor to set and enforce safety and health standards for all employers engaged in industries affecting interstate commerce. In the private sector OSHA generates four types of costs: the direct cost of compliance, the indirect cost of lost production, penalties for failure to comply, and finally the burden of paperwork. Because of its large cost, this last category merits separate discussion.

Robert S. Smith, formerly in charge of safety and health evaluation for the Department of Labor, has examined the costs and benefits of OSHA. Smith quotes findings by the National Association of Manufacturers that OSHA costs range from $35,000 to $350,000 per firm. This estimate is confirmed by the fact

that the first thirty-three businesses to obtain small-business loans for the purpose of OSHA compliance averaged loans of $200,000 each.[13]

The *Fourth Annual McGraw-Hill Survey* estimates that investment by industry, both manufacturing and nonmanufacturing, in OSHA compliance totaled $3.2 billion in 1976.[14] In addition, outlays by universities for the purpose of OSHA compliance amounted to $31 million in 1975.[15] When adjusted for inflation, the 1976 dollar figure is $33 million. The total cost of compliance for the economy, then, is $3.23 billion in 1976.

Compliance costs of the EEOC. The Equal Employment Opportunity Commission (EEOC) is one of three federal agencies involved in eliminating job discrimination.[16] It was established in 1972 by the Equal Employment Opportunity Act "to enforce the prohibition of discrimination because of race, color, religion, sex or national origin in all employment practices, including hiring, firing, layoffs, promotion, wages, training, disciplining action and other terms, privileges, conditions, or benefits of employment."[17] In the process of abolishing job discrimination, employers are made to bear a variety of costs. Affirmative action programs, such as those for hiring, promotions, and training opportunities, must be staffed in the private sector, and valuable employee time can be devoted to the additional paperwork involved in federal compliance.

The EEOC regulates the flow of information in the labor market to a certain extent. Employers must go to great lengths to insure that job information is disseminated in minority areas. Weidenbaum and Rockwood state that:

> Affirmative Action efforts must be concerned not only with the wide advertisement of job openings, but also with the images projected by any promotional literature whether oriented toward recruiting, consumers or for other purposes. . . . The overall demand for advertising may thus be increased . . . to the extent that employers either advertise more frequently than they otherwise would, or run larger ads to convey a more positive attitude toward hiring and promoting women and minorities.[18]

Another important origin of private sector costs is EEOC's effect on total output. Because of the necessity of widening the search for job applicants, the period during which a vacancy remains unfilled is prolonged, and understaffing causes decreased output.

Legal costs are another direct, highly visible cost attributable to the EEOC. These costs arise in the form of fees paid in the process of contending EEOC claims of both governmental and private infringement. In addition, if a private firm is found in violation of the Equal Opportunity Employment Act, awards must be paid to the injured party.

Since the benefits and costs of the EEOC have not been thoroughly analyzed, data on its costs are minimal. One portion of the costs is quantifiable,

however: the $262 million in awards paid out by business on resolution of charges under Title VII of the Civil Rights Act, as amended, prohibiting discrimination in employment conditions.[19] In addition, cost estimates on the effect of the EEOC on university operations are relevant. Required university programs for equal employment opportunity, equal pay, affirmative action, and prevention of age discrimination cost universities an estimated $83 million in 1976.[20] Combining this estimate with the above penalty payments yields a total of $345 million. Since these are the only data available on the costs of the EEOC, the figure represents a severe underestimate of the full costs.

Compliance cost of the Davis-Bacon Act. The Davis-Bacon Act was established in 1931 to shield local labor on federal construction projects from the competition of the lower wage rates of nonlocal labor. The act requires payment of "prevailing wages" and fringe benefits to workers employed under federal government contracts for the construction of public buildings or public works. There are fifty-six additional federal laws which require prevailing wages, similar to those specified in the Davis-Bacon Act, for projects assisted by federal grants or loans.[21]

The major and most obvious cost of such legislation is that it prevents the government from minimizing costs. The government can no longer accept bids for work from firms whose wage rates might be below those that prevail in the locality. There are several types of indirect costs, though for the most part these remain immeasurable. A. J. Thieblot has estimated the direct costs of the Davis-Bacon Act, based on data collected during 1971 when the act was suspended for a little over a month.[22] At that time all construction projects for which bids had been received were sent back for rebids at competitive wage rates. In attempting to estimate the costs of the act, the percentage difference in the bids was taken to represent the inflated payments due to the act, and hence the cost of the legislation. This is an example of a transfer payment that is included in the total.

Thieblot offers two warnings with respect to these data. First, all initial bids became public knowledge before the rebids, which may have influenced later decision making. Second, a large amount of "gamesmanship" occurred among both open-shop and union contractors, so that a pure estimate of what would occur had the act not been in existence is unlikely.

To control for competitive factors other than those related to the Davis-Bacon Act, only the lowest initial bids and lowest rebids were considered in the comparison. The results show that the low rebids were 0.63 percent lower than the original low bids. This figure does not include the inflationary effect during the delay between bids and rebids. As Thieblot states, "This percentage is probably a fair representation of actual savings to the government as a result of the suspension." Given an estimated total of $38 billion for government spending on construction, this amounts to savings of $240 million a year. If this figure is corrected for inflation during the bidding period, the figure would

increase to between $620 million and $1 billion.[23]

Congressman John Anderson of Illinois has offered another estimate of the direct cost. Using an econometric model constructed by John Gould, Anderson estimates a 6.5 percent difference between average wages under the Davis-Bacon Act and average wages if the act were repealed.[24] This figure implies a cost of $567 million a year.

In keeping with the spirit of the present study, Thieblot's estimate of $240 million will be used so as to keep the aggregate cost figure on the conservative side. In addition, it must be recalled that none of the several indirect costs is included. Therefore, the figure of $240 million remains, at best, a minimum bound for the cost to the economy of the Davis-Bacon Act.

Regulation of universities. The American Council on Education (ACE) undertook a study to determine the cost of federally mandated regulations to universities. The study involved six public and private institutions of various sizes and locations and covered the period from 1965 to 1975. It attempted to measure "incremental costs" which were defined as "those additional costs directly associated with carrying out the federal programs." These comprise both one-time start-up costs and expenses which recur annually, including operating costs. The authors of the ACE study made no attempt to develop aggregate cost figures for all U.S. academic institutions.[25]

A main conclusion of the ACE study was that in the 1974–1975 academic year, the combined cost of implementing the federally mandated social programs at the six institutions was $9–10 million. The cost represented between 1 and 4 percent of the operating budgets of the individual universities. The cost of implementing the federally mandated social programs at these six institutions has doubled over the last five years, a rate which exceeds the increase in the overall cost of instruction.

For the purpose of obtaining a conservative aggregate estimate of the cost of federal regulation of universities, not all the cost estimates in the ACE study are relevant. In particular, since fringe benefits are not considered here, the ACE estimates of the costs of unemployment compensation, Social Security tax increases, health maintenance organization, and retirement benefits will be excluded. In addition, the ACE estimates of the costs of environmental protection regulation will be omitted since they are included in another section of this paper. In all, only 46.3 percent of the costs derived by the ACE are relevant for the present purpose. To obtain a conservative estimate of the total cost of regulation to all universities, the low figure of 1 percent of operating budgets is used here. It is assumed that the aggregate cost of each program reflects the same percentage of the total cost as did each program in the ACE study.

As can be seen in Table 11, the aggregate cost estimate of compliance with federal regulations for American colleges and universities is $158 million in 1974–1975. This amounts to $167 million in 1976 dollars. These estimates are

TABLE 11
AGGREGATE COMPLIANCE COSTS FOR ALL U.S. ACADEMIC INSTITUTIONS, 1974–1975
(millions of dollars)

Program	*ACE Estimate (1)*	*Percent of Total*[a] *(2)*	*Aggregate Estimate*[b] *(3)*
Equal employment opportunity	1.986	20.0	68.0
Equal pay	0.426	4.0	14.0
Affirmative action	0.024	0.2	0.7
Age discrimination	0.019	0.1	0.3
Wage and hour standards	1.293	13.0	44.0
Occupational safety and health	0.908	9.0	31.0
Total	4.656	46.3	158.0

[a]Column 1 ÷ $9,711,582 (ACE total cost estimate) rounded to nearest hundredth.
[b]Column 2 × 1 percent of total operating budget of all U.S. academic institutions, 1974–1975, or $341 million.

SOURCE: Carol Van Alstyne and Sharon Coldren, *The Costs of Implementing Federally Mandated Social Programs at Colleges and Universities* (Washington, D.C.: American Council on Education, June 1976).

incorporated into the present study by allocating them to appropriate sections throughout the study. The equal employment opportunity, equal pay, affirmative action, and age discrimination estimates are included in the section on Equal Employment Opportunity Commission, and the occupational safety and health estimates in the section on OSHA.

Private sector costs of reducing pollution. The most common strategy currently employed to deal with environmental problems is to set and enforce standards of environmental quality. The two central federal laws are the Clean Air Act and the Federal Water Pollution Control Act; subsequent laws have widened the scope of these initial statutes.

In general, the quality standards are implemented by setting approximate limits to the amount of pollution from each source. Typically, these limits require uniform or proportionate reductions by all dischargers; that is, each source is required to reduce its discharges by an amount proportional to its contribution to the total.

The cost and relative ease of pollution reduction is contingent upon several variables—the industry in question, its product mix, its technology, the age of the existing capital, and the operational controls of the industry. The estimates given in the summary section relate to incremental compliance costs for pollution abatement. Specifically, they represent outlays by both the public and private sectors for federally required plant and equipment. A summary of these

TABLE 12
PUBLIC AND PRIVATE INCREMENTAL COMPLIANCE COSTS OF POLLUTION ABATEMENT, 1976
(billions of dollars)

Pollutant/Source	*Air*	*Water*	*Solid Waste*	*Total*
Private	3.8	2.4	0.4	6.6
Public	0.3	1.4	0.3	2.0
Total	4.1	3.8	0.7	8.6

SOURCES: Figures for the private sector are from *The Seventh Annual Report of the Council on Environmental Quality*, p. 166; and for the public sector, from *The Fifth Annual Report of the Council on Environmental Quality*, p. 175. These estimates have been adjusted for inflation during the 1973–1976 period.

costs is shown in Table 12. Because estimates of incremental outlays by the public sector were not available for 1976, the 1973 figures were used after adjustment for inflation during that period. Again, these were treated as a one-time resource use in order to remain consistent with their treatment in the gross expenditure accounts of the federal government. The total compliance cost is estimated at $8.6 billion for 1976.

Compliance costs of credit regulation. The Equal Credit Opportunity Act of 1974 was enacted to eliminate credit discrimination on the basis of sex or marital status. Regulation B of the Board of Governors of the Federal Reserve System was adopted to carry out the purposes of this act and is the only regulation for which cost estimates could be obtained. It is not the only regulation with which creditors must comply, however. Costs are induced by Regulation Z (to implement the Fair Credit Billing Act of 1974), the Real Estate Settlement and Procedures Act, Regulation C (to implement the Home Mortgage Act of 1975), and the Federal Trade Commission's Trade Regulation Rule on Preservation of Consumer Claims and Defenses.

An extremely thorough analysis of the Equal Credit Opportunity Act was undertaken by James Smith. He identified seven nonrecurring costs: legal fees, training costs, costs of destroying obsolete forms, reprogramming computer systems to comply with the new regulations, costs for additional storage space, printing and mailing the notice "Credit History for Married Persons," and conversion of creditors' computerized or manual systems to introduce the use of two names on files. The last three arise from section 202.6, the main purpose of which is to provide married women with a credit history which may be useful if they become divorced, separated, or widowed. Smith reports that the total of nonrecurring costs is $174.8 million a year.[26]

Three main recurring costs were also identified by Smith: costs to creditors of additional time needed for computer runs of longer records and for report preparation, costs to creditors of buying two or three credit reports instead of one for a single application, and costs to credit-reporting agencies as a result of

increased requirements for data processing and customer service. Smith estimated these recurring costs at $118 million. In sum, this form of federal regulation cost the economy $293 million in 1976.

Another area of credit regulation is the impact on consumer credit financing of a recent Federal Trade Commission ruling. It makes third-party financing agencies subject to all claims and defenses which the purchaser and borrower could assert against the seller, the so-called Holder-in-Due-Course Doctrine. This is but one activity of the commission, whose duties range from investigation and litigation under the Clayton Act to enforcement of the Hobby Protection Act. Wharton Econometric Forecasting Associates estimated that the ruling lowered personal consumption expenditures by $1–2 billion in 1976.[27] The lower figure of $1 billion is used in an attempt to keep the final estimate conservative in magnitude.

Costs of government regulation of transportation. The investigation into the costs that government regulation of transportation imposes on the economy focuses on land and air transportation. Under the general title of land transportation, the following modes are considered: common carrier trucks, private trucks, railroads, pipelines, and domestic water transportation. The analysis of air transportation will be limited to domestic passenger service.

In general, five main costs arise from regulation of the transportation industry:

(1) increased cost of a mode
(2) inefficient shift of traffic from low- to high-cost modes
(3) "deadweight" losses from decreased use of services because of inefficient pricing
(4) distortions in other sectors due to locational and product price discrimination (that is, cross-subsidization by consumers in one region of users in another region)
(5) dynamic losses caused by reduced incentives for innovation.

Often in transportation systems, attempts are made to carry some customers at the expense of others; that is, some customers pay charges which are less than the costs of the service used, and others pay correspondingly more. In the words of John Meyer, "The net effect . . . of cross-subsidization is to induce uneconomic use of resources. It often means that the wrong mode is used." He goes on to say that "so-called beneficiaries of cross-subsidization may end up paying more than they would with a more competitive and efficient transportation system."[28] The direct implication is that because of differential rates, additional costs are incurred through the use of more expensive modes, which would not have been used had the restrictions not been imposed.

There is evidence in the literature that regulation imposes large costs on railroads by retarding innovation. Ann Friedlander estimated this secondary loss at between $12 million and $41 million. In the same study, she estimated

that in 1964 inefficient pricing caused a deadweight loss in the railroad industry of between 2 and 1.79 percent of rail revenue. She notes that accounting for distortions to complementary goods (for example, where the increase in demand for one good increases the demand for another) would add another .0022 to .0044 percent of gross national product. The total figure for 1964, then, was between $220 million and $270 million. With respect to excess capacity costs (resulting from such practices as requiring empty loads on the back hauls), Friedlander estimates that costs are between $2.4 billion and $3.8 billion. Because these figures are rather high, her "low" figure is placed in the "high" column in Table 13.[29]

Table 13, taken from Thomas Moore's testimony before the Senate Subcommittee on Transportation and Aeronautics, combines estimates of Merton J. Peck, Robert W. Harbeson, and Ann Friedlander.[30] The estimates cover the period from 1964 to 1969. The figures are updated here in a relatively crude manner by assuming that the portion of industry revenue which the costs

TABLE 13

COMPLIANCE COST OF REGULATION IN THE TRANSPORTATION INDUSTRY, 1969

(millions of dollars)

Type of Loss	*Low*	*Medium*	*High*
Inefficient use of mode			
Common carrier trucks	1,400	1,660	1,890
Private trucks	100	200	1,000
Rails	1,700	2,000	2,400
Water carrier	200	300	300
Pipeline	—	—	—
Subtotal	3,400	4,160	5,590
Traffic shifted to alternate mode			
Trucks to rails	200	1,100	2,900
Water carriers to rails	—	—	—
Pipelines to others	—	—	—
Subtotal	200	1,100	2,900
Traffic not carried	175	300	400
Retarded innovation	12	—	41
Deadweight loss	220	—	270
Total	4,007	5,560	9,201

—: Not estimated.

SOURCE: The low estimate is based on Merton J. Peck, "Competitive Policy for Transportation?" in Almarin Phillips, ed., *Perspectives on Antitrust Policy* (Princeton, N.J.: Princeton University Press, 1965), pp. 261-65. Medium and high estimates are derived from Robert W. Harbeson, "Toward Better Resource Allocation in Transport," *Journal of Law and Economics* (October 1969), pp. 322-34.

represent has remained constant from 1969 to 1975. Harbeson's estimates of the cost of traffic misallocation have been questioned. Moore himself has stated that "this author [Moore] remains unconvinced that the amount of traffic that would shift from motor carriers to rails is substantial."[31]

Kenneth Boyer, in a recent article, disagreed with the comparative-cost methodology employed by Harbeson. Boyer argued that the loss of rail traffic to highway transportation in the 1950s and 1960s was, to a large extent, a switch to superior service, with the minimum regulation of rates a minor factor. In his study of the subject, Harbeson found this service differential to be rather small, implying a great sensitivity to rate changes. Boyer, on the other hand, presented evidence which "casts doubt on the standard method for calculating the service differential." Boyer states that reducing rail rates by even as much as 50 percent will have only a small effect on traffic allocation since, as he argues, "the choice is dominated by a large service differential."[32] Deregulation, then, would have only minimal effects.

The main conclusion of Boyer's study is that the size of the service differential has been underestimated in previous studies by at least tenfold, causing an overstatement of economic loss due to traffic misallocation," subject to various qualifications given in the study.[33]

Because Boyer's findings cast doubt on Harbeson's conclusions and Boyer's estimate is only an upper bound, this component of the cost of land transport regulation ($200 million) is deducted from the $4.007 billion total in Table 13; for the purpose of the present paper, the total cost of land transport regulation is considered to be $3.807 billion. As Boyer states, "The economic costs of regulation may be quite large, but those induced by intermodal traffic misallocation will not be a large component."[34] This, then, contributes to an understatement of the true aggregate cost of transportation regulation.

It should be noted that the full cost of regulation is not reflected in these estimates for the transportation industry. In addition to the values which could not be estimated in Table 13, other factors, such as retarded innovation in the trucking industry, were not quantified.

Regulation of air transportation. Over the past thirty-four years, the Civil Aeronautics Board (CAB) has controlled airline fares and the entry of firms into the interstate airline industry. The regulation which is imposed by the CAB can affect the cost of air transport in several different ways. The federally imposed barrier to entry can keep out potentially more efficient airline operators. Restraint of entry into city-pair markets shields inefficient carriers at the expense of more aggressive ones, possibly leading to higher costs than would prevail otherwise. CAB regulation may also have led to labor costs that exceed those which might prevail in a market characterized by free competition. And because of the lack of price competition, excessive service competition may have increased average costs considerably.

Attempts at estimating the costs of regulation with respect to fares and market efficiency have been undertaken by W. A. Jordan and Theodore Keeler. Jordan compares fares of the relatively unregulated California intrastate routes (Pacific Southwest Airlines or PSA) with fares in the Northwest corridor which are regulated by the CAB. The study covers the year 1965 when the only regulation imposed on PSA was a maximum fare. In effect, Jordan estimates hypothetical regulated fares for the California market and then compares them with existing fares. His findings show that coach fares for similar interstate markets would have been between 32 and 47 percent lower than the CAB-regulated fares which were in effect at this time.[35]

Keeler studied fares for thirty major domestic air travel markets. He developed a long-run airline cost model and used it to predict hypothetical unregulated fares for the thirty markets. His underlying assumption is that in a free market the fares charged would equal average cost. The results of his study show that, "as of 1968, regulated routes had markups over the estimated unregulated fares ranging from 20 to 95 percent, with a distinct tendency for markups to rise with distance." Updating to 1972, Keeler states that the markups range from 45 to 84 percent. Jordan's updated figures range from 47 to 89 percent.[36]

Posner, in a study of the social costs of regulation, notes that there have been several estimates of the extent to which CAB regulation has increased the price of airline travel.[37] He computes the simple average of these estimates to be a 66 percent increase, which he uses to estimate the social cost of regulation as a percentage of industry sales. Employing different demand elasticities, Posner estimates the loss between 20 percent and 19 percent of industry sales for elasticities of 2.5 and 2.36. The low figure of 19 percent will be used here in the calculation of the total cost of airline regulation. Given a $5 billion passenger revenue in 1968, the result is a social loss of $933 million. This approximation can be made more exact once more complete and accurate data are obtained. Besides the obvious limitations of the data, the analysis lacks the effects of regulation on baggage revenue.

Douglas and Miller issue a caveat on the estimation of the technical inefficiency of regulated carriers done by both Keeler and Jordan.[38] At present, however, these estimates are the best available and can serve as a useful approximation. In addition, the concurrence of Keeler's and Jordan's results do add strength to their respective findings. With the caveat that these are crude approximations, around 1969 the economic cost of land transportation regulation was $3.807 billion and of air transportation regulation $933 million, for a total cost to the economy of $4.740 billion. In updating this figure, 1974 data were used as the most recent available. It will be assumed that the cost of regulation as a percentage of industry sales remained constant from 1969 to 1974.

The adjustment process requires two steps. First, the figure for total loss

TABLE 14

TOTAL OPERATING REVENUE, BY MODE, 1968 AND 1974
(millions of dollars)

Mode	*1968*	*1974*
Motor carriers	6,283	11,083
Water carriers	355	551
Pipelines	1,023	1,587
Railroads	10,627	16,044
Total land transport revenue	18,288	29,265
Domestic air passenger revenue	4,913	11,879

SOURCES: 1968 statistics for land transport are from Interstate Commerce Commission, *82nd Annual Report on Transport Statistics in the U.S. for the Year Ended December 31, 1968* (Washington, D.C., 1969); 1974 statistics for land transport are from Interstate Commerce Commission, *88th Annual Report on Transport Statistics in the U.S. for the Year Ended December 31, 1974* (Washington, D.C., 1975); and statistics for air transport are from Civil Aeronautics Board, *Handbook of Airline Statistics* (Washington, D.C., 1969 and 1975).

from economic regulation must be adjusted for changes in business volume in the industries under investigation. Second, an adjustment must be made for inflation. To adjust for changes in the volume of business, the percentage increase in operating revenues is obtained for each mode listed under land and air transportation from 1968 to 1974. Each figure is then weighted by the percentage of total revenue contributed by the mode. A composite weighted average can be calculated and applied to the total loss figure. The change can be added to the original figure, yielding a partially updated figure. The effect of inflation, as measured by the change in the consumer price index (CPI)[39] is then used to adjust the figure to 1974 dollars.

Table 14 contains the data on total operating revenue by mode for the years 1968 and 1974. This information is used for the calculation of the weighted average in Table 15. The increment in loss due to regulation, obtained by adjusting the previous total figure for changes in business volume, is 77 percent of the original figure, computed as \$4.740 billion × .77 = \$3.650 billion. With this first adjustment, the new total figure for 1974 is \$4.740 billion + \$3.650

TABLE 15

PERCENTAGE INCREASE IN REVENUE, BY MODE, 1968 TO 1974

Type of Transportation	*Percent Increase, 1968–1974*	*Percent of Total Revenue*	*Weighted Percent Increase*
Land	60	79	47
Air	142	21	30
Total			77

SOURCE: Table 14.

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billion, or $8.390 billion. This figure must now be adjusted for inflation. The consumer price index, using 1967 as the base year, has increased 63 percent from 1968 to 1976. Therefore an additional $5.31 billion must be added, yielding a final figure of $13.7 billion loss due to regulation in the transportation industry.

The private costs of FPC regulation. The regulatory authority of the Federal Power Commission (FPC) is rooted in two pieces of legislation, the Federal Power Act of 1935 and the Natural Gas Act of 1938. The commission has two major concerns: price and quantity. The price policy is to protect consumers against prices that are "unreasonable and unduly discriminatory." The FPC tries to set the sale price in a specific contract as close to the cost of service as possible. In its policy to regulate quantity, the commission has the responsibility of guaranteeing an adequate supply of electric energy throughout the United States, "with the greatest possible economy and with regard to the proper utilization and conservation of natural resources."[40]

One type of regulatory cost is generated by the requirement that producers of gas and electricity and transportation companies participate in "cost of service" review cases. Paul MacAvoy has investigated this area and stated that there were approximately six classes of proceedings a year which required the services of industry experts, lawyers, and corporate executives for extended periods.[41]

The main costs of FPC regulatory activities fall under three categories: electric power, the field price of gas, and gas pipelines. The cost estimates in Table 16, which were derived by MacAvoy, come from surveys of defendants' actual expenditures in recent cases. The origin of the costs are varied. For example, in an attempt to set wholesale price ceilings on all interstate sales, the FPC requests large amounts of data. In providing such information, valuable resources are utilized by firms. Rate cases might be undertaken if informal reviews do not result in the rate reductions desired by the commission.

With regard to natural gas, two costs are induced. The first is the cost of regulatory delay. In order to place gas in the pipeline, the producing company holding discovered and developed gas reserves must first complete several formal procedures, the first of which is to acquire a "Certificate of Necessity." The second cost is that of area rate proceedings.

According to the MacAvoy study, summarized in Table 16, the total cost for 1970 is $36 million. When translated into 1976 dollars, the final figure is $58 million.

The costs of FCC regulation of cable TV. The Radio Act of 1912 required any entity operating a radio station to obtain a license issued by the secretary of commerce. The act set out rules of compliance for station owners, but they were seldom followed, and the large number of stations formed in 1922 generated chaos. Although the stations violated the rules for licensees, in general the

TABLE 16
ANNUAL COSTS OF FPC REGULATORY ACTIVITIES
(millions of dollars)

Activity	*Cost*
Electric power price regulation	1.6
Electric power system evaluation	1.9
Gas field price regulation	30.0
Gas pipeline price and systems regulation	2.5
Total	36.0

SOURCE: Paul W. MacAvoy, "The Effectiveness of the Federal Power Commission," *Bell Journal of Economics* (Autumn 1970).

courts upheld the stations, saying that the secretary of commerce, Herbert Hoover, had no right of control.

To alleviate the situation, Congress in 1927 passed a law regulating the radio industry and initiating the Federal Radio Commission. The commission was required to classify radio stations, prescribe the nature of their service, assign wave lengths, determine the power and location of the transmitters, regulate the kind of apparatus used, and make regulations to prevent interference. In 1934 these functions of the Federal Radio Commission were transferred to the Federal Communications Commission (FCC), which was also made responsible for the regulation of the telephone and telegraph industries. This section deals with only one facet of FCC regulatory activity, namely licensing, restricting entry, and allocation of rights in relation to cable TV.

In 1945 the FCC allocated rights to the UHF spectrum to local rather than to regional stations, but technological advances did not permit reception of UHF signals until 1952. The UHF stations were brought under FCC control with the passage of the All-Channel Television Receivers Act of 1964. Given this control, the commission passed rules to protect the UHF stations from the competition of cable TV, which threatened to diminish advertiser support for the UHF stations.[42]

Mitchell and Comanor have investigated the loss of efficiency because of the restricted demand for cable TV.[43] They argue that regulators, acting as economic planners, attempt to exploit the monopoly position of cable TV to gain revenue for their activities. In fact, the cable firms would never see their profits because of, say, the required transfer of income to support UHF stations.

As Mitchell and Comanor state, behavior of this sort causes social cost, regardless of whether such monopoly profits are used in the public interest. They argue that "The higher prices set to obtain monopoly rewards not only create the classic dead-weight loss of monopoly but also they limit the extent to which scale economies may be realized."[44] Given the high fixed capital costs and low marginal costs of the cable industry, there are indeed economies of scale.

Comanor and Mitchell estimate the loss to the economy from the higher price of cable TV which is produced by regulation. Using a price of $5 per month for the cable service, they estimate the loss at between $1 billion and $2 billion a year, depending on the magnitude of demand elasticity.[45] The $1 billion estimate will be used for the present study in an effort to remain conservative. Once again, this is a minor part of the total FCC regulatory program and by no means represents the total costs of the FCC.

Private costs of U.S. import quotas. Imports can be reduced to any desired level, through the use of either quotas or tariffs. Both instruments result in an increase in home production of the protected commodity, an increase in its price, and a decrease in its consumption. The imposition of any restriction represents an interference in the working of a free market and induces costs both to the parties regulated and to the consumers of the restricted product. Import quotas are such a restriction and result in a variety of costs.

"Import quotas" is a generic term embracing two types of instruments, mandatory and voluntary. Mandatory quotas refer to quantitative limits fixed by the importing country's government. In contrast, voluntary quotas are fixed by the exporting industry and its government, usually in agreement with the government of the importing country. The two concepts are not as different as they appear, however. Ilse Mintz states that "The term voluntary is justified only in the sense that the exporting country has the bitter choice between prohibiting some of its exports or seeing them prohibited by some protectionist measure of the importing country, such as a mandatory quota, a special duty or even an embargo."[46]

Mintz, in her study of U.S. import quotas, has identified four types of costs attributable to these instruments. The first type is the transfer cost, in other words, money transferred from consumers to producers.

The second type is referred to as import costs. These costs represent the difference between the receipts that importers and exporters collect from the amount of a given commodity admitted under the quota and the receipts that they would derive from the same amount of the commodity if imported at the lower prices which would prevail in the absence of the quota.

The third fraction of the total cost of the quotas is the production cost, that is, the cost of resources wasted in producing goods which could be produced more cheaply abroad. This type of cost pertains only to the quantity produced over and above the amount that would exist in the absence of the quota.

The fourth portion of the total cost of the quotas is the consumption cost. This represents the sacrifice made by consumers in decreasing their consumption of the restricted commodity below what it would be if there were no quota. This cost can be approximated by the price differential which would cause consumers to buy a substitute rather than the desired, restricted good.

The total cost of the import quotas is the sum of the above four costs.

TABLE 17
COSTS OF U.S. IMPORT QUOTAS, BY COMMODITY, 1973
(billions of dollars)

Restricted Commodity	*Cost*
Sugar	0.58
Textiles	2.5
Meat	0.6
Total	3.68

SOURCE: Ilse Mintz, *U.S. Import Quotas: Costs and Consequences* (Washington, D.C.: American Enterprise Institute, 1973), p. 10.

Mintz's findings of the costs that accrue to certain commodities are summarized in Table 17.

The cost of sugar quotas is approximately 32 percent of total U.S. expenditures on sugar. With regard to textiles, Mintz states that even given the conservative estimates that quotas raise price by only 5 to 10 percent, the cost is still $2.5 billion. Translating the final figure of $3.68 billion into 1976 dollars yields a figure of $4.7 billion.

Compliance cost of the federal paperwork burden. The types of forms required by the federal government are as varied as the businesses which they affect. There are federal reports on income and social security taxes withheld from employees' wages, unemployment compensation taxes, and income taxes, all of which require both quarterly and annual reporting. In addition, forms and record-keeping requirements are issued by the Equal Employment Opportunity Commission, the Department of Labor, and the Federal Trade Commission. Several firms must also file reports with the Interstate Commerce Commission and the Federal Communications Commission. Others are required to make reports on excise taxes, taxes on firearms or beverages, or the use of motor vehicles.

The Office of Management and Budget estimated that at the end of the fiscal year in 1971 the federal government had about 6,400 different kinds of forms—not counting tax and banking forms—and that completing these reports would take individuals and business firms 130 million hours of work in one year.[46] In 1974 the number of approved public-use forms, excluding all tax and banking forms, dropped to 5,146 from the 1971 figure, but to fill them out, individuals and business firms spent more than the 130 million man hours required in 1971. Several new programs, such as OSHA, environmental protection regulations, and equal opportunity compliance, were the main sources of the man-hour increase. The amount of paper flowing into federal agencies per year fills 4.5 million cubic feet of space. This amounts to ten forms for every person in the United States, or two billion pieces of federal paper annually.

The Commission on Federal Paperwork recently completed a massive

investigation of the economic impacts of governmental reporting requirements. From its estimates of the current costs of federal paperwork for each major sector of the American economy, the commission concluded that in private industry total costs range from $25 billion to $32 billion a year. Not all these costs are relevant for the purpose of this report. Some outlays for paperwork, for example, involve income tax reporting. Therefore, the $25 billion estimate, the low end of the range of the commission's figures, is used here.[48]

Notes to Text

[1]Reuben Kessel, "Economic Effects of Federal Regulation of Milk Markets," *Journal of Law and Economics* (October 1967), p. 56.

[2]Ibid., p. 60.

[3]Richard Posner, "The Social Costs of Monopoly and Regulation," *Journal of Political Economy*, vol. 83, no. 4 (1975), p. 807.

[4]Ibid., p. 818.

[5]Paul MacAvoy, *Federal Milk Marketing Orders and Price Supports* (Washington, D.C.: American Enterprise Institute, 1977).

[6]Richard Ippolito and Robert Masson, "The Social Costs of Federal Regulation of Milk" (unpublished paper, January 1976, cited in MacAvoy, *Federal Milk Marketing Orders*). Total deadweight loss includes loss from pricing mechanism of federal orders, cooperative monopolization, and prohibitions on reconstitution; total annual figure includes transfer payments from the same sources.

[7]John Kwoka, "Pricing under Federal Milk Market Regulation, Theory, Objectives, and Impact" (unpublished paper, 1975, cited in MacAvoy, *Federal Milk Marketing Orders*). Gross transfer payments are from fluid sales.

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[9]Ibid., pp. 49–67.

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[12]Ibid.

[13]Robert S. Smith, *The Occupational Safety and Health Act* (Washington, D.C.: American Enterprise Institute, 1976).

[14]*Fourth Annual McGraw-Hill Survey—Investment in Employee Safety and Health*, cited in Time Engel, *OSHA: An Overview*, American Conservative Union Issues Analysis Series (June 1977), p. 7.

[15]Carol Van Alstyne and Sharon Coldren, *The Costs of Implementing Federally Mandated Social Programs at Colleges and Universities* (Washington, D.C.: American Council on Education, June 1976).

[16]The three agencies are the Equal Employment Opportunity Commission, the Labor Department's Employment Standards Administration, and the Office of Federal Contract Compliance.

[17]Murray L. Weidenbaum, *Business, Government, and the Public* (Englewood Cliffs, N.J.: Prentice-Hall, 1977), pp. 92–93.

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[19]*Fair Employment Compliance* (December 25, 1976), p. 2.

[20]Van Alstyne and Coldren, *The Costs of Implementing Federally Mandated Social Programs at Colleges and Universities*.

[21]J. P. Gould, *Davis-Bacon Act: The Economics of Prevailing Wage Laws* (Washington, D.C.: American Enterprise Institute, 1971), pp. 3, 6.

[22]A. J. Thieblot, *The Davis-Bacon Act*, Labor Relations and Policy Series Report no. 10 (Philadelphia: University of Pennsylvania, 1975), pp. 90–97.

[23]Ibid., pp. 93–94.

[24]Gould, *Davis-Bacon Act*.

[25]Van Alstyne and Coldren, *The Costs of Implementing Federally Mandated Social Programs at Colleges and Universities*. The six institutions studied were University of Illinois at Urbana, Miami-Dade Junior College at Miami, Duke University, Georgetown University, Hampton Institute, and College of Wooster.

[26]James S. Smith, "The Equal Credit Opportunity Act of 1974: A Cost-Benefit Analysis," paper presented at the Annual Meeting of the American Finance Association (September 1976), pp. 1, 7, 8–18.

[27]Wharton Econometric Forecasting Associates, Inc., *Wharton Short-Term Econometric Model Post-Meeting Forecast Review* (June 1, 1977).

[28]*Transportation Act of 1972*, Statement of John R. Meyer before Senate Subcommittee on Transportation and Aeronautics, 92nd Congress, Serial no. 92-79, pt. 4, p. 1325.

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[34]Ibid.

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[36]Theodore Keeler, "Airline Regulation and Market Performance," *Bell Journal of Economics* (Autumn 1972), pp. 399–424.

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[38]George W. Douglas and James C. Miller, *Economic Regulation of Domestic Air Transport: Theory and Policy* (Washington, D.C.: Brookings Institution, 1974).

[39]*Economic Report of the President* (Washington, D.C., January 1975).

[40]Paul W. MacAvoy, "The Effectiveness of the Federal Power Commission," *Bell Journal of Economics* (Autumn 1970), p. 274.

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[43]W. Comanor and B. Mitchell, "The Costs of Planning: The FCC and Cable Television," *Journal of Law and Economics* (April 1972), p. 177.

[44]Ibid., p. 198.

[45]Ibid., p. 205.

[46]Ilse Mintz, *U.S. Import Quotas: Costs and Consequences* (Washington, D.C.: American Enterprise Institute, 1973), p. 20.

[47]Hearings before the Senate Subcommittee on Government Regulation of the Select Committee on Small Business, 92nd Congress, 2nd Session, pt. 2, p. 619.

[48]Commission on Federal Paperwork, *Final Summary Report* (Washington, D.C.: Government Printing Office, 1977), p. 5.

Costs of Regulation and Benefits of Reform

by Murray L. Weidenbaum

Center for the
Study of
American Business
Washington University · St. Louis

Publication Number 35 November 1980

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Progress toward deregulation of the airlines and the elimination of many silly job safety regulations have created the notion that government regulation is entering a declining phase in the United States. The facts, however, support the reverse view. The pace of regulation of business is continuing on an upward trajectory. The number of agencies, regulatory programs, and authorizing statutes—and the budgets to carry them out—are all continuing to grow.

Moreover, a very substantial further expansion of regulation is in the government pipeline. Many of the laws passed in recent years are in the early growth stages of development. As the U.S. Council on Environmental Quality pointed out in its recent annual report (1978), current estimates of the burden of regulation "do not yet include many costs associated with the hazardous waste section of the Resource Conservation and Recovery Act of 1976, the Toxic Substances Control Act of 1976, and 1977 Amendments to the Federal Water Pollution Control Act, and the 1977 Amendments to the Clear Air Act." For most of this legislation, the Council pointed out that the Environmental Protection Agency (EPA) is still in the process of developing its final regulations, the effects of which will not be felt until business and government begin to implement them.[1]

Similar patterns prevail in other areas. The Occupational Safety and Health Administration (OSHA) has recently promulgated a generic carcinogenic standard which, when implemented, is likely to generate compliance costs greater than the total existing array of OSHA standards.[2] The National Highway Traffic Safety

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Administration is pursuing mileage goals at a pace which will test the outer limits of the survival capacity of the relatively few American companies that still produce motor vehicles.[3] In light of these expansions of regulatory activity, surely some perspective is useful.

THE NEW WAVE OF GOVERNMENT REGULATION

It is hard to overestimate the current rapid expansion of government involvement in business in the United States. Certainly the majority of public policy changes affecting business-government relations in recent years has been in the direction of greater governmental intervention—environmental controls, job safety inspections, equal employment opportunity enforcement, consumer product safety regulations, energy restrictions, and so forth. Indeed, when we attempt to look at the emerging business-government relationship from the business executive's viewpoint, we see a very considerable public presence in what historically have been private affairs.

No one who operates a business today, neither the head of a large company nor the corner grocer, can do so without considering a multitude of government restrictions and regulations. His or her costs and profits can be affected as much by a bill passed in Washington as by an executive action in the front office or a customer's decision at the checkout counter. Management decisions fundamental to the business enterprise are increasingly subject to governmental influence, review or control.

In fact, the term "regulated industry" has become archaic. *Every* industry in the United States is feeling the rising power of government regulation in each major aspect of its day-to-day operations. If we could accurately measure the pervasiveness of government intervention, we would not find the economists' favorites—electric utilities and railroads—at the top of the list. More likely, we would encounter such giants of the manufacturing sector as automobile, aerospace, and chemical companies, with the oil industry and health services not too far behind.

Because of the rapid proliferation of government regulatory activity in recent years, it should be useful to attempt to measure this

phenomenon. Let us try to do so by focusing on the resources that are required to carry out these efforts. That measurement should provide an upper limit to the amount of savings that could result from regulatory reform.

THE COSTS OF GOVERNMENT REGULATION

The costs that result from government regulation of business can be analyzed by grouping them into three categories:

1. The cost of administering the regulatory agencies: This is the smallest portion and the easiest to measure. The data are also useful indicators of changing trends and relationships in the entire regulatory network.

2. The indirect cost of compliance by the private sector: This element is much larger and more difficult to measure. However, as we will see, there is a substantial literature on individual programs which can be drawn upon to develop useful aggregate estimates.

3. The induced effects of regulation: This is the most diffuse and elusive aspect of measuring the impacts of regulation. Yet there are important indicators which show that regulation has extremely substantial, long-term effects on innovation, capital formation, and the structure of industry.

The Direct Costs of Regulation

The expansion of regulation in the United States can be seen most readily in the steady increase in the number of major regulatory agencies established by the Congress—from fourteen prior to 1930, to a little over two dozen in 1950, to a present total of 57. As shown in Figure 1, the most rapid expansion occurred not in the New Deal period of the 1930s, but rather during the 1970s.[4]

The initial and direct effects of government regulation can be measured by the budgets of the regulatory agencies themselves, which are presented in Table 1. The figure includes such government administrative costs as salaries of inspectors, office supplies, and the government's own paperwork flow. These are the expenses of writing, managing, publishing, and policing regulations.[5] The great

TABLE 1

Expenditures on Federal Regulatory Activities

(Fiscal Years, Millions of Dollars)

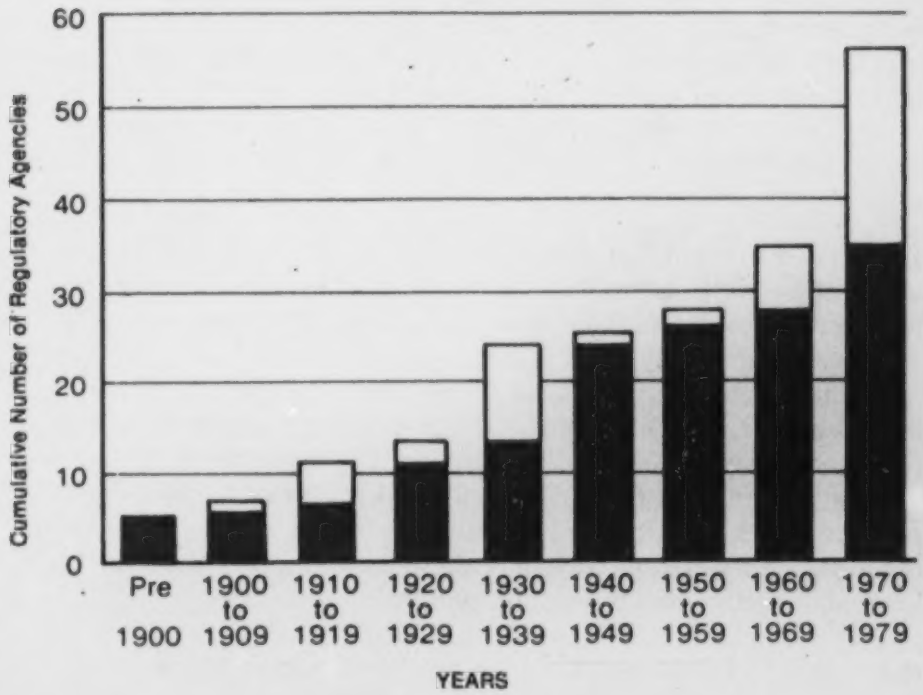
Area of Regulation	*1970*	*1971*	*1972*	*1973*	*1974*	*1975*	*1976*	*1977*	*1978*	*1979*	*(Estimated) 1980*	*1981*	*% Change 1970 to 1979*	*% of 1981 Budget*
Social Regulation														
Consumer Safety and Health	$ 392	$ 593	$ 948	$1059	$1251	$1347	$1464	$1772	$2261	$2474	$2606	$2857	+ 531%	41%
Job Safety and Other Working Conditions	62	104	124	227	310	379	447	492	544	642	742	800	+ 935%	12%
Environment and Energy	85	146	493	585	759	967	1026	1047	1296	1517	1688	2217	+ 1685%	32%
Total Social Regulation	539	843	1565	1871	2320	2693	2937	3311	4101	4633	5036	5874	+ 760%	85%
Economic Regulation														
Finance and Banking	106	123	134	142	158	186	211	240	273	296	294	352	+ 179%	5%
Industry-Specific Regulation	125	151	166	140	203	220	251	286	297	318	377	384	+ 154%	5%
General Business	96	105	120	133	153	169	199	225	245	271	316	327	+ 182%	5%
Total Economic Regulation	327	379	420	415	514	575	661	751	815	885	987	1063	+ 171%	15%
Grand Total	$ 866	$1222	$1985	$2286	$2834	$3268	$3598	$4062	$4916	$5518	$6023	$6937	+ 537%	100%
Annual Nominal Increase		41%	62%	15%	24%	15%	10%	13%	21%	12%	9%	15%		
Annual GNP Deflator		5.1%	4.1%	5.8%	9.7%	9.6%	5.3%	5.5%	7.3%	8.9%	8.9%	8.8%		
GNP Deflator Index[1]	100	105.1	109.4	115.7	127.0	139.2	146.5	154.6	165.9	180.7	196.7	214.0		
Total in 1970 $	$ 866	$1163	$1814	$1976	$2231	$2348	$2456	$2627	$2963	$3054	$3062	$3242		
Annual Real % Increase		34%	56%	9%	13%	5%	5%	7%	13%	3%	0%	6%		

NOTE: [1]GNP Deflator figures for years 1971-1977 are taken from *Statistical Abstract of the United States, 1978.* Figures for 1978-1981 are taken from the *Budget of the United States Government, Fiscal Year 1981.*

Source: Center for the Study of American Business

bulk of the regulatory budgets (approximately eighty-five percent) is devoted to the newer areas of social regulation, such as job safety, energy and the environment, and consumer safety and health. Note that the traditional regulating commissions may still dominate the professional literature, but they cast a much smaller shadow on the federal budget.

FIGURE 1
Historical Perspective of Federal Agency Growth



Source: Center for the Study of American Business

Note: Agencies do not total 57 since some agencies have split regulatory functions between two or more spin-off agencies. The date that the parent organization was established was used to create the chart.

These governmental outlays indicate the costs of regulation which are borne by the taxpayer. Estimates for the fiscal year 1980 show a total of $6.0 billion in federal expenditures to operate the 57 agencies which regulate business. That dollar figure represents nearly a six-fold increase from the 1970 level of $866 million. There has been, and continues to be, a steady growth in the pace of regulatory activities. In fact, budget estimates for the regulatory agencies for fiscal 1981 show an increase of nearly $1 billion, to a total of $6.9 billion in administrative costs—a 15 percent increase over 1980 figures.

In short, the cost of operating federal regulatory agencies is rising more rapidly than the federal budget as a whole, the population of the country, or the gross national product. The costs to the taxpayer are obviously not trivial, but the key effects of government regulation must be seen in terms of the compliance by the private sector.

The Indirect Cost of Regulation

At first blush, government imposition of socially desirable requirements on business through the regulatory process appears to be an inexpensive way of achieving national objectives. This practice apparently costs the government little—about one percent of the federal budget. But the public does not escape paying the cost. Every time, for example, that the EPA imposes a more costly (albeit less polluting) method of production on any firm, the cost of the firm's product to the consumer will tend to rise. Similar effects flow from other regulatory efforts, including those involving product safety, job health, and hiring and promotion policies.

These higher prices represent the "hidden tax" of regulation that is shifted from the government to the consumer. Moreover, to the extent that government-mandated requirements impose similar costs on all price categories of a given product (such as passenger automobiles), this hidden tax tends to be more regressive than the income tax or sales taxes. Of course, it is not inevitable that every regulatory activity will increase inflationary pressures. Where

regulation generates social benefits (such as a healthier and thus more productive work force) in excess of the social costs it imposes, inflationary pressures should be reduced.

At times the impact of regulation on the prices that consumers pay is direct and visible. The federal government has required the producers of automobiles to incorporate in their product a wide array of specified safety and environmental features. The Bureau of Labor Statistics each year estimates the added price of the typical passenger automobile resulting from the safety and ecological features which were incorporated that year in response to federal requirements. In Table 2, these items are summed and put on a consistent price basis. Through 1978, the cumulative cost increase per vehicle of these mandated features came to $666, or $7 billion for the vehicles sold that year.

Numerous other costs in the private sector result from the activities of regulatory agencies. In a few cases—notably EPA and OSHA—comprehensive annual surveys of the cost of compliance are available. An annual survey by the McGraw-Hill Department of Economics reports the capital outlays that are made to meet OSHA standards; its current estimates are in the neighborhood of $3.5 billion a year.

The U.S. Council on Environmental Quality (CEQ) projects each year the incremental capital and operating costs that arise from environmental regulation. As can be seen in Table 3, the annual cost of incremental pollution abatement expenditures was $26.9 billion in 1978, consisting of $14.0 billion of current costs and $12.9 billion for amortization of capital costs. CEQ estimates that these costs will rise to $64.0 billion in 1987 (measured in constant 1978 dollars) and that, over the decade, approximately $478 billion will be spent to comply with federal environmental legislation, above and beyond those substantial outlays that would have been made in the absence of such legislation.

Another very substantial direct cost is borne by business firms that must fill out the never-ending flow of questionnaires and other forms issued by the regulatory agencies. The Federal Paperwork

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TABLE 2

Increase in Retail Price of Automobiles Due to Federal Requirements

Year of Regulation	Government Mandated Equipment	Estimated Current Cost
1968	Seat and shoulder belts, standards for exhaust emissions	$ 47.84
1968-69	Windshield defrosting systems, door latches, etc.	14.53
1969	Head restraints	27.48
1970	Reflective devices and further emission standards	14.77
1968-70	Ignition locking and buzzing systems, etc.	12.75
1971	Fuel evaporative systems	28.33
1972	Improved exhaust emissions and warranty changes; seat belt warning system	42.37
1972-73	Exterior protection	95.29
1973	Reduced flammability materials, etc.	8.72
1969-73	Improved side door strength	20.85
1974	Interlock system and improved exhaust emissions	133.50
1975	Additional safety features and catalytic converter	146.66
1976	Hydraulic brakes, improved bumpers, etc., (less savings from removal of interlock system)	41.54
1977	Leak resistant fuel system, etc.	21.25
1978	Redesign of emissions controls	9.99
	TOTAL	$665.87

Source: Center for the Study of American Business

TABLE 3
Estimated Incremental Pollution Abatement and Environmental Quality Expenditures, 1978-87
(billions of 1978 dollars)

	1978			1987			Cumulative (1978-87)			
	Operation and Maintenance	Annual Capital Costs	Total Annual Costs	Operation and Maintenance	Annual Capital Costs	Total Annual Costs	Capital Investment	Operation and Maintenance	Capital Costs	Total Costs
Air Pollution										
Public	0.9	0.3	1.2	2.0	0.8	2.8	4.6	13.7	5.5	19.2
Private										
Mobile	4.3	3.3	7.6	5.1	9.3	14.4	59.6	45.0	66.4	111.4
Industrial	2.3	2.7	5.0	3.7	5.2	8.9	28.6	44.1	38.6	82.7
Utilities	1.6	1.2	2.8	6.5	4.8	11.3	26.4	37.5	28.1	65.6
Subtotal	9.1	7.5	16.6	17.3	20.1	37.4	119.2	140.3	138.6	278.9
Water Pollution										
Public	1.5	3.0	4.5	2.1	5.0	7.1	17.2	16.6	46.7	63.3
Private										
Industrial	2.1	1.6	3.7	5.7	4.6	10.3	28.0	38.9	30.4	69.3
Utilities	1.2	0.8	2.0	1.8	1.2	3.0	3.9	16.0	10.1	26.1
Subtotal	4.8	5.4	10.2	9.6	10.8	20.4	68.5	71.5	87.2	158.7
Solid Waste										
Public	NA	NA	NA	0.5	0.3	0.8	NA	3.5	2.2	5.7
Private	NA	NA	NA	1.2	0.6	1.8	NA	8.8	4.7	13.5
Subtotal	NA	NA	NA	1.7	0.9	2.6	NA	12.3	6.9	19.2
Toxic Substances	0.1	NA	0.1	0.3	NA	0.3	NA	2.2	NA	2.2
Drinking Water	<.05	<.05	<.05	0.4	0.4	0.8	NA	2.9	2.7	5.6
Noise	<.05	<.05	<.05	0.6	1.0	1.6	4.8	2.5	4.1	6.6
Pesticides	<.05	<.05	<.05	0.1	<.05	0.1	NA	0.4	<.05	0.4
Land Reclamation	NA	NA	NA	0.8	NA	0.8	NA	6.0	NA	6.0
Total	14.0	12.9	26.9	30.8	33.2	64.0	192.5	238.1	239.5	477.6

NA = Not Available

Source: U.S. Council on Environmental Quality

Commission estimated that this paperwork burden costs businesses from $25 to $32 billion each year.[6]

For many of the older regulatory agencies—such as the Interstate Commerce Commission (ICC) and the Civil Aeronautics Board (CAB)—independent scholars have estimated the costs for all or a portion of the regulations. Usually, each estimate has covered a different time period. The Center for the Study of American Business at Washington University culled from the literature what were considered to be the best estimates, usually taking the lower end if a range was offered, and put the results on a consistent price basis. Industry-specific regulations (such as those of the ICC, CAB, etc.) figure prominently, in part because of the wealth of data available on them. For many of the newer regulatory agencies, however, such as the Consumer Product Safety Commission and the Department of Energy, reasonable compliance costs have not been developed, and thus implicitly they were carried at zero, except for the paperwork burden. This procedure yields both a major underestimate and a clear opportunity for further research. The resulting estimate of the compliance costs came to $63 billion in 1976 (see Table 4).

TABLE 4

Annual Cost of Federal Regulation
By Area, Calendar 1976
(millions of dollars)

Area	Administrative Cost	Compliance Cost	Total
Consumer Safety and Health	$1,516	$ 5,094	$ 6,610
Job Safety and Working Conditions	483	4,015	4,498
Energy and the Environment	612	7,760	8,372
Financial Regulation	104	1,118	1,222
Industry Specific	484	19,919	20,403
Paperwork	(a)	25,000	25,000
TOTAL	$3,199	$62,906	$66,105

(a) Included in other categories

Source: Center for the Study of American Business

These estimated compliance costs were approximately twenty times larger than the budgets of the agencies issuing the regulations.[7]

Thus, on the average, each dollar that Congress appropriates for regulation results in an additional $20 of costs imposed on the private sector of the economy. In a more recent report prepared for the Joint Economic Committee of the U.S. Congress, I attempted to prepare a rough update of these figures by using the multiplier of 20 to 1 that was obtained in the base period and applying it to the budget data for more recent years. The results showed the continued upward movement in the costs resulting from federal regulation of business.[8] Using that approach, the estimated aggregate cost of issuing and complying with federal regulations comes to about $126 billion in the fiscal year 1980, or over $500 for each man, woman, and child in the United States (see Table 5).

TABLE 5

Estimated Cost of Federal Regulation of Business
(Fiscal years, in billions of dollars)

	1977	1978	1979	(estimated) 1980
Administrative Costs	$ 4.1	$ 4.9	$ 5.5	$ 6.0
Compliance Costs	$82.0	$ 98.0	110.0	120.0
TOTAL	$86.1	$102.9	$115.5	$126.0

Source: Center for the Study of American Business

The Induced Effects of Regulation

Some of the most powerful effects that flow from the exercise of the government's rule-making power are even more difficult to quantify. Those induced impacts of regulation include the following:

The innovative product research and development that is not performed because corporate research and development budgets increasingly are being devoted to what is termed "defensive research." A number of individual companies report that they devote large and growing shares of their scientific resources to meeting regulatory requirements or to avoiding violations of regulatory restrictions. For example, one hidden cost of government regulation is a reduced rate of introduction of new products. The longer it takes for a new product to be approved by a government agency—or the more costly the approval process—the less likely that the new product will be created. In any event, innovation will be delayed. The impacts are most conspicuous in the pharmaceutical area and are likewise becoming onerous in the chemical products sector, particularly as the toxic substance control regulations are promulgated.

The new investments in plant and equipment that are not made because the funds must be diverted to meeting government-mandated social requirements. The resultant loss of productivity has been measured for environmental and job safety by Edward Denison of the Department of Commerce at about one fourth of the potential average annual increase in productivity.[9]

Capital formation and productivity are also adversely affected by the uncertainty about the future of regulations governing the introduction of new processes and products. An example is furnished in the report of a task force of the U.S. Energy Resources Council which dealt with the possibility of developing a new synthetic fuel industry. In considering the National Environmental Policy Act of 1969, the task force stated that the major uncertainty was not whether a project would be allowed to proceed, but rather the length of time it would be delayed pending the issuance of an environmental impact statement that would stand up in court. In assessing the overall impact of government regulatory activity on the establishment

of a new energy industry, the task force concluded, "In summary, some of these requirements could easily hold up or permanently postpone any attempt to build and operate a synthetic fuels plant."[10] The recent cancellation of the SOHIO pipeline project (in 1979) provides evidence that the regulatory uncertainties are not limited in their adverse impacts to new (coal degasification) or even controversial (nuclear) technologies.

The workers that are not hired because federal regulations have priced them out of labor markets. One increase in the statutory minimum wage reduced teenage employment in the United States by over 200,000 below what it otherwise would have been.[11] In construction labor, where unemployment rates are substantially above the national average, government regulation also has acted to price some segments of the work force out of competitive labor markets. Under the Davis-Bacon Act, "prevailing" wages are paid on federal and federally supported construction projects. These government-mandated wage rates are often higher than those that actually prevail in the labor market where the work is done.[12]

The concentration of industry that results as smaller enterprises find that the burdens of government regulation fall on them disproportionately hard. Most of this impact is unintentional, in that the regulations typically do not distinguish among companies of different sizes. But forcing a small firm to fill out the same specialized forms—or to develop a new type of equipment—as a large company with highly-trained technical staffs places a significantly greater burden on that smaller enterprise. This general point is supported by data and examples for such different governmental regulatory activities as the Environmental Protection Agency, the Employee Retirement Income Security Act (ERISA), the National Labor Relations Board, the Occupational Safety and Health Administration, and the Securities Exchange Commission.[13]

The immeasurable effects of government regulation on the basic entrepreneurial nature of the private enterprise system. To the extent that management's attention is diverted from traditional product development, production, and marketing concerns to meeting

governmentally imposed social requirements, a significant bureaucratization of corporate activity results.

In employee pension fund management, for example, pension regulation has shifted much of the concern of fund managers from maximizing the return on the contributions to a more cautious approach of minimizing the likelihood that the managers will be criticized for their investment decisions. It thus has become safer—although not necessarily more desirable for the employees covered—for the pension managers to keep more detailed records of their deliberations, to hire more outside experts (so that the responsibility can be diluted), and to avoid innovative investments.

In short, federal regulatory activity is resulting in a significant bureaucratization of business activity. The ultimate costs of excessive government involvement in the economy are not always visible but surely are powerful—the factories that are not built, the jobs that are not created, the goods and services that are not produced, and the incomes that are not generated. These effects have formidable impact on our standard of living and our quality of life.

THE IMPLICATIONS FOR ACADEMIC THINKING

It must be recognized that impetus for most of the expansion in government power over business is not being provided by the industries being regulated. Generally, businesses have shown a minimum of enthusiasm for EPA, OSHA, ERISA, the Equal Employment Opportunity Commission (EEOC), etc. If anything, the companies claim that the "benefits" to them of these regulations are negative. The pressures for the new style of regulation come, rather, from a variety of citizen groups concerned primarily with non-economic aspects of our national life—environmentalists, consumer groups, labor unions, and civil rights organizations. Professor Barry Weingast of Washington University has been developing a more comprehensive theory of the relationships among the regulators and the regulated, an approach that tries to take account of the changing balance among public and private interest groups.[14]

To talk or write about the regulated industry "capturing" its regulators is, to put it kindly, a rather quaint way of viewing the fundamental shift in business decision making now taking place: the shift of power from private managers to public officials. Yet, the core of the economists' version of the "capture" theory still holds—public policy tends to be dominated by the organized and compact pressure groups which attain their benefits at the expense of the more diffused and larger body of consumers.[15] But the nature of those interest groups has changed in recent years. Rather than the railroad baron (a relatively easy target for attack), the villain of the piece has become a self-styled representative of "the public interest," who has succeeded so frequently in identifying his or her personal prejudices with the national well-being. The business firm, in contrast, performing its traditional middleman function, more typically serves the unappreciated and involuntary role of proxy for the overall consumer interest.

It is not a question of begrudging a "few" more billion dollars for job safety, consumer health, etc. The truth is that the typical regulatory program is not reaching the worthy objectives it was established to attain. For instance, take the job safety program: despite the array of regulations, inspections, and proceedings—and, of course, the billions of dollars devoted each year to meeting the federal safety standards—we see no improvement in the statistics on days lost due to job health and safety hazards.

But that is no isolated example. Surely the railroad passenger—that vanishing breed of consumer—does not benefit from the mass of regulation maintained over rail companies by the Interstate Commerce Commission. Unfortunately, these are typical and not unusual cases. Virtually every study of regulatory experience—ranging from trucking to pharmaceuticals to pensions—indicates both needless expense and ineffective operations or, worse yet, counterproductive results.

APPROACHES TO REGULATORY REFORM

Economists are prone to take measurements of economic phenomena. The numbers, of course, are not an end in themselves, but an input to decision makers. The measurement of the costs and related impacts that flow from government regulation is no esoteric matter. This information can be used in many ways. First of all, the cost data show the public and the government the economic importance that regulation has assumed, especially as measured by the large dollar amounts of resources that are required in order to meet federal mandates.

Second, this information helps to shift the public dialogue onto new and higher ground. The pertinent policy questions are no longer, "Are you for or against clean air or safe products?" or other such absolutes. Increasingly, the public discussions are formed in terms of less emotional and long-neglected questions such as, "How well is the regulatory process working?" and, "Are there better ways of achieving the public's desires?"

Finally, the availability of information on the costs of regulation is an important step in reforming the regulatory process. The pressure of the cost data inevitably leads to proposals for benefit/cost analyses, cost-effectiveness studies, risk-benefit evaluations, and similar analytical approaches to what in the past had been viewed too often as emotional issues. Hopefully, legislation reforming regulatory practices will mandate such analytical techniques and thus improve the cost—and benefit—data that are used in the regulatory process.

A new way of looking at the microeconomic effects of regulatory programs is needed. A parallel can be drawn to macroeconomic matters, where important and conflicting objectives are recognized and attempts at trade-offs are made (for example, as between economic growth and price stability). At the microeconomic level, it is likewise appropriate to reconcile the goals of specific government programs with national objectives. Environmental protection, product safety, and other regulatory efforts should be related to costs to the consumer, availability of new products, and employment. In part, this reconciliation can be made at the initial

stages of the government process, when the president proposes and the Congress enacts a new regulatory program.

Benefit-Cost Analysis

One device for broadening the horizons of government policymakers and administrators is the economic impact statement. Policymakers could be required to consider the costs (and other adverse effects) of their actions as well as the benefits. This is not a novel idea. In November 1974, then-President Gerald Ford instructed the federal agencies under his jurisdiction to examine the effects of major regulatory actions on costs, productivity, employment, and other economic factors. President Carter has continued this effort, with some modifications.

This first step is subject to several shortcomings. Many of the key regulatory agencies—ranging from the Consumer Product Safety Commission to the Federal Trade Commission—are so-called "independent agencies," which are beyond the president's jurisdiction in these matters. Even in the case of the regulatory activities that come within presidential oversight, the agencies covered by the Executive Order are required only to examine the economic aspects of their actions; the weight they give to economic factors remains at their discretion—to the extent that Congressional statutes permit them to give any consideration to economic influences at all.

A broader approach is needed, one with a strong legislative mandate. In the fashion of the environmental impact statements (but without as much of the trivia), Congress should require each regulatory agency to assess the impact of its proposed actions on the society as a whole, and particularly on the economy. Much would depend on the "teeth" put into any required economic impact statement. Merely legislating the performance of some economic analysis by an unsympathetic regulator would serve little purpose beyond delaying the regulatory process and making it more costly. But limiting government regulation to those instances where the total benefits to society exceed the costs would be a major departure from current practice.

Government regulation should be carried to the point where the incremental costs equal the incremental benefits, and no further. Indeed, this is the basic criterion that is generally used to screen government investments in physical resources. Overregulation is not an emotional term. It is the economist's shorthand for regulation for which the costs exceed the benefits.

The critics of the analytical approach to evaluate government regulation tend to forget that benefit/cost analysis is a neutral concept. It gives as much weight to a dollar of benefits as to a dollar of costs. And, in a broader sense, the estimation of benefits and costs need not be necessarily viewed in dollar terms. The costs as well as the benefits may at times properly be measured in terms of human life. For example, OSHA regulations may have a very high opportunity cost when they divert professional safety staffs of the companies from their traditional duty of training workers in safer procedures. The "benefits" of following rules printed in the *Federal Register* may be far more illusory and surely fewer.

The implementation of benefit/cost analyses needs a great deal of attention. After all, a reluctant agency can merely go through the motions of studying the effects of its actions on the economy and then proceed as it originally intended. An agency not directly involved in regulation—such as the General Accounting Office or the Office of Management and Budget—should set government-wide standards, concepts, and methods of performing economic evaluations of regulations, including the estimation of benefits and costs. The determination of the interest rates to be used in discounting future costs and benefits, for example, should not be a matter left to the judgment of the agency which is attempting to justify its own action. Where a dollar sign cannot be placed on the benefits, reliance can be placed on cost/effectiveness analysis, which is a search for least-cost solutions.

As a minimum, the Congress should endorse the kind of common sense that was embodied in a federal court decision which stopped OSHA from issuing new benzene regulations. The court's language is instructive: "Although the agency does not have to

conduct an elaborate cost/benefit analysis...it does have to determine whether the benefits expected from the standards bear a reasonable relationship to the costs imposed by the standard."[16] (When OSHA appealed that decision to the Supreme Court, its benzene standards were rejected.)

The ability of the executive branch to change the basic regulatory system is limited. Each regulation is issued in accord with a law passed by Congress. Reform measures cannot simply be "proclaimed," they must be legislated. Many of the proposals to reform government regulation involve the "sunset" mechanism—the compulsory periodic review of each major regulatory program to determine whether it is worthwhile to continue it in the light of changing circumstances. This procedure would provide Congress with a formal opportunity to revise the underlying regulatory statutes or to determine that a given regulatory program is no longer needed and that the "sun" should be allowed to "set" on it. A benefit/cost analysis would provide a quantitative mechanism that would help in making those value judgments.

Budgeting as a Management Tool

Greater attention should be given to the role of the Congressional budget process in managing regulation. In those cases where an agency's regulations generate more costs than benefits, the agency's budget for the coming year should be reduced, and perhaps vice versa. Because the appropriations for the regulatory agencies are small portions of the government's total budget, limited attention has been given to them in the budget process. In view of the large costs that they often impose on the society as a whole, greater attention is warranted in reviewing their appropriation requests via a regulatory budget.

Changing Attitudes Toward Regulation

Fundamentally, regulatory reform is not a concern with technical measurements or administrative procedures. Rather, government decision makers need to take a very different view of the regulatory mechanism than they do now. Rather than relying on regulation to

control in detail every facet of private behavior, the regulatory device needs to be seen as a powerful tool to be used reluctantly and with great care and discretion. Consequently, it is attitudes that need to be changed. Experience with the job safety program provides a cogent example. Although the government's safety rules have resulted in billions of dollars in public and private outlays, the goal of a safer work environment has not been achieved.

A more satisfying answer to improving the effectiveness of government regulation of private activities requires a major change in the approach taken to regulation, and one not limited to the job safety program. Indeed, that program is used here merely as an illustration. If the objective of public policy is to reduce accidents, then public policy should focus directly on the reduction of accidents. Excessively detailed regulations are often merely a substitute—the normal bureaucratic substitute—for hard policy decisions.

Rather than placing emphasis on issuing citations to employers who fail to fill forms out correctly or who do not post the required notices, stress should be placed on the regulation of those employers with high and rising accident rates. Perhaps fines should be levied on those establishments with the worst safety records. As the accident rates decline toward some sensible standard, the fines could be reduced or eliminated. But the government should not be much concerned with the way a specific organization achieves a safer working environment. Some companies may find it more efficient to change work rules, others to buy new equipment, and still others to retrain workers. The making of this choice is precisely the kind of operational business decision making that government should avoid, but that now dominates many regulatory programs.

Alternatives to Regulation

The promulgation by government of rules and regulations restricting or prescribing private activity is not, of course, the only means of accomplishing public objectives. Codes of behavior adhered to on a voluntary basis can be effective. Government itself has available to it various powers other than the regulatory mechanism.

Through its taxing authority, the government can provide strong signals to the market. Rather than promulgating detailed regulations governing allowable discharges into the nation's waterways, the government could levy substantial taxes on those discharges.

The use of taxation would be meant neither to punish polluters nor to give them a "license" to pollute. Rather, it would work through the price system to encourage producers and consumers to shift to less polluting ways of producing and consuming goods and services. Price incentives tend to force the environmental agencies to consider explicitly the cost of cleaning up pollution, while direct controls make it very easy to adopt extremely expensive if not unrealistic goals, such as zero discharge.

In the case of the traditional, one-industry type of government regulation (as of airlines, trucking, and railroads), a greater role should be given to the competitive process and to market forces. Unlike the newer forms of regulation, the older forms of regulation are often mainly barriers to entry into a given industry, protecting existing firms from competition by potential new entrants. To date, none of the procedural reforms previously described has been enacted by the Congress. Perhaps the most significant single legislative action in the regulatory reform area in recent years was the law phasing out the Civil Aeronautics Board over a seven year period.

With reference to consumer protection, an information strategy can provide a sensible alternative to compulsory product standards. For the many visible hazards that consumers voluntarily subject themselves to, the most important consideration in public policy is to improve the individual's knowledge of the risks involved rather than limit personal discretion. In their daily lives, citizens rarely opt for zero-risk alternatives and more often trade off between speed and safety, for example.

The more widespread provision of information to consumers on potential hazards in various products may, in many circumstances, be far more effective than banning specific products or setting standards requiring expensive alterations in existing products. The information approach takes account of the great variety of consumer desires and capabilities. Interestingly enough, this approach often is favored in

consumer surveys, although *not* by some of the most vehement representatives of the so-called public interest groups.

Any realistic appraisal of government regulation must acknowledge that important and positive benefits have resulted from many of the regulatory activities—less pollution, fewer product hazards, reducing job discrimination, and other socially desirable goals of our society. But the "externalities" generated by federal regulation do not justify government attempting to regulate every facet of private behavior. A reasonable approach to this problem requires great discrimination in sorting out the hazards that are important to regulate from the kinds of lesser hazards that can best be dealt with through the normal prudence of consumers, workers, and business firms."

THE SAVINGS FROM REGULATORY REFORM

It is difficult to estimate the specific savings that would occur from the adoption of any of the approaches to regulatory reform suggested here. What is clear, however, is that each of these changes could reduce the economic burden of government rule-making while often increasing the likelihood of reaching the nation's basic goals and objectives. This is most apparent in the case of economic regulation, where the reliance on competition would be a far less costly way of meeting the public's transportation demands than the status quo of detailed regulation.

On the basis of the data in Table 4, savings in the area of economic regulation—by deregulating the airline, railroad, trucking, radio and television industries—could well reach $20 billion a year. In the field of social regulation, a reasonable initial objective would be to slow down, if not halt, the now rapid rise in the issuance—and thus the cost of complying with—new rules and directives. As pointed out earlier, one major new OSHA standard alone may likely generate a larger economic burden of compliance than the entire array of existing rules issued by that agency, which imposes costs of over $3 billion a year at present. Moreover, the potential cost of new environmental regulations already in the "pipeline" is far greater.

Thus, the measurable dollar savings from regulatory reform surely could be substantial. But, in the long run, the most important benefits from changing the status quo would be the improved productivity, the higher rates of capital formation and innovation, and ultimately the improved living standards that would result for American consumers. That surely makes regulatory reform a worthy and high-priority undertaking.

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NOTES

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Benefit-Cost Analysis of Government Regulation

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PUBLICATION NUMBER 37 February 1981

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DISCUSSIONS OF GOVERNMENT regulation of product hazards, such as toxic substances, frequently conclude that decision makers would be aided by the results of benefit-cost studies and related economic analyses.[1] This article tries to explain the role of such quantitative analyses in the regulatory process.

The motive for incorporating benefit-cost analysis into public decision making is to lead to a more efficient allocation of government resources by subjecting the public sector to the same type of quantitative constraints as those in the private sector. In making an investment decision, for example, business executives compare the costs to be incurred with the expected revenues. If the costs exceed the revenues, the investment usually is not considered worthwhile. If revenues exceed costs, further consideration usually is given the proposal, although capital constraints require another determination of the most financially attractive investments.

The government agency decision maker, however, does not face the same type of economic constraints. If the costs and other dis-

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At the time of this printing, Dr. Weidenbaum was nominated Chairman of the U.S. Council of Economic Advisers. He was Director of the Center for the Study of American Business at Washington University in St. Louis when this article was written. Reprinted with permission from TOXIC SUBSTANCES JOURNAL, Volume 2, Number 2, Autumn 1980, pp. 91-102.

advantages to society of an agency action exceed the benefits and other advantages, that situation may not have an immediate adverse impact on the agency. However, such an action would have an immediate impact on a private business if one of its executives made an error. Such analytical information rarely exists in the public sector, so that, more often than not, the governmental decision maker is not aware that he or she is approving a regulation that is economically inefficient. The aim of requiring agencies to perform benefit-cost analysis is to make the government's decision-making process more effective, and to eliminate regulatory actions that, on balance, generate more costs than benefits. This result is not assured by benefit-cost analysis, since political and other important, but subjective, considerations may dominate. This may result in actions that are not economically efficient, but are desired on grounds of equity or income distribution. Yet benefit-cost analysis may provide valuable information for government decision makers.

The Economic Rationale

It may be useful to consider the economic rationale for making benefit-cost analyses of government actions. Economists have long been interested in identifying policies that promote economic welfare, specifically by improving the efficiency with which a society uses its resources.[2]

Benefits are measured in terms of the increased production of goods and services. Costs are computed in terms of the foregone benefits that would have been obtained by using those resources in some other activity. The underlying aim of benefit-cost analysis is to maximize the value of the social income, usually measured by the gross national product (GNP). For many years, certain federal agencies (such as the Corps of Engineers and the Bureau of Reclamation) have used benefit-cost analysis to evaluate prospective projects.

Despite important operational difficulties, including that of choosing an appropriate discount rate, which would correspond to a realistic estimate of the social cost of capital, these analyses have helped to improve the allocation of government resources. They have served as a partial screening device to eliminate uneconomical projects—those for which prospective gains are clearly less than

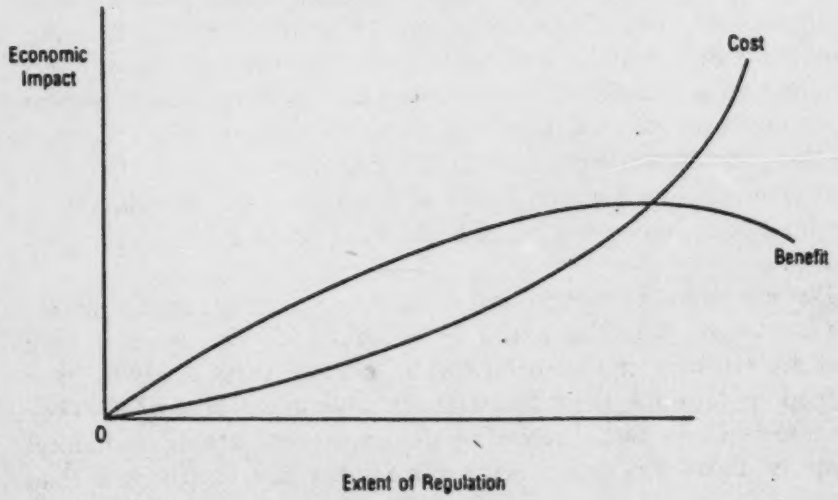
estimated costs. The analyses also have provided some basis for ranking and comparing projects and choosing among alternatives. Perhaps the overriding value of benefit-cost analysis has been to demonstrate the importance of making relatively objective economic evaluations of political actions and to narrow the area in which subjective factors dominate. Thus, if economically inefficient programs are approved, at least government decision makers know the price being paid for those actions.[3]

Applying Analysis to Regulation

Figure 1 shows the basic relationship of costs and benefits that tends to hold for most regulatory programs. Typically, the initial regulatory effort—such as cleaning up the worst effects of pollution in a river—may well generate benefits greater than costs. But the resources required to achieve additional cleanup become disproportionately high, and at some point the added benefits may be substantially less than the added costs. For example, a study of the impact of environmental controls on the fruit and vegetable processing industry revealed that it costs less to eliminate the first 85 percent of the pollution than the next 10 percent.[4] In beet sugar plants, it costs more than $1 a pound to reduce bio-

Figure 1

Benefit-Cost Analysis of Regulation



logical oxygen demand (BOD)—a measure of the oxygen required to decompose organic wastes—up to a level where 30 percent of pollution is eliminated. But it costs an additional $20 for a one-pound reduction at the 65 percent control level and an additional $60 for a one-pound reduction when over 95 percent control is achieved.[5]

Another comparison is equally telling. The pulp and paper industry spent $3 billion between 1970 and 1978 complying with federal clean-water standards, and achieved a 95 percent reduction in pollution. But to reach the new reduction goal proposed by the Environmental Protection Agency (EPA)—98 percent by 1984—would cost $4.8 billion more, a 160 percent increase in costs to achieve a 3 percent improvement in water quality. Thus, it is important to look beyond the relationship of the costs and the benefits of a proposed governmental undertaking to the additional (marginal) benefits and costs resulting from each extension of or addition to the governmental activities.

If regulatory activity goes unchecked, the result could be an excess of costs over benefits. Thus, benefit-cost analyses should be viewed as a tool for identifying the optimum amount of regulation, rather than as a means of debating the pros and cons of regulation in general. To an economist, "overregulation" is not an emotional term; it is merely shorthand for the regulatory activities in which the costs to the public are greater than the benefits.

When there is more than one alternative for attaining a regulatory goal, benefit-cost analysis can be used to compare the various methods and to help select the most attractive. Consider the following hypothetical example: Suppose a government agency wishes to control the amount of pollutants a factory is spilling into a river. Assume technology allows for two means of reducing the pollution, System A and System B, of which System B is costlier, but more effective (see Table 1).

Table 1

Applying Benefit-Cost Analysis

System	Total Annual Cost	Total Annual Benefits	Benefit-Cost Ratio
A	$14,000	$17,500	1.25
B	26,000	34,000	1.38

System B has greater benefits per dollar spent than System A (i.e., a benefit-cost ratio of 1.38 compared with 1.25). Although System B has a larger annual cost than System A, System B will yield the greater benefit to society. In the creation of government policy, however, such simple cases are rarely encountered.

If a business decision in the private sector places an external burden on its neighbors, such as pollution, the firm does not include such a cost in its accounting, since it does not bear the burden. Public sector decision makers, however, must, or at least ought to, consider all the effects of such a decision. Because their vantage point is the entire nation, government regulators—unlike their private sector counterparts—should attempt to include all costs and benefits, including those external to the government.

The agencies should do so because most regulatory actions have indirect effects on the economy. For example, requiring safety belts in automobiles has a direct impact on the cost of automobiles and on sales in the safety belt industry. It also influences the severity of auto accidents and has a ripple effect on the suppliers of the safety belt industry and their suppliers, and so on. If a regulatory decision is to be good, these indirect effects, as well as the direct impacts, must be taken into account.

Quantification

The benefits and costs attributable to regulation are measured by the difference between the benefits and costs that occur in the presence of regulation and those that would prevail in its absence. Although the idea may seem straightforward, its application can be complex. Determining what would occur in the absence of regulation—which establishes a reference point for the calculations—may involve a considerable amount of judgment.

Table 2 shows how the incremental costs (the expenses that would not have been made in the absence of regulation) were computed in one study of water pollution control. Apparently the bulk of the costs would have been undertaken voluntarily.

Sometimes the indirect effects of regulation may be as important as the direct. Consider, for example, the question of mandatory standards to ensure the production of less hazardous consumer products. From time to time, suggestions have been made to require more protection in helmets and other recreational equipment

Table 2

Calculation of Incremental Cost of Regulation

Steps	*Example*
Company identifies an action taken to comply with a specific regulation.	Installation of waste-water pretreatment system to remove 99 percent of pollutants in compliance with Title 40 of the *Code of Federal Regulations*, Chapter 1, Part 128.
Would action have been taken otherwise?	Pretreatment system without Title 40 would have been designed to remove 95 percent of pollutants.
What was the cost of the action?	$1,200,000 (from fixed-asset ledger data).
How much would the action that would have been taken in the absence of regulation have cost?	$800,000 (the cost of installing a 95 percent system).
What was the incremental cost?	$1,200,000 − $800,000 = $400,000.

Source: *Regulation*, July/August, 1979, p. 21.

used in playing football. Those using the safer helmets would be expected to receive the benefit of fewer or less severe injuries. However, such a safety standard could impose substantial costs on lower-income youngsters. Perhaps of greater concern, the standards might even contribute to more injuries since the price increases might result in more people playing football without any protective equipment at all. That example illustrates another basic thrust of benefit-cost analysis—to examine the proposed government action not only from the viewpoint of the impact on the business firm but also from the vantage point of the effects on the consumer.

A large, but difficult to measure, type of regulatory cost is a grouping that economists refer to as dead-weight losses. Regulation often limits the range of permissible prices, practices, or processes. Those legal restrictions may inhibit the most productive use of resources. The loss of the higher output that would result in the absence of the regulatory activity—those dead-weight losses—arises from an inefficient combination of factors. For example, the total efficiency of the economy is reduced when regulated surface transportation rates make it necessary for freight to be moved by rail rather than hauled at a lower cost by truck.[6] That is so because

more resources are being used to achieve the same objective.

When political judgment suggests that it is not feasible to put a dollar sign on the benefits, a benefit-cost analysis still can be helpful by ranking the cost-effectiveness of alternatives. By using this method, which was originally developed for military programs, estimates are made of the costs of different ways to accomplish an objective. Cost-effectiveness analyses permit policymakers to identify least-cost solutions. In this more limited approach, the analyst assumes that the objective is worth accomplishing. In the regulatory field, this approach may be particularly useful in dealing with programs to reduce personal hazards. Instead of dealing with such an imponderable question as the cost of a human life, the emphasis shifts to identifying regulatory approaches that would maximize the number of lives saved after use of certain resources (such as people or capital), or minimize pain. Rather than a cold systems approach, such attempts at objective analysis show true compassion for our fellow human beings by making the most effective use of the limited resources available to society.[7]

Discounting

A regulatory action has an impact not only in the present but also in the future. It is necessary, therefore, to place a lower value on future costs and benefits than on present costs and benefits. The basic notion here is that a given benefit is worth more today than tomorrow, and a given cost is less burdensome if borne tomorrow than today. (This is a restatement of the economic principle that a dollar received today is worth more than a dollar received tomorrow, because today's dollar could be invested and earn a return.) For this reason, future benefits and costs have less weight than today's benefits and costs.

This practice is important in evaluating regulatory actions. If the costs and benefits of two actions appear equal, and most of the benefits of one action occur after five years, while the benefits of the other action occur immediately, then the latter is the preferred alternative. Discounting of the future thus implies that the timing of any proposed action's costs and benefits is an important consideration in its evaluation.

Assuming we are able to quantify the costs and benefits in a given program, it is then necessary to discount correctly the ben-

efits and costs expected in the future. The discount rate (r) can be crucial, as is seen in the highly simplified, two-period example shown in Table 3.

Table 3

The Role of Interest Rates

Plan	Benefit Period 1	Benefit Period 2	Cost Period 1	Discounted Benefit in Period 1	
				$r = 10\%$	$r = 5\%$
A	$200	0	$100	$200	$200
B	0	$215	$100	$195	$205

If all costs accrue in period 1 and the discount rate is 10 percent, then plan A is superior to plan B. However, if the correct discount rate is 5 percent, not 10 percent, then plan B is preferable. The appropriate discount rate is obviously very important in benefit-cost analysis. Such decisions can be biased, however, if Congress or a government agency designates an unrealistically low interest rate, which frequently has been the case in federal expenditure programs. Such an action tends to underestimate the costs of initial capital outlays and overestimate the extent of future benefits.

Uses and Limitations of Benefit-Cost Analysis

Reliable measures of costs and benefits are not easily achieved or always possible. Should the loss of a forest be measured by the value of the timber eliminated? What of the beauty destroyed? What of the area's value as a wildlife habitat? In view of such questions, it is unlikely that agency decision makers will be faced with simple choices.

However, the difficulties involved in estimating the benefits or costs of regulatory actions need not serve as a deterrent to pursuing the analysis. Merely identifying some of the important and often overlooked impacts may be useful in the decision-making process. Examples on the cost side include the beneficial drugs that are not available because of regulatory obstacles, the freight not carried because empty trucks are not permitted to carry backhauls, and the television stations that are not broadcasting because they were not licensed. On the benefit side, examples include a

more productive work force that results from a lower rate of accidents on the job, savings in medical care because of safer products, and a healthier environment that results from compliance with governmental regulations.

At times the imperfections of benefit-cost analysis may seem substantial. Nevertheless, this analysis can add some objectivity to the government's decision-making process. While benefit-cost analysis is capable only of showing the effectiveness of an action, the subsequent decisions of elected officials and their appointees might be envisioned as representing society's evaluations of the equity effects of that action. Economists can provide benefit-cost analyses and studies of the distribution of those benefits and costs, leaving the final decision to society's representatives. Presumably, those individuals are better able to make political decisions on the impacts of the actions they contemplate. Despite its shortcomings, benefit-cost analysis is a neutral concept, giving equal weight to a dollar of benefits and to a dollar of costs.

Not all the criticism of benefit-cost analysis may be valid. The idea of attempting to quantify the effects of regulation outrages some persons. They forget the objectives that economists have in developing such measurements. The goal is not to eliminate all regulation. As economists of all political persuasions have testified before a variety of congressional committees, it is not a question of being for or against government regulation of business. A substantial degree of intervention in private activities is to be expected in a complex, modern society.

Critics who are offended by the notion of subjecting regulation to a benefit-cost test may unwittingly be exposing the weakness of their position: they must be convinced that some of their pet rules would flunk the test. After all, showing that a regulatory activity generates an excess of benefits is a strong justification for continuing it.

Despite talk of cold systems approaches, economists are deeply concerned about people as well as dollar signs. The painful knowledge that resources available to safeguard human lives are limited causes economists to become concerned when they see wasteful use of those resources because of regulation.

General Motors, for example, calculates that society spends $700 million a year to reduce carbon monoxide auto emissions to 15 grams per mile, thus prolonging 30,000 lives an average of one

year, at a cost of $23,000 for each life. To meet the 1981 standard of 3.4 grams per mile, the company estimates that it will cost $100 million in addition, and prolong 20 lives by one year at an estimated cost of $25 million for each life. Human lives are precious, which is why it is so sad to note another use of that money. It has been estimated that the installation of special cardiac-care units in ambulances could prevent 24,000 premature deaths each year, at an average cost of approximately $200 for each year of life.* Thus spending the $100 million for the special ambulances conceivably could save 500,000 lives a year.

Part of the problem in setting regulatory policy is that at times the benefits are more visible than the costs—not necessarily greater, but more evident. If the required scrubber for electric utilities results in cleaner air, we see the benefits. The costs are merely part of the higher electric bill we pay. Thus, the cost of regulation takes on the characteristics of a hidden sales tax that is paid by the consumer.

A by-product of benefit-cost analyses is the identification of less costly ways to achieve society's regulatory objectives. For example, detailed estimates of industrial compliance with federal regulations, produced by Arthur Andersen & Company for the Business Roundtable, revealed the types of regulations that tend to generate especially high costs.[9] Such information may help government policymakers select less costly approaches. (See Table 4.)

In the final analysis, however, the political factors in regulatory decision making cannot be ignored. Many social regulations involve a transfer of economic resources from a large number of people to a small group of beneficiaries. The Occupational Safety and Health Act's (OSHA) coke-oven standard, for example, protects fewer than 30,000 workers, but is paid for by everyone who buys a product containing steel. So long as regulators avoid concentrating the costs on a small group that could organize political counterpressures, costly regulations can be promulgated easily.[10]

Despite the limitations, there is a useful role for formal economic analyses of regulatory impacts in providing, at least, an ancillary guide to policymakers. As a federal court stated in striking down OSHA's proposed benzene regulation: "Although the agency does not have to conduct an elaborate cost-benefit analysis, . . . it does have to determine whether the benefits expected from the standards bear a reasonable relationship to the costs imposed by the

Table 4

Attributes of Regulations with High Incremental Cost

Type of Regulation	*Characteristics*
Continuous Monitoring	Requires evidence of compliance by means of round-the-clock monitoring devices or continuous maintenance of comprehensive records of actions taken and results achieved.
Forcing New Technology	Requirement to meet a level of compliance not achievable with available technology, often effected through legislation specifying a stringent deadline.
Capital Intensity	Requires the purchase of new equipment or modification of existing equipment.
Recurring Costs	Requires actions that lead to continuing costs of operation or maintenance.
Retrofitting	Requires modification of existing facilities, not just application to new facilities.
Specified Compliance Action	Requires a specified method of compliance without flexibility to recognize differing circumstances for application of alternative techniques to achieve the desired objective.
Inadequate Risk Assessment	Requires compliance with a stringent standard even though the risks have not been adequately assessed.
Changing Requirements	Requires adaptation to rules that are frequently changed or are subject to delay in being defined; capital-spending plans are made without knowledge of requirements to be met.

Source: Arthur Andersen & Company.

standard."[11] That court's common-sense approach might be the direction to which the public policy debates on regulation could profitably shift.

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Senator LAXALT. Dr. Miller?

STATEMENT OF JAMES C. MILLER III, ADMINISTRATOR FOR INFORMATION AND REGULATORY AFFAIRS, OFFICE OF MANAGEMENT AND BUDGET, AND EXECUTIVE DIRECTOR, PRESIDENTIAL TASK FORCE ON REGULATORY RELIEF, ACCOMPANIED BY C. BOYDEN GRAY, COUNSEL, PRESIDENTIAL TASK FORCE ON REGULATORY RELIEF

Mr. MILLER. Thank you, Mr. Chairman.

I would like to preface my remarks by saying what a pleasure it has been to have had dealings with you, sir, and with your staff on this matter—Mr. Nash, Mr. Cynkar, and Ms. Heck—and with Senator Leahy, and especially Mr. Podesta and his associates.

It has been a rewarding experience. We have searched for the truth, and I hope that we are close to finding it.

Mr. Chairman and members of the subcommittee, I am pleased to be here this morning, along with Chairman Weidenbaum, to discuss our mutual efforts to improve the regulatory process. With us today is C. Boyden Gray, counsel to the Presidential Task Force on Regulatory Relief.

As you know, many efforts have been mounted over the past several years to improve the performance of the regulatory agencies, and this subcommittee has performed a Herculean task in identifying problems of regulatory procedure and finding solutions.

The bill before you, I know, is the product of extensive discussions involving members of this subcommittee, leaders from the private sector, and key officials in the administration, including the chairman of President Reagan's Task Force on Regulatory Relief, Vice President George Bush.

Moreover, we have had a close, cordial, and productive working relationship with you and your staff and look forward to its continuation in the future.

THE PRESIDENT'S PROGRAM OF REGULATORY RELIEF

Before I discuss the details of S. 1080, the proposed Regulatory Reform Act, I would like to review briefly the President's program of regulatory relief and discuss our early experience under Executive Order 12291, "Federal Regulation."

As one of the four cornerstones of President Reagan's economic recovery program, regulatory relief is clearly one of the top priorities of this administration.

The four cornerstones are a stringent budgetary policy to restrain Federal spending and put more resources in the private sector where they are more productive;

A tax reduction program to encourage saving and investment;

A program of regulatory relief to achieve regulatory goals that lower costs in order to increase the supply of goods and services available for other pressing needs; and

A stable monetary policy to reduce uncertainty and encourage greater investment by businesses and more rational expenditures on the part of consumers.

The four components are complementary. They share the basic philosophy of increasing overall economic activity in order to increase productivity, reduce inflation and unemployment, and raise the real incomes of all Americans.

During his first months in office, the President took swift and positive action to eliminate excessive and inefficient regulations. Let me take just a minute to outline some of these actions for you.

On the day after his inauguration, President Reagan asked the Vice President to chair a Cabinet-level task force on regulatory relief. The task force is responsible for reviewing new regulations, assessing existing regulations, and coordinating legislative policies in the regulatory area.

As I mentioned, the task force is chaired by Vice President Bush, but it also includes as members Treasury Secretary Regan, Attorney General Smith, Commerce Secretary Baldrige, Labor Secretary Donovan, Office of Management and Budget Director Stockman, Assistant to the President for Policy Development Anderson and, of course, Murray Weidenbaum, Chairman of the Council on Economic Advisors, and one of the world's authorities on regulatory matters.

As the Vice President has noted, the charge given to his Task Force is not to study regulation or deregulation but to provide regulatory relief.

Eight days later, on January 29, the President sent a memorandum to the heads of 11 cabinet departments and the Environmental Protection Agency, asking them to postpone for 60 days, or until March 30, the effective dates of all final regulations that had not yet taken effect.

He also asked that agencies not issue any additional final regulations during this period.

This action was taken to allow time for the President's appointees to familiarize themselves with the details of the so-called midnight regulations and other proposed new rules.

On February 17, President Reagan issued Executive Order 12291, Federal Regulation, designed to improve regulatory performance and provide regulatory relief.

The President's program of regulatory relief goes beyond new regulations to include existing regulations.

On March 25, building on the President's previous actions, Vice President Bush released a list of 27 existing regulatory programs which agencies had agreed to reassess.

The Task Force and the agencies will continue to review and identify additional areas where review of the existing rules and regulatory programs is necessary.

The Vice President also asked the assistance of business, labor, consumer, and other groups in identifying regulations in need of rescission or modification. We have received over 200 detailed and sophisticated submissions in response to that request.

In coordination with the responsible agencies, we intend to use these submissions to help establish the regulatory priorities of this administration.

Almost every Cabinet department and agency has taken important steps to provide regulatory relief. For example, the Department of Transportation has proposed changes in a number of regulations, especially those affecting the automobile.

The Department of Energy has targeted some 200 regulations for thorough review. The Department of Labor's own Regulatory Reform Task Force has begun a careful review of regulatory proposals and existing programs to find ways of achieving health and safety goals at lower cost.

These actions are only a first step in achieving meaningful regulatory relief. Although it is too early to have final figures, preliminary results have been gratifying.

I can assure you that the relief measures taken by the agencies amount to billions of dollars per year, and we are only beginning. Much more will be done in the coming months. Regulatory relief is essential to economic recovery.

The President himself has made it clear that he expects real regulatory relief, and we intend to carry out his mandate and that of the American people.

EXECUTIVE ORDER 12291

Now let me address our experience under Executive Order 12291. I would like to point out that the Executive order has only been in place since February 17. Our experience has understandably been too short to predict precisely what the final results will be.

However, I can say with certainty that the first 3 months have been very encouraging.

The Executive order consists of three major parts:

First, it sets out the President's regulatory principles. Under these commonsense principles, an agency is directed not to regulate unless the benefits of the rule exceed the costs. The least costly alternative is chosen, and the regulation maximizes net benefits.

Second, the Presidential Task Force on Regulatory Relief is clearly established as the primary oversight body with regard to executive branch regulatory policy.

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Third, the Executive order creates a review process directing the Office of Management and Budget, under the direction of the Presidential task force, to review proposed regulations and consult with agencies about them. It calls for OMB to identify existing regulations which agencies should review and for OMB and the Task Force jointly to develop legislative proposals where needed in the regulatory area.

To date, over 658 rules have been submitted by 23 Executive and independent agencies.

I might note that, taken together, the Departments of Transportation, Agriculture, and the Environmental Protection Agency account for over half of these rules.

The rate at which regulations are being issued by agencies has slowed significantly as well. The number of new, final, and proposed regulations is down by more than a third since January. The average number of pages published daily in the Federal Register has been cut by more than half.

With regard to our experience under the Executive order, two points deserve particular emphasis.

First, we have found that flexibility is crucial—a point made by Professor Weidenbaum a moment ago. It is simply not possible to anticipate all the issues that surface in the regulatory area. I believe that such unforeseeable situations demand flexibility on the part of the institutional arrangement assigned to address these issues.

Second, the authority to waive regulations and to identify certain other regulations as major is another crucial element in the Executive order. The authority granted under the order, permitting us to exempt certain classes of regulations, prevented the program from being brought literally to a standstill. The authority to designate rules as major keeps agencies on their toes and allows us to identify especially burdensome or controversial regulations for review, even if ordinarily they would not qualify as major.

The task force is still learning how best to deal with the business of regulatory relief. It is important that hard and fast requirements not be imposed which could block new and effective regulatory relief measures.

REGULATORY REFORM ACT

Mr. Chairman and members of the subcommittee, we in the administration heartily support the goals of S. 1080. As our Executive order indicates, we believe it essential to perform analysis for major new and existing regulations and to choose the most cost-effective means of achieving a statutory goal.

While we can achieve these goals under the Executive order, there is a clear benefit to codifying these requirements in legislation. The basic concepts emobodied in S. 1080, we believe, hold the potential for providing the longlasting reform of the regulatory process that is vitally needed.

As with much legislation, an appropriate balance must be struck between detailed legislative provisions and the need for flexibility. For the most part, I think S. 1080 achieves this goal.

The bill addresses the pervasive problems of agency reliance on undisclosed or questionable scientific data and the current inadequacies of rulemaking files. The bill would require an agency to disclose at the outset the studies on which it intends to rely and to make those studies and all other relevant material available for public comment.

These are important provisions, and we support them.

The bill also provides for what has come to be known as hybrid rulemaking for major rules. The opportunity for oral presentation and cross-examination in major rule-makings, we believe, can strengthen the regulatory process by providing close scrutiny of matters of material fact.

As the sponsors of the bill recognized, it is also important to limit the scope of judicial review on such procedural issues. We, in fact, would suggest that the provision for judicial review be even more carefully circumscribed.

The bill also contains important provisions eliminating the "race to the courthouse" problem that exists under the current venue provision and establishing a regulatory agenda and calendar.

In both cases, the bill makes an important contribution toward improving administrative practice.

The centerpiece of the bill, from our perspective, is its provision requiring careful economic analysis of major rules. All too often in the past, rules were issued with little or no consideration of their economic consequences. That will not happen under this administration, and it should not happen under any subsequent administration.

This is an area, however, where the balance between effective legislative prescriptions, on the one hand, and needed executive branch flexibility on the other is particularly difficult to accomplish. With just a few changes, we believe that S. 1080 can achieve that balance.

Essentially, what is required is an executive branch oversight mechanism that grants the President, or his designees, authority to designate major rules and to enforce compliance with the provisions of the proposed legislation. This would reduce the role of the courts in these areas.

We also believe that it would be simpler to put the new procedural provisions in a new chapter 6 of the Administrative Procedure Act, rather than run the risk of unintentionally complicating the well-understood provisions of existing chapter 5.

Finally, we think that the first definition of major rule contained in the bill should be limited to rules that would increase the enforcement or compliance costs by $100 million or more. As it now stands, a full economic impact analysis would be required for even minor changes in major existing rules.

Our concern here is twofold. First, we want to insure that enactment of the bill would not hamper the Administration's efforts to achieve regulatory relief.

Second, we want to avoid the danger of creating opportunities for litigation, particularly litigation over the adequacy of an agency's analysis, that could be used to frustrate, rather than promote, regulatory relief.

To the extent there is judicial review of whether a rule is major, we believe it should be limited to the bright-line test of the $100 million increase in compliance and enforcement costs. The other two tests are too vague to permit useful judicial review.

In connection with judicial review, we should add one point about the Bumpers amendment. We believe that the bill's provision eliminating any provision of validity with respect to an agency's assertion of power or jurisdiction beyond its statutory authorization raises no serious problem. Indeed, under the Executive order, we are committed to achieving this same objective.

But other presumptions not involving agency jurisdiction or power, such as those relating to procedural regularity, statutory interpretation of technical or scientific provisions, and an agency's own rules, serve a useful purpose in focusing judicial review on the issues of significance. Moreover, elimination of these presumptions could create needless uncertainties and litigation.

With these and other minor changes, we believe that enactment of S. 1080 would result in a significant and enduring improvement in the substance and procedures of regulatory decision making.

The bill's approach is comprehensive and is based on a well-reasoned understanding of the nature of the regulatory problem and what can be done to correct it.

In this regard, we are particularly pleased that the bill's major rulemaking provisions will not become effective until January 1, 1983.

This delayed effective date does not undercut in any way the urgency of the problem but rather evidences a realistic appreciation that it will require time for the agencies to adopt to the new demands being placed upon them.

As I pointed our earlier, we are only in the initial stages of implementing the Executive order. We are learning constantly. The bill would allow that learning process to continue to the ultimate benefit of the regulatory process itself.

Thus, we strongly support section 8 of the bill.

Mr. Chairman and members of the committee, that completes my prepared statement.

Mr. Weidenbaum, Mr. Gray, and I shall be happy to address any questions you might have.

Thank you.

Senator LAXALT. Thank you, Dr. Miller.

Mr. Gray, do you have a statement?

Mr. GRAY. No, sir.

Senator LAXALT. I gather from your statements that we have no problem with respect to the administration on the sunset and venue provisions. We are alright there? Essentially, do I read this correctly?

Mr. WEIDENBAUM. Yes, sir.

Mr. MILLER. Yes, sir.

Mr. GRAY. Yes, sir.

Senator LAXALT. You have some concerns, I gather—and we should address this because you use the term frequently—of whether or not under the legislation there is going to be sufficient flexibility so that the administration can do its job. I might say in behalf of the chairman, and I think I speak for the members of the

subcommittee, that there is nobody on this subcommittee who wants to frustrate you in the good work that you are now doing. Do you see anything within this legislation which would lead to that result?

Mr. MILLER. Not in the bill, as presently drafted, Senator.

We are especially appreciative of the delayed effective date of some of the major provisions. It would become effective on January 1, 1983. I think this would be sufficient to allow the flexibility that we really need.

Beyond that, we think that some flexibility should be afforded the President or his designees, especially to identify major new rules and regulations as being major, even though they might not qualify under the strict standards that you have established in the bill, and secondly, to waive some portions or classes of regulations from the requirements.

I understand the concerns you have expressed in the past about possible abuses of this waiver authority. I think it important to think in terms of the President who would likely assign or designate such authority to either the Office of Management and Budget or the Council of Economic Advisers or some organization in the Executive Office of the President that doesn't have a stake in the regulatory process itself.

We will be looking at it with quite an objective eye.

I feel confident that from one administration to another this waiver authority would be used rationally.

I think the importance of that waiver authority is clearly established.

Senator LAXALT. In terms of mechanism, what are you leaning toward—OMB, as being the mechanism?

Mr. MILLER. I don't want to sound like someone from——

Senator LAXALT. That's all right. We don't mind your being a bit self-serving.

Mr. MILLER. Maybe Mr. Weidenbaum would like to speak on behalf of CEA.

Mr. WEIDENBAUM. When I was advising Governor Reagan in my capacity as a private citizen, I urged him strongly to put this regulatory review authority in the Executive Office of the President and preferably to attach it to the Office of Management and Budget, precisely because that is an organization which does not have a stake in the conduct of any regulatory program.

I think that independence from the conduct of the regulatory process itself is very important.

Senator LAXALT. I'm not worried in the least about the present situation. As we indicated, what we are trying to do is codify this so we have some degree of permanency in the situation. What happens when we get an administration down there which is in lock step with the regulators?

Mr. WEIDENBAUM. That has worried me a great deal, because that isn't a theoretical concern. You and I have shared that concern in recent years.

In practice, I frankly do not know of any specific regulatory review procedure that could force an unwilling President to carry out the intent that we have all expressed this morning to reduce the burden of Government regulation.

Senator LAXALT. Can't we establish some kind of criteria, perhaps within this legislation, that would at least furnish us with some guidelines to insure against that kind of result, or do you think that would be too difficult?

Mr. GRAY. I think if the bill were to authorize the President to designate his representatives within the Executive Office of the President, you would avoid, I think, the problems of having the regulators themselves guarding the process.

That would permit any President to choose a combination of OMB, CEA, the Domestic Policy Adviser, or whatever he chose.

I don't think you can specify with great detail, because every President is going to do it slightly differently. This President is doing it differently than in the past.

I think if you set up within the Executive Office of the President, that would eliminate the problem Murray was talking about which is having the regulators themselves—from EPA or OSHA or whatever—come in and control the process.

Senator LAXALT. You would be satisfied then with the existing procedure? Do you think we would have sufficient safeguards within the legislation and with what you are doing under the order?

Mr. GRAY. What we are doing under the order is, we think, at the moment sufficient.

What concerns us about the legislation is that designation of major rules and the review of regulatory impact analysis is too much turned over to the courts. We think it ought to be narrowed and more of that flexibility put into the executive branch.

I don't know exactly what would happen once the effective date of the legislation passes; but I believe that unless some more flexibility is moved into the executive branch and the court's role cut back a bit, that our ability to designate what otherwise might be a minor rule or a major rule, or to waive requirements for a major rule, could be undercut if, subsequently, a court challenged. That in our view wouldn't necessarily be productive in the long run.

Senator LAXALT. Do you think the waiver requirement is that essential? You have all spoken to that. Do you need that in terms of flexibility?

Mr. GRAY. Yes, sir.

Dr. Miller can go into this in more detail, but we have exempted under the Executive order's waiver authority three classes of regulation—some IRS, some EPA, and some Department of Transportation.

I suppose you could write that into the legislation, but you might have missed something and you might freeze it. It is just difficult to do legislatively.

Senator LAXALT. Do you see any guidelines at all in the waiver authority that we could write into this legislation?

Mr. GRAY. Yes, sir; we could develop guidelines.

Senator LAXALT. It would be better than nothing; or would not guidelines be better in your estimation?

Mr. WEIDENBAUM. May I add as a former member of the bureaucracy going back a long time, that in this absence of waiver authority, I can think of ways that uncooperative agencies could

literally swamp the entire regulatory review process by adopting the practice of issuing only very small, minute regulations.

In other words, any one regulation that is introduced today would be fractionalized into 50 or 100 different regulations. The entire review process could totally bog down.

I defer to our legal counsel on the specifics, but I do believe that a certain guarded exceptions procedure is necessary.

Mr. MILLER. Could I amplify on that?

I think that Mr. Gray's suggestion of putting it in the Executive Office of the President is a very important first step.

Second, you might consider asking the President to submit a report yearly on the use of that waiver authority. That would provide important congressional oversight of that authority.

I would suggest you might write in guidelines, but I would be reluctant for the President's actions under those guidelines to be subject to judicial review.

On the question of waiver authority, let me just make a suggestion.

The bill, as drafted, exempts the Internal Revenue Service. Under the Executive order, we have not exempted the Internal Revenue Service, or the whole of its Internal Revenue Service.

We found out that the Internal Revenue Service turns out hundreds of policy letters and memorandums weekly which, arguably, qualify as regulations that would come over to us but for which there is not sufficient reason for us to be reviewing. They could have clogged our pipeline so thoroughly we would not have been able to focus on the issues of relevance. So we wrote a categorical waiver for most of these things, reserving the authority to reach in for something that appeared to be very controversial and very important and to review that.

We have a similar arrangement with the Department of Treasury's Bureau of Alcohol, Tobacco, and Firearms and with the Customs Department. That is very important.

We have written similar kinds of partial waivers or exemptions for the Department of Transportation and for the Environmental Protection Agency.

We are trying to develop such categorical exemptions for other types of regulations.

We just don't know exactly how those classifications should be written for each agency, but the flexibility to do that, I think, is very important in terms of how well we can manage that process.

Senator LAXALT. Senator Leahy?

Senator LEAHY. Thank you, Mr. Chairman.

Let me just go back to one of the things you suggested about having a report annually from the President to get congressional oversight. What would congressional oversight of that report be? What would the Congress do with the report?

Mr. MILLER. You would have a copy of the report. I presume that if you wished, you could ask an administrative witness to come up and explain such a report.

I'm not a lawyer, sir, and maybe I'm using the term——

Senator LEAHY. I understand. I'm just interested and I'm trying to think of some ways to streamline this.

Does that contemplate some sort of a legislative veto?

Mr. WEIDENBAUM. I would suggest that if the Congress, and this committee, for example, were to review the report and be dissatisfied with the way this provision is operating in practice, the committee, of course, would then be free to report out an amendment or statutory change.

You would have the current information on which to make such a proposal.

Senator LEAHY. I see.

Dr. Miller, the Executive Order 12291 gives substantial authority to OMB to implement President Reagan's goal of regulatory relief. You are the traffic cop in that regard. You are supposed to insure that only cost-effective regulations are issued by the administration.

Let me just explore some of the practical problems presented by placing your office and OMB on top of the very large pyramid of Federal regulatory agencies.

You said that 658 rules have been submitted to the task force for review under the Executive order. How many of those regulations have actually been reviewed by your office?

Mr. MILLER. They all are subject to review. Only a small portion of those were major regulations and were accompanied by a regulatory impact analysis.

If I could just explain briefly the process. When a regulation comes in, it is logged into our system. We have everything on computer. We have desk officers who are the lynchpin of our organization. They review the regulation, both for the paperwork or information requirements under the Paperwork Reduction Act of 1980, and also for the substance of the regulation.

They send copies to the budget examiners in OMB—people who have a great deal of expertise on particular programs. They send them also to the longer range economic analysts in my office and receive their views and recommendations.

These things are very routine in most instances. Where there is substantial disagreement, that is resolved by one or both of my two deputies. In critical cases, it is resolved by me.

Senator LEAHY. Of the 658 how many would you say actually got a full review—other than the logging in and passing on?

I am just trying to get an idea of what ends up being major. What numbers are we talking about here?

Mr. MILLER. We have received so far, because the process is just in place, very few major regulations, for which there has been prepared an appropriate regulatory analysis. For example, we requested of the Postal Service that they provide us with a regulatory analysis of their new nine-digit or ZIP-plus-four ZIP code proposal.

They have submitted to us such an analysis, and we are in the process of reviewing it already. We have had only two or three analyses of that magnitude.

Most of the reviews we have completed have been on the substance of the regulation.

We have consulted with agencies on some 10 regulations of the 658 or so that we consider to be important and not in conformance, or of questionable conformance, with the President's principles and

asked them to review them. They are so doing. So it is only a handful.

We have been receiving, however, at the rate—658, I think, reflects the date of May 1—we are receiving some 20 rules a day. This reflects something like 5,000 a year.

The vast majority of these are turned around very quickly.

The average length of time we review a regulation is 8 days.

Senator LEAHY. What is the size of the staff doing that?

Mr. MILLER. We have approximately 45 people involved at present in looking at the information policy and information requests of regulations and in the desk officer work and in handling the flow of paper. We have a residual 20-person staff of the Council on Wage and Price Stability—the people who were reviewing regulations for the Council on Wage and Price Stability—which are in the process of being folded into my office.

Some 60 or 65 people are now involved in the process of reviewing these regulations. We will be joined by a group from the Department of Commerce to look at some of the statistical questions.

As you know, under the Paperwork Reduction Act, the Federal statistical policy function was transferred from the Department of Commerce to OMB, specifically to my office. We do plan to hire some additional staff—desk officers primarily—to handle these additional requirements.

Under the Paperwork Reduction Act, the flow of rules that have to be evaluated has approximately tripled.

Senator LEAHY. Let me make sure I fully understand this.

It seems to me that with everything we are doing to cut down, we seem to be adding. We have done away with the Council on Wage and Price Stability, but yet you have taken a whole lot of people from the Council and added them to your office.

We have done the Paperwork Reduction Act, and that has tripled the amount of paperwork.

Mr. MILLER. That's right.

Senator LEAHY. You are talking about adding more people to cut down on regulations.

Mr. MILLER. That's right.

Senator LEAHY. I think probably the same questions are occurring to Senator Laxalt and Senator Thurmond as to myself. Would you like to elaborate a little bit on that?

Mr. MILLER. Surely. I welcome an opportunity to do so.

Senator LEAHY. I thought you might.

Mr. MILLER. We were testifying before the House yesterday on OMB's budget, and the same question came up.

With respect to the Council on Wage and Price Stability, at the time of the inauguration, the staff level was something close to 200. The President, as you know, in his first press conference on January 29 announced the end to the ineffective and excessively burdensome program of wage and price guidelines.

Most of the Council on Wage and Price Stability staff was involved in that.

Over a period of several months, that staff has gone from 200 down to 20. So only 10 percent is left, and these are the people that had been performing economic analyses of regulatory issues. It is a

very fine staff. I know these people personally, and I hold their work in high esteem.

These individuals will become part of the Office of Management and Budget—part of my office. That is the plan, sir. They are key people in the analysis and evaluation of these regulatory impact analyses that agencies will be sending over to us for review.

One office in the Executive Office of the President—the Council on Wage and Price Stability—will be eliminated. Ten percent of those people will be folded into OMB to handle the additional responsibilities given to OMB under the Executive order.

With respect to the paperwork, it is certainly paradoxical that a reduction in paperwork requires more paperwork, at least for our agency.

The Paperwork Reduction Act establishes a goal of a 25-percent reduction in the paperwork and information requests applied to the American people by October of 1983.

I have promised in hearings before the Congress and in public that we not only will meet that goal but we will exceed it.

While there is, paradoxically, a rise in the amount of paper, we have to evaluate that the total paperwork burden on the American economy and on the American people will go down substantially.

I am not talking about a decrease from what is a rising level. I am talking about an absolute decrease in the paperwork.

Senator LEAHY. A decrease in what the level of paperwork was at the time the bill was passed.

Mr. MILLER. That's right.

I have been told, and I know for a fact, that agencies are going to be very upset about this because we are in the process of giving them their budget ceilings within which they have to operate.

I am sure you will hear all sorts of stories that things will come to a halt, but we believe that the agencies can meet this and we are going to insist that they do it.

Beyond that, with respect to the additional staff, as Professor Weidenbaum was outlining, we have had wonderful cooperation from the rest of the administration. We simply could not have done it all just by the task force, much less just OMB.

The President's program has, in my judgment, generated enormous savings to the American public. It is billions of dollars per year already, and it is going to be in the tens of billions of dollars per year very shortly.

While we do have maybe a million dollars a year added to our budget for these 20 additional people and for the work that they perform, in my judgment as an economist, that is a return on your investment that is quite extraordinary.

Senator LEAHY. The Executive order gave you the authority to issue guidelines for the agencies to do the regulatory impact analyses. Have those guidelines gone out yet?

Mr. MILLER. We have issued an initial set for review. I have on my desk the revised version. I have not had an opportunity to finalize those guidelines to my satisfaction.

Senator LEAHY. But that will be done soon?

Mr. MILLER. Yes, sir. They will be coming out very soon.

Senator LEAHY. Could we get a list of the 10 regulations you were talking about that have had this major review?

Mr. MILLER. I would be glad to provide it to you.

Mr. Podesta asked for some information, and we simply were not able to provide it. We will provide it very quickly to you.

Senator LEAHY. Let me ask you a question, and this is really a summary of a number of questions that have been asked me by various cosponsors—both Republicans and Democrats.

I would ask the question of both you and Mr. Weidenbaum because you have both argued for cost-benefit analyses in Federal regulations.

Let me be a devil's advocate for a bit. How does one go about assessing these costs and benefits?

For example, if a rule cost $1 billion to implement and it would save one life, is that cost effective?

Mr. MILLER. By the very nature of the question, you can't answer it. Cost effectiveness implies the choosing among alternative ways of doing something. If the objective set is to save a life, what you do is take a given population and reduce the probability that any one of them will lose their life. If you do that, you have to think of the alternatives.

Cost-effectiveness means: Let's choose the least costly way.

Only if you were able to tell me that all other ways of achieving that goal cost more than $1 billion, would I be able to answer the question that, yes, that is cost effective.

Senator LEAHY. Say we answered it and all the other ways did.

Mr. MILLER. Cost more than $1 billion?

Then the cost-effective rule would say that that was the cost-effective way of achieving that goal.

Senator LEAHY. That doesn't necessarily mean that we would still want the rule; does it?

Mr. MILLER. No.

Senator LEAHY. What about if it saved 1,000 lives?

Mr. WEIDENBAUM. May I attempt to respond to that?

In practice, I have found that when we are dealing with the vital subject of human lives—and we each only have one—so frequently it is not dollar signs that are on either side of that benefit-cost equation but people and human lives.

For example, the question of asbestos has been raised. Asbestos is a known carcinogen. If rules were issued making it so difficult to manufacture asbestos as to virtually eliminate it, yes, that would save no doubt, statistically, a significant number of lives by reducing exposure in the work place to a known carcinogen.

What is the benefit of the rule? What is the cost of the rule?

I wouldn't view the costs in a green eyeshade/dollar sign approach. I would view it in terms of all of the havoc created on the highway because there wasn't asbestos in those brake linings. Far more lives would be lost from outlawing asbestos than would be saved in the workplace.

Nitrites in meat are a much more recent example, because that decision essentially was faced. Nitrites are a mild carcinogen. If the Government had outlawed the use of nitrites in meat, there would have been a modest reduction in the exposure to this mild carcinogen.

On the other hand, there would have been an obvious increase in botulism, and the number of lives lost would be far greater.

Senator LEAHY. There is very much of a dispute on that.

I sat through 3 days of hearings on that with the late Senator Allen. They had equally eminent scientists who were on both sides of that question.

I understand the point you're making, but the question of nitrates, nitrites, and nitrosamines is still one of some dispute.

But don't we have to give some kind of guidance to the agencies as to what is of value today and what is of value to future lives? A number of us look at this with some concern.

I look at it from a personal point of view. Both my grandfathers were stone cutters in Vermont. Both died of silicosis of the lungs. My grandfather, Patrick Leahy, died at the same age I first ran for the Senate—the age of 33—leaving a family behind. My other grandfather at a later age.

Both died having worked very hard in an industry which if they were in it today they would not die because of regulations—clean air regulations. Yet that industry is doing just as well today as it did then—in fact better. Stockholders are making a lot more money.

Where do you put those values? How do you do this? Do you look at just a dollar figure? Do we tell agencies when you get right down to the "bottom line," it is going to be "*x*" number of dollars per life when you compare all the factors. At some point you look at the number of lives potentially at risk and put a dollar figure on them. How do you do that?

Mr. MILLER. There are two key points that I would urge.

One is to look at the alternatives.

Taking your example, if you are going to impose $1 billion of costs on this society to save one life, is there an alternative use—my instinctive answer is yes—for the same $1 billion that would save far more lives?

The second point is that there is difficulty in legislating commonsense—for example, reducing exposure to some hazard at the cost of, say, $1 million, the exposure being the equivalent of smoking one cigarette a year.

It strikes me that when we get down to that point, where we are dealing with such remote and minor hazards and the outlays are so substantial, that we have gone past the point of commonsense.

Senator LEAHY. Aren't we talking about things that are of far more immediacy, like the areas of the Environmental Protection Agency and the Nuclear Regulatory Commission, and questions of the cause of acid rain and pollution and things that may affect my children or grandchildren?

We can reduce this to a very simple argument. I am talking about what kinds of guidelines Dr. Miller gives these regulatory agencies when you get into the question of human life.

I have used up my time, but I know that these are the questions we are going to hear on the floor.

I am going to ask the same line of questions of many of the witnesses who will be here today, because it will be the major part of the debate when this matter hits the floor.

Mr. MILLER. Senator Leahy, you have identified an extraordinarily sensitive and important area.

Could I give you several responses?

First, as a technical matter, I don't think that specific guidelines are necessary in this bill. The question of the action undertaken by the Agency is in response to whether the benefit-cost requirement is judicially reviewable.

Second, both my grandfathers have passed away. Both died of cancer. One died of an occupationally related disease. One died of throat cancer, but he chewed tobacco and that may have been the reason. The other died of stomach cancer, and he was a blacksmith. That may have been occupationally related.

These kinds of issues are a very substantial concern to any of us who have lost loved ones due to occupational-related diseases.

Part of it is a matter of our learning over a period of time about these diseases. We are finding out that they are occupational-related diseases today, which we didn't know 10 or 20 years ago.

That is one important function the Government can carry out—providing and disseminating appropriate information.

We have to keep some perspective——

Senator LEAHY. Just information or regulations too?

Mr. MILLER. Regulations too, but information is a very important function of Government in this area.

Let me mention to you a feeling that I have that while some cases of regulation involve this kind of sensitive question, most don't. Most instances of regulation and providing regulatory relief, the answer is so self-evident. The problem is that the agency goes on about its business, because that's the only way it knows to regulate. We have to change that.

Let me give you an example. An example that I analyzed closely was OSHA's proposed acrylonitrile standard. OSHA had proposed several alternatives but the one—the tightest standard—just seemed off the wall to me.

As a matter of fact, I rated the probabilities of lost life due to driving an automobile and compared them to what would be gained under this standard.

It would be easy to paint some company that had acrylonitrile exposure in its plant as being very unconcerned and unloving about its employees. But yet under the analysis that I performed, it showed specifically that if you were plant manager and you had two positions to fill—one, a messenger, somebody to drive an automobile around and deliver packages or whatever and the other to put someone in the plant in an area exposed to acrylonitrile under the existing standard—the choice between the two positions to fill would be in assigning the person to drive the car to a greater risk of death than the person exposed to acrylonitrile.

In those kinds of circumstances, I think a reasonable person would agree that it wouldn't make a lot of sense to spend huge sums to further reduce the probability of accidental death from exposure to acrylonitrile.

That is not to say that when the cost of reducing the exposure is very low it should not be done.

So many regulations involve just the application of almost common sense.

The important thing to me, Senator Leahy, of this benefit-cost requirement is not that one cranks in a blank box and out comes

an answer but that we get the information on which to make a decision.

So often in the past, agencies have simply refused to do the analysis necessary for providing the basis for an informed decision. It was not until the Supreme Court ruled in the *Benzene* case that OSHA really came around to addressing the question of having to evaluate the benefits to be secured from their proposed regulations.

In many cases, it will not be possible to quantify well the benefits and quantify well the costs.

Your bill accounts for that, and it is very technically well-crafted to incorporate that concern.

I like to use the piles of sand analogy. If you have two large piles of sand on this table seem comparable in size, it would be difficult to tell which were larger. But if you took a cup of sand from each pile in sequence, as the absolute sizes of these piles diminished, their relative sizes would become more apparent.

If we can in benefit-cost analysis identify those costs that can be identified and quanitifed well, and identify those benefits that can be identified and quanitified well, and subtract those away, then the regulatory decisionmaker can focus on those subjective costs and benefits. We can see a little better which pile of sand is larger.

Senator LEAHY. I would like to submit a number of questions.

Thank you, Mr. Chairman.

Senator LAXALT. With respect to the questions, we are going to run out of time here shortly. I know you have other commitments. We would like leave to address some questions to you that we haven't been able to propose this morning.

Senator Thurmond?

Senator THURMOND. Thank you, Mr. Chairman.

Dr. Miller and Mr. Gray, I would like to discuss with you the need for an executive oversight provision in S. 1080. It is my understanding that such a provision was not included in this legislation—in part, because of administration opposition to it.

In your testimony, however, you have indicated that an oversight provision might be necessary to clarify the responsibility for centralized oversight and that discretion to insure compliance rests with the President or his designees. What sort of provision should be added to S. 1080, or what language would you suggest?

Mr. MILLER. Senator, I think we need to go back and do a little homework. I would suggest to your staff some specific language that might be incorporated.

Senator THURMOND. You would like to do that or intend to do that?

Mr. MILLER. We will do that, sir.

Senator THURMOND. Thank you.

Mr. Weidenbaum, in the area of executive oversight, you have noted of a lack in S. 1080 of a provision allowing OMB, or other presidential designee, to waive agency compliance with the regulatory analysis sections. I understand that such waiver power is currently a feature of Executive Order 12291.

Could you provide specific examples of where such waiver power might need to be exercised?

Mr. WEIDENBAUM. Yes, sir.

In the case of the vast number of Internal Revenue Service regulations, letters, and other actions that IRS has taken, we found it necessary at the outset of the process to grant a measure exemption to IRS in order to avoid bogging down the entire tax collection process.

That is the advantage of the waiver. The Office of Management and Budget retains the authority to pull back that waiver should circumstances change.

Senator THURMOND. Dr. Miller, could you discuss in greater detail the position which you took in testifying before the House Judiciary Committee that determination of whether a rule is major should not be subject to judicial review?

Mr. MILLER. Senator Thurmond, it is a close call, arguably. It is difficult to think of an appropriate balance between this problem of being so specific that the definition would be subject to judicial review in a way that wouldn't engage in excessive litigation and also retaining the flexibility.

On this continuum, it is difficult to note exactly where it should go.

I think some judicial review of a very simple standard, such as $100 million per year, may make sense, coupled with presidential authority to identify agency regulations that would not ordinarily qualify or which the agencies might argue wouldn't qualify. Giving the authority to the President to designate such regulations as major is important to this process.

I say this from an experience under the Ford administration's Executive order with respect to inflation impact statements and economic impact statements. We were learning there. One thing that we learned was that agencies were very recalcitrant about identifying major regulations.

At that time I was on the Council on Wage and Price Stability. My staff would telephone an agency and say: this regulation appears to be major. The agency would say: In our judgment, it isn't. And that was it.

Today under the new Executive order, if we have strong reason to believe that the regulations should be reviewed, we can so inform an agency and the agency agrees.

Senator THURMOND. While I realize that legislative veto issues are not specifically the subject of today's hearing, Dr. Miller, you have recently stated that the administration could accept certain versions of a congressional veto applied to selected independent agencies. Could you be more specific as to what versions would be acceptable and to which independent agencies the veto would be applicable?

Also, what is the basis for your position that a legislative veto mechanism could be applied to independent but not to all agencies?

Mr. MILLER. Let me address the second point first.

The reason is, that is the President's view. The President is opposed to a legislative veto mechanism that applies to the executive branch agencies for two reasons.

The first is that he feels that this could undermine his ability to achieve the kind of regulatory relief and other reforms that he believes are necessary. The second is that a legislative veto applied

to the executive branch agencies would undermine the presidency itself.

With respect to the certain independent agencies, his position is that they are so beyond his control and so beyond the control of Congress that there needs to be additional oversight. He is going to be looking at ways to apply stronger oversight of the so-called independent agencies, and he would accept and perhaps even welcome a legislative veto kind of mechanism to provide additional congressional oversight of these independent agencies.

In all of this, of course, the President reserves the right, and indeed the duty, to question the constitutionality of such provisions in court.

As a policy matter he accepts and perhaps even welcomes a legislative veto for certain independent agencies.

To answer your first question, Senator Thurmond, I don't have a ready answer. I don't have a list of the agencies that would be acceptable for legislative veto, and I can't tell you the specific type of legislative veto mechanism that the President would find acceptable.

I do, however, contemplate and expect that members of the administration will be working with Members of the Congress and their staff and the Members of the Senate and their staff developing the specific outlines of what would be acceptable.

Senator THURMOND. I have several more questions. I will ask just one more, and the rest you can answer for the record.

With regard to independent agencies, Dr. Miller, why were they not included within the coverage of Executive Order 12291? Did the administration feel they did not have the authority to extend this Executive order to the independents?

Mr. GRAY. I think the answer is twofold.

In terms of authority, we do have less authority--considerably less authority--over the independents than over the executive branch agencies. But we are not totally lacking in authority.

The reason we didn't exert what possibly we might have is a policy judgment on our part that political and pragmatic consequences were not worth the results that might be achieved.

By our estimate, well over three-quarters of the burdens associated with over-regulation are imposed by the executive branch agencies. The independent agencies tend to be the economic antitrust type agencies--rate making and licensing.

We decided for pragmatic reasons that the Antitrust Division could handle presenting the President's program and viewpoint to those agencies.

We would be better off sticking with the executive branch agencies, as they present more problems than we will be able to solve probably. There is no reason to take on a bigger obligation.

Senator THURMOND. Thank you.

Mr. Chairman, if I could just have the rest of the answers for the record, then if you will excuse me the Constitution Subcommittee is in session and I am needed there.

Senator LAXALT. Thank you very much, Senator Thurmond.

That will conclude our session. I am afraid we ran out of time much too rapidly. We would appreciate it, gentlemen, if we could have the questions that are being submitted back by Wednesday of

next week if that is not unreasonable. We are attempting to fast-track this through the subcommittee, and we would like to have it at that time so that perhaps we could go the end of next week.

Mr. MILLER. We will do our best.

I apologize for going on in some answers. I wish we had been able to address more.

Senator LAXALT. Not at all. I think that the colloquy that you had with Senator Leahy struck at the heart of the problem that is being expressed here in the Senate.

I have had the same kinds of questions. How do you equate the human and life factors with the economics? Yet we have to arrive at something here that will take into consideration all those elements.

We thank you very much. It has been a very stimulating session.

Mr. MILLER. Thank you, Mr. Chairman.

Mr. WEIDENBAUM. Thank you.

[Mr. Miller's prepared statement and additional articles, and responses to questions posed by Senators Laxalt and Leahy follow:]

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Prepared Statement of James C. Miller, III

Mr. Chairman and Members of the Subcommittee:

I am pleased to be here this morning, along with Chairman Weidenbaum, to discuss our mutual efforts to improve the regulatory process. With us today is C. Boyden Gray, Counsel to the Presidential Task Force on Regulatory Relief.

As you know, many efforts have been mounted over the past several years to improve the performance of the regulatory agencies, and this Subcommittee has performed a Herculean task in identifying problems of regulatory procedure and finding solutions. The bill before you, I know, is the product of extensive discussions involving Members of this Subcommittee, leaders of the private sector, and key officials in the Administration, including the Chairman of President Reagan's Task Force on Regulatory Relief, Vice President George Bush. Moreover, we have had a close, cordial, and productive working relationship with you and your staff and look forward to its continuation in the future.

Before I discuss the details of S. 1080, the proposed "Regulatory Reform Act", I would like to review briefly the President's progam of regulatory relief and discuss our early experience under Executive Order 12291, "Federal Regulation."

President's Program of Regulatory Relief

As one of the four cornerstones of President Reagan's economic recovery program, regulatory relief is clearly one of the top priorities of this Administration. The four cornerstones are:

- A stringent budget policy to restrain federal spending and put more resources in the private sector where they are more productive;

- o A tax reduction program to encourage saving and investment;
- o A program of regulatory relief to achieve regulatory goals at lower costs in order to increase the supply of goods and services available for other pressing needs; and
- o A stable monetary policy to reduce uncertainty and encourage greater investment by businesses and more rational expenditures on the part of consumers.

The four components are complementary. They share the basic philosophy of increasing overall economic activity in order to increase productivity, reduce inflation and unemployment, and raise the real incomes of all Americans.

During his first months in office, the President took swift and positive action to eliminate excessive and ineffective regulations. Let me take just a minute to outline some of these actions for you.

On the day after the Inauguration, President Reagan asked the Vice President to chair a Cabinet-level Task Force on Regulatory Relief. The Task Force is responsible for reviewing new regulations, assessing existing regulations, and coordinating legislative policies in the regulatory area. As I mentioned, the Task Force is chaired by Vice President Bush, but it also includes as members: Treasury Secretary Regan, Attorney General Smith, Commerce Secretary Baldridge, Labor Secretary Donovan, Office of Management and Budget Director Stockman, Assistant to the President for Policy Development Anderson, and Council on Economic Advisers Chairman Weidenbaum. As the Vice President has noted, the charge given to his Task Force is not to <u>study</u> regulation or deregulation, but to <u>provide regulatory relief</u>.

Eight days later, on January 29, the President sent a memorandum to the heads of eleven cabinet departments and the Environmental Protection Agency, asking them to postpone for 60 days -- until March 30 -- the effective dates of all final regulations that had not yet taken effect. He also asked the agencies not to issue any additional final regulations during this period. This action was taken to allow time for the President's appointees to familiarize themselves with the details of the so-called "midnight regulations" and other proposed new rules.

On February 17, President Reagan issued Executive Order 12291, "Federal Regulation," designed to improve regulatory performance and provide regulatory relief.

The President's program of regulatory relief goes beyond new regulations to include existing regulations. On March 25, building on the President's previous actions, Vice President Bush released a list of 27 existing regulatory programs which agencies had agreed to reassess. The Task Force and the agencies will continue to review and identify additional areas where review of existing rules and regulatory programs is necessary. The Vice President also asked the assistance of business, labor, consumer, and other groups in identifying regulations in need of recission or modification. We have received over 200 detailed and sophisticated submissions in response to that request. In coordination with the responsible agencies, we intend to use these submissions to help establish the regultory priorities of this Administration.

Almost every Cabinet department and agency has taken important steps to provide regulatory relief. For example, the Department of Transportation has proposed changes in a number of regulations, especially those affecting the automobile; the Department of Energy has targeted some 200 regulations for

thorough review; the Department of Labor's own Regulatory Reform Task Force has begun a careful review of regulatory proposals and existing programs to find ways of achieving health and safety goals at lower costs.

These actions are only a first step in achieving meaningful regulatory relief. Although it is too early to have final figures, preliminary results have been gratifying. I can assure you that the relief measures taken by the agencies amount to billions of dollars per year. And we are only beginning. Much more will be done in the coming months. Regulatory relief is essential to economic recovery. The President himself has made it clear that he expects real regulatory relief and we intend to carry out his mandate and that of the American people.

Executive Order 12291

Now let me address our experience under Executive Order 12291. I would like to point out that the Executive Order has only been in place since February 17, and our experience has understandably been too short to predict precisely what the final results will be. However, I can say with certainty that the first three months have been very encouraging.

The Executive Order consists of three major parts. First, it sets out the President's regulatory principles. Under these common-sense principles, an agency is directed not to regulate unless the benefits of the rule exceed the costs; the least costly alternative is chosen; and the regulation maximizes net benefits.

Second, the Presidential Task Force on Regulatory Relief is clearly established as the primary oversight body with regard to Executive-branch regulatory policy.

Third, the Executive Order creates a review process directing the Office of Management and Budget, under the direction of the Presidential Task Force, to review proposed regulations and consult with agencies about them. It calls for OMB to identify existing regulations which agencies should review and for OMB and the Task Force jointly to develop legislative proposals where needed in the regulatory area.

To date, over 658 rules have been submitted by 23 Executive and "independent" agencies:

Department/Agency	Submissions
Agriculture	101
Commerce	38
Community Services Administration	1
Education	34
Energy	17
Environmental Protection Agency	161
Federal Emergency Management Agency	5
Federal Inspector for Alaska Natural Gas Transportation	4
General Services Administration	13
Health and Human Services	15
Housing and Urban Development	37
Interior	22
Justice	15
Labor	31
National Foundation on the Humanities	5
Nuclear Regulatory Commission	1
Office of Personnel Management	10
Small Business Administration	2
State	2
Transportation	110
Treasury	1
U.S. Metric Board	3
Veterans Administration	30
Total	658

I might note that, taken together, the Departments of Transportation, Agriculture and the Environmental Protection Agency account for over half of these rules.

The rate at which regulations are being issued by agencies has slowed significantly as well. The number of new final and proposed regulations is down by more than a third since January, and the average number of pages published daily in the Federal Register has been cut by more than half.

With regard to our experience under the Executive Order, two points deserve particular emphasis. First, we have found that flexibility is crucial. It is simply not possible to anticipate all the issues that surface in the regulatory area. I believe that such unforeseeable situations demand flexibility on the part of the institutional arrangement assigned to address these issues. Second, the authority to waive regulations and to identify certain other regulations as "major" is another crucial element in the Executive Order. The authority granted under the order permitting us to exempt certain classes of regulations prevented the program from being brought literally to a standstill. The authority to designate rules as "major" keeps agencies on their toes and allows us to identify especially burdensome or controversial regulations for review, even if ordinarily they would not qualify as "major".

The Task Force is still learning how best to deal with the business of regulatory relief. It is important that hard and fast requirements not be imposed which could block new and effective regulatory relief measures.

Comments on S. 1080

Mr. Chairman and Members of the Subcommittee, we in the Administration heartily support the goals of S. 1080. As our Executive Order indicates, we believe it essential to perform analysis for major new and existing regulations and to choose the most cost-effective means of achieving a statutory goal. While we can achieve these goals under the Executive Order, there is a clear benefit to codifying these requirements in legislation. The basic concepts embodied in S. 1080, we believe, hold the potential for providing the long-lasting reform of the regulatory process that is vitally needed.

As with much legislation, an appropriate balance must be stuck between detailed legislative provisions and the need for

flexibility. For the most part, I think S. 1080 achieves this goal.

The bill addresses the pervasive problems of agency reliance on undisclosed or questionable scientific data and the current inadequacies of rulemaking files. The bill would require an agency to disclose at the outset the studies on which it intends to rely and to make those studies and all other relevant material available for public comment. These are important provisions and we support them.

The bill also provides for what has come to be known as "hybrid rulemaking" for major rules. The opportunity for oral presentation and cross-examination in major rulemakings, we believe, can strengthen the regulatory process by providing close scrutiny of matters of material fact. As the sponsors of the bill recognized, it is also important to limit the scope of judicial review on such procedural issues, and we in fact would suggest that the provision for judicial review be even more carefully circumscribed.

The bill also contains important provisions eliminating the "race to the courthouse" problem that exists under the current venue provision and establishing a regulatory agenda and calendar. In both cases, the bill makes an important contribution towards improving administrative practice.

The centerpiece of the bill, from our perspective, is its provision requiring careful economic analysis of major rules. All too often in the past, rules were issued with little or no consideration of their economic consequences. That will not happen under this Administration, and it should not happen under any subsequent Administration. This is an area, however, where the balance between effective legislative prescriptions on the one hand and needed Executive-branch flexibility on the other is

particularly difficult to accomplish. With just a few changes, we believe that S. 1080 can achieve that balance.

Essentially, what is required is an Executive-branch oversight mechanism that grants the President or his designees authority to designate major rules and to enforce compliance with provisions of the proposed legislation. This would reduce the role of the courts in these areas. We also believe that it would be simpler to put the new procedural provisions in a new Chapter 6 of the Administrative Procedure Act, rather than run the risk of unintentionally complicating the well-understood provisions of existing Chapter 5. Finally, we think that the first definition of "major rule" should be limited to rules that would increase enforcement or compliance costs by $100 million or more. As it now stands, a full economic impact analysis would be required for even minor changes in major existing rules.

Our concern here is two-fold. First, we want to ensure that enactment of the bill would not hamper the Administration's efforts to achieve regulatory relief. Second, we want to avoid the danger of creating opportunities for litigation -- particularly litigation over the adequacy of an agency's analysis -- that could be used to frustrate, rather than promote, regulatory relief. To the extent there is judicial review of whether a rule is "major", we believe it should be limited to the bright line test of the $100 million increase in compliance and enforcement costs. The other two tests are too vague to permit useful judicial review.

In connection with judicial review, we should add one point about the Bumpers Amendment. We believe that the bill's provision eliminating any presumption of validity with respect to an agency's assertion of power or jurisdiction beyond its statutory authorization raises no serious problem. Indeed, under the Executive Order we are committed to achieving this same

objective. But other presumptions not involving agency jurisdiction or power -- such as those relating to procedural regularity, statutory interpretation of technical or scientific provisions, and an agency's own rules -- serve a useful purpose in focusing judicial review on the issues of significance. Moreover, elimination of those presumptions could create needless uncertainties and litigation.

With these and other minor changes, we believe that enactment of S. 1080 would result in a significant and enduring improvement in the substance and procedures of regulatory decisionmaking. The bill's approach is comprehensive and is based on a well-reasoned understanding of the nature of the regulatory problem and what can be done to correct it. In this regard, we are particularly pleased that the bill's major rulemaking provisions will not become effective until January 1, 1983. This delayed effective date does not undercut in any way the urgency of the problem, but rather evidences a realistic appreciation that it will require time for the agencies to adapt to the new demands being placed upon them. As I pointed out earlier, we are only in the initial stages of implementing the Executive Order. We are learning constantly. This bill would allow that learning process to continue, to the ultimate benefit of the regulatory process itself. Thus, we <u>strongly</u> support Section 8 of the bill.

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Mr. Chairman, Members of the Committee, that completes my prepared statement. Mr. Weidenbaum, Mr. Gray, and I shall be happy to address any questions you might have.

THOSE REGULATORY DELIGHTS

by

James C. Miller III*

Over the past decade, we have gorged ourselves on regulatory delights ranging from cleaner air to safer products, "effective" drugs to increased auto mileage. That we have engaged in gluttony seems no longer in doubt. What is in doubt is how public policy will respond to this condition. Unfortunately, Congress and the Administration seem prepared only to give the patient a life-time supply of Alka-Seltzer, and are currently debating whether the dosage should be two tablets or three. What is really needed is an admonition against overeating and a set of rules for selecting a proper menu.

Note that I did not say the patient should stop eating. But he should eat in moderation and his diet should be full of nutrition.

Let me give you an indication of where we've been and where we're going. Between 1970 and 1979, the number of pages in the Code of Federal Regulations increased by 72 percent. The number of pages in the Federal Register increased by 287 percent. The cost of government regulation has been estimated by Murray Weidenbaum at upwards of $100 billion per year.1/

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* Remarks prepared for a conference entitled "Coping With Industry Environmental Costs," sponsored by McGraw-Hill (Arlington, Virginia; May 16, 1980).

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1/ See, for example, Murray L. Weidenbaum and Robert DeFina, "The Cost of Federal Regulation of Economic Activity," AEI Reprint No. 88.

But as Bill Lilley and I pointed out in our article in The Public Interest,[2/] most of this growth has been in the social regulatory areas -- health, safety, and the environment. As an index, while the expenditures of the economic regulatory agencies rose some 266 percent during the decade, the expenditures of the major social regulatory agencies rose by 423 percent (see attached table). In fact, the expenditures of the social regulatory agencies exceed those of the economic regulatory agencies by a factor of over 12 to 1. Moreover, with the singular exception of energy, almost everywhere we see economic regulation on the decline. Significant cutbacks have been completed or are underway in airlines, trucking, railroading, and communications -- initiatives for which our political leaders and regulators should take great pride and credit. But to the supply of regulatory delights in the social areas, there seems to be no end.

Let me give you just one example. In its recently-released generic carcinogen policy statement the Occupational Safety and Health Administration (OSHA) indicated that it might establish new standards for 571 out of some 2,400 suspect carcinogens (45 Federal Register 5001 et seq.). For the seven OSHA carcinogen standards for which estimates are available (asbestos, vinyl chloride, coke oven emissions, arsenic, benzene, acrylonitrile, and beryllium), the total annual cost is $675 million, or roughly $96 million per carcinogen. Extrapolating this figure to 571 new standards implies an additional cost to society of over $55 billion per year, or more than 61 percent of current expenditures on new plant and equipment in manufacturing. Of course, OSHA is unlikely to impose costs of this magnitude, simply because the marginal cost of reducing exposure to additional elements is likely to be lower and because presumably OSHA has gone after the bigger fish first. But what about carcinogen standards about to be promulgated by the Environmental Progection Agency (EPA) and the Food and Drug Administration (FDA)? And what about the new regulations under the Resource Conservation and Recovery Act of 1976 and others coming down the pike?

2/ William Lilley III and James C. Miller III, "The New 'Social Regulation'," The Public Interest (Spring, 1977), pp. 49-61; AEI Reprint No. 67.

The major reason for my citing these figures is not to condemn regulation per se but to emphasize its importance. If a large company experienced such a dramatic increase in the expenditures of one of its components, it would want to take a closer look. If a homeowner began receiving utility bills rising at a record clip, he would want to investigate. A rise in regulatory costs does not by itself mean that anything is wrong. But we need to find out. Inefficiency on a small scale may be permissible, but inefficiency on a large scale can be intolerable.

As you know, this menu of regulatory delights on which we have overindulged has been served up by an alphabet soup of agencies initiated by Congress and given broad authority in some cases and narrow authority in others. Unfortunately, usually where the Congress has granted narrow authority, the result has been regulatory excess. An example is the Delaney clause in the Food, Drug, and Cosmetic Act. But let me focus for a moment on where the agencies have a significant degree of discretion. Let me begin with the well-worn observation that the raison d'etre of regulatory agencies is to promulgate regulations. But in promulgating regulations, are they likely to use their discretion to make them insufficiently tough, or make them excessive? I believe the answer, in far too many cases, is readily apparent: the agencies are characterized by excessive regulatory zeal. One reason has to do with the regulation-creating process itself. Those who write regulations are not the heads of the agencies, but the GS-13s and GS-14s who write the original drafts. These are passed up the line and are approved, and once they reach the Federal Register, the agency is unlikely to "confess error" and change its mind dramatically, even in the face of compelling evidence.

What about these GS-13s and GS-14s? They are self-selected on both the supply and demand sides. Let me suggest that EPA, for example, is more likely to hire the candidate that shows enthusiasm for "Cleaning up America" than one who says, "On the one hand there are benefits, and on the other hand there are costs." Moreover, the former candidate is more likely than the latter to offer himself or herself to EPA for possible employment. Of course, having well-motivated employees is certainly to be desired, even in government.

But when such employees are de facto judges of policy, we must be concerned about the degree of agency discretion.

In such a setting, Congress should either rewrite the statutes or, as an interim measure, promulgate simple rules that will guide agencies to use their discretion in a common-sense manner. I and others have strongly advocated the use of benefit-cost analysis for this purpose. Among others, I am a strong supporter of the general thrust of Senator Dole's proposal to require all regulatory agencies, notwithstanding other provisions of their enabling statutes, to show that: (a) the benefits of their proposed regulations exceed the costs, and (b) they have chosen the least-costly means of meeting their regulatory objectives. I would add only a sunset provision for existing regulations, so that they too would have to pass this new benefit/cost test.

Benefit-cost analysis, as I define it, is no mechanical "black box" into which regulatory agencies put data, and out comes the answer. In many cases, expert judgment will be required, and in many cases political judgment also will be required, especially where the re-distributional aspects of the issue are quite significant.

Benefit-cost analysis is nothing more than a large ledger sheet on which one writes down the benefits on one side and the costs on the other. Some benefits will be easily quantified; others not. Some costs will be easily quantified; others not. But simply going through the process of trying to enumerate benefits and costs and estimating them where feasible provides an important regimen in the decision-making process. Moreover, quantification where feasible makes it much easier for agencies to focus on areas where quantification is especially difficult or impossible. In Congressional testimony, I once used the example of piles of sand. If you observe two large piles of sand, it may be difficult to tell which is larger. But if a "bucket brigate" were organized whereby, in succession, bucketfuls were taken from each pile, it would become progressively easier to determine which pile were the larger.

Finally, perhaps the most important reason for benefit-cost analysis is that it forces regulatory agencies to be quite specific about the grounds for their decisions. One lesson I learned at the

Council on Wage and Price Stability is that agencies are very reluctant to state in specific terms the reasons for their decisions and resist even more stating the distributional consequences of their actions -- that is, who gains at whose expense.

My opponent in today's debate, Mr. Mark Green, will no doubt dissent from this view. He will say that techniques for estimating benefits and costs are so imperfect that benefit-cost analysis should in no way determine the outcome of a regulatory decision. The problem with this argument is that it offers nothing better. Of course any statute to require benefit-cost analyses will have imperfections. Of course agencies and regulatory intervenors will not be perfect in their ability to estimate benefits and costs. Of course the judicial system's review of such decision-making will have certain imperfections. The point is that all institutional arrangements have imperfections. The world is not perfect and perhaps never will be. The relevant question is whether we can improve regulatory performance. I believe that with respect to benefit-cost analysis the answer is yes.

Perhaps the reason Mr. Green is so distrustful of benefit-cost analysis is that he has never done one. Moreover, his recent foray into the use of benefit-cost analysis leaves much to be desired. As the paper distributed to you earlier ("The (Nader-) Green-Waitzman Report on the Benefits of Social Regulation") indicates, Mr. Green and his co-author make serious errors when reporting facts, when reporting conclusions of others, and when interpreting those underlying facts and conclusions.

Just a few days ago, Mr. Green's colleague, Mr. Ralph Nader, testified before the House Subcommittee on Oversight and Investigations, charging that many companies have engaged in what he called "cross-town hypocrisy" -- that is, telling regulatory agencies that they could not meet new standards, or only at great cost, while telling the Securities and Exchange Commission (SEC) and their stockholders quite a different story. Yet, Mr. Nader's research failed to discover that, in at least several instances he cited, the companies were telling the truth; that by the time the firm had reported to the SEC and its stockholders, the likely outcome of the regulatory decision had changed. Had he bothered to investigate, Mr. Nader could

well have avoided a most unpleasant and vituperative exchange with Congressman Lent.

One final example: Mr. Green's book entitled, The Other Government: The Unseen Power of Washington Lawyers,[1] opens with these words:

> As the Washington, D.C., Tourline bus creeps along Rock Creek Parkway, the guide diligently points out the Lincoln and Jefferson memorials, the Washington Monument, and John Kennedy's grave at Arlington Cemetary.

As Daniel D. Polsby points out in a review published in the Michigan Law Review[2]:

> This is a particularly felicitous beginning for The Other Government. The Tourline bus company is fictional, and none of the many Washington tour bus companies has a route that follows Rock Creek Parkway.

In fact, Mr. Polsby points out, tour buses and commercial vehicles are actually prohibited from using the Rock Creek Parkway (36 C.F.R. §50.36(a) 1975). Not only that, but the National Park Service informs me that Rock Creek Parkway ends at the Kennedy Center, and from there one cannot even see the Jefferson Memorial!

In conclusion, let me emphasize that regulation -- especially social regulation -- has a role to play in American society. But the role it is playing today is wide of the mark. Fundamental changes are needed, and will be arrived at only through careful research and discussion, without the shrill emotional responses that are so often elicited whenever criticisms of regulation are made. What we need is a moderate, nutritious diet. Alka-Seltzer simply won't do.

1/ New York: Grossman Publishers, 1975.

2/ November, 1975, pp. 148-63.

James C. Miller III
February 19, 1980

INDICES OF GROWTH IN FEDERAL REGULATION, 1970-1979

YEAR	NUMBER OF MAJOR "ECONOMIC" REGULATORY AGENCIES[1]	NUMBER OF MAJOR "SOCIAL" REGULATORY AGENCIES[2]	EXPENDITURES OF MAJOR "ECONOMIC" REGULATORY AGENCIES (IN MILLIONS)[3]	EXPENDITURES OF MAJOR "SOCIAL" REGULATORY AGENCIES (IN MILLIONS)[4]	NUMBER OF PAGES IN FEDERAL REGISTER	NUMBER OF PAGES IN CODE OF FEDERAL REGULATIONS
1970	8	12	$166.1	$1,449.5	20,036	54,105
1971	8	15	$196.8	$1,882.2	25,447	54,487
1972	8	15	$246.3	$2,247.5	28,934	61,035
1973	8	18	$198.7	$2,773.7	55,592	64,052
1974	9	18	$304.3	$3,860.1	45,422	60,270
1975	10	18	$427.6	$4,251.4	60,221	72,200
1976	10	18	$489.8	$5,020.3	57,072	73,149
1977	10	18	$540.8	$6,383.7	65,603	83,300
1978	10	18	$512.5	$7,225.4	61,261	88,562
1979	10	18	$608.6	$7,576.1	77,492	95,000 (est.)
Percent increase (1970-1979)	25	50	266	423	287	72

1/ Agencies included: Civil Aeronautics Board, Commodity Futures Trading Commission (1975-79), Economic Regulatory Administration (1979), Federal Communications Commission, Federal Energy Administration (1974-1976), Federal Energy Regulatory Commission (1979), Federal Maritime Commission, Federal Power Commission (1970-1978), Federal Trade Commission, International Trade Commission (1974-1979), Interstate Commerce Commission, Securities and Exchange Commission, and Tariff Commission (1970-1973).

2/ Agencies included: Agricultural Marketing Service (1972-1979), Atomic Energy Commission (1971-1974), Consumer and Marketing Service (1970-1971), Coast Guard, Consumer Product Safety Commission (1973-1979), Employment Standards Administration (1971-1979), Environmental Protection Agency, Equal Employment Opportunity Commission, Federal Aviation Administration, Federal Highway Administration, Federal Railroad Administration, Food and Drug Administration, Mining Enforcement and Safety Administration (1973-1978), Mine Safety and Health Administration (1979), Mine Safety and Health Review Commission (1979), National Highway Traffic Safety Administration, National Labor Relations Board, National Transportation Safety Board (1971-1979), Nuclear Regulatory Commission (1975-1979), Occupational Safety and Health Administration (1971-1979), Occupational Safety and Health Review Commission (1971-1979)

3/ Source: The Budget of the United States, 1972 to 1980. Figures are for fiscal year.

4/ Source: Same as footnote 3. Total expenditures of all agencies listed in footnote 2 above, except only health-and-safety-related expenditures for the following agencies: Atomic Energy Commission (1970-1974; "regulatory activities"), Coast Guard ("operating expenses": merchant marine safety and marine law enforcement/marine environmental protection), Federal Aviation Administration ("operations": flight standards, medical standards program; "facilities, engineering and development"; and "safety regulation"), Federal Highway Administration ("motor carrier and highway safety"), and Federal Railroad Administration ("Bureau of Railroad Safety").

Source: Years 1970-1975: William Lilley III and James C. Miller III, "The New Social Regulation," The Public Interest (Spring 1977), p. 50 (AEI Reprint No. 66); years 1976-1979: updates provided by AEI staff.

Lessons of the Economic Impact Statement Program

James C. Miller III

ADDRESSING the Congress in October 1974, President Ford announced that he would require government agencies to assess the inflationary impact of their major proposed regulations and legislative recommendations. A month later he established, by executive order, an Inflation Impact Statement (IIS) Program that was to run through 1976 and apply to all executive branch agencies. At the end of 1976, Ford extended the program and changed its title to the more descriptively accurate Economic Impact Statement (EIS) Program. (In the interests of simplicity, this title and acronym will be used here, with the caveat that they should not be confused with those of the Environmental Impact Statement Program.)

Because of strong opposition from organized labor—owing especially to claims that the EIS requirement delayed regulations at the Occupational Safety and Health Administration (OSHA)—many thought that President Carter would terminate the program. Instead, he has given it strong support, most recently on April 15, when he announced several measures dealing with inflation. Specifically, he asked that full consideration be given to "the economic cost of major government regulations, through a more effective analysis of their economic impact," and directed the Council on Wage and Price Stability (CWPS) "to provide relevant agencies with analyses of the inflation implications of specific government regulatory and legislative actions."

Meanwhile, support for the EIS initiative has been growing in Congress, where there is considerable interest in strengthening the program and applying it to the independent regulatory agencies as well as those within the executive branch. Bills have been introduced to require all agencies to prepare "regulatory cost/benefit assessments" of their proposed legislation and regulations having a significant economic impact (H.R. 351 and H.R. 701); to have the Congressional Budget Office prepare economic impact statements for proposed legislation and agency regulations (H.R. 1743); and to require agencies to prepare economic impact statements for proposed regulations, submit them to CWPS for comments thirty days in advance of their appearance in the *Federal Register*, and publish the analysis and CWPS's comments along with the proposed regulation (H.R. 2100).

In view of President Carter's interest in continuing and perhaps even strengthening the EIS program, and in view of forthcoming deliberations over such proposals on Capitol Hill, it is appropriate to review the record in order to learn what has been accomplished to date and what might be done to make such efforts more effective.*

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* A thorough assessment of the program is contained in Thomas D. Hopkins, *An Evaluation of the Inflation Impact Statement Program* (Washington, D.C.: Council on Wage and Price Stability, December 7, 1976).

Background

During 1974, rising anxiety about "double digit" inflation stimulated popular and official interest in the problem and led President Ford, in one of his first steps, to convene a series of summit conferences on inflation. These meetings produced a variety of recommendations in September and October of that year.

At the same time, the unprecedented growth in federal regulation was also causing concern. The early 1970s had seen the creation of seven new regulatory agencies, including the Environmental Protection Agency (EPA), the Consumer Product Safety Commission (CPSC), and OSHA. Between 1970 and 1974 the number of pages in the *Federal Register* had grown from 20,036 to 42,422 per year; the number of pages in the *Code of Federal Regulations* had grown from 54,105 to 69,270; and some twenty-nine major regulatory statutes had been enacted (see summary and table on page 43, this issue). Many business leaders, academics, and policy-makers were urging that regulatory activity be given closer scrutiny and that careful attention be paid to the costs and benefits of major regulations *before* rather than *after* they become effective.

These two concerns came together at two inflation summit conferences attended exclusively by economists. At the first session (Washington, September 5, 1974), there was considerable discussion about the extent to which "sacred-cow" regulations constrained economic growth, created unemployment, and caused prices to be higher than they would have been otherwise. At the second session (New York City, September 23), Thomas G. Moore, senior fellow at the Hoover Institution and an AEI adjunct scholar, circulated a petition calling for the elimination of a long list of federal regulatory and legislative restraints. Included on the list were laws restricting competition in transportation and limiting supplies of energy, as well as regulations setting the maximum interest rates payable by financial institutions and mandating safety devices on new automobiles. This petition was signed (with minor qualifications in some instances) by twenty-one of the twenty-three economists in attendance.

Thus, worry over inflation—and over regulation as a factor contributing to it—was the major reason the EIS program was established. But the officials responsible for the program were after more than a simple tracing through of the cost impact of proposed regulations and legislative recommendations.* They wanted to use the requirement to improve agency decision-making, and this meant getting the agencies to address the costs and benefits of their proposals. What program officials wished to avoid was the tendency for agencies to serve special constituent interests, often at great cost to the general public; to view the objects of their regulations as natural enemies, to be dealt with punitively; to forge ahead with regulatory and legislative proposals without knowing enough about the problem being addressed or the effects of the proposed solution; and to resist suggestions for alternative, more efficient ways of dealing with economic problems.

In briefings on the program, agencies were told that a proposal need not be considered inflationary simply because it might generate costs. Rather, if the proposal would increase real output (that is, generate tangible and intangible benefits in excess of costs), then in a real sense it was *anti-inflationary*, but if the action would decrease real output (that is, generate costs in excess of benefits), it was inflationary. Agencies were not required under the program to place exclusive, or even primary, reliance in their decision-making on cost-benefit calculations, for such a requirement could have been imposed only through legislation. Nevertheless it was believed that requiring agency officials to address costs and benefits systematically would make them more sensitive to these issues.

A first step in the program was to establish criteria for determining whether a proposed regulation or legislative recommendation should be considered "major." Obviously, to attempt assessments of *all* proposals would spread resources far too thin. So a principal

* These officials were under no illusion that the program would *solve* the inflation problem, or even make a substantial contribution for that matter. In contrast with fiscal and monetary policy, regulation has a very small effect on the rate of inflation. But for a given impact on that rate, regulation often has a greater effect upon consumer welfare because it operates directly upon the real supply of goods and services rather than working through aggregate demand.

objective was to flag for analysis (and possible reconsideration) those proposals having costs greatly exceeding benefits. Since it tends to be easier to make a preliminary estimate of costs than benefits—especially at the initial stage of a proposal—the criteria focused on this aspect. Although supplemental criteria were developed, nearly every EIS issued during the first two years of the program was triggered by a preliminary finding that the proposal would cost $100 million during the first year it would be in effect or $150 million during the first two years.

Each EIS was required to analyze the proposal's estimated costs *and* benefits. These estimates were to include intangibles as well as tangibles and were to be expressed in dollar terms whenever possible. The EISs also had to review the costs and benefits of alternative approaches for achieving the same goal.

The administration of the EIS program was decentralized. Each agency was responsible for determining which of its proposals was major and for preparing the statements. Upon request, statements on proposed legislation were given to the Office of Management and Budget (OMB) and those on regulatory proposals were given to CWPS. Eventually, agencies were required to certify in the *Federal Register* that the inflationary impact of their proposed regulations had been considered and, in the case of major proposals, that an EIS had been prepared; also, upon request, agencies had to explain to CWPS why, in their judgment, a proposal was not major.

Finally, since the program was a presidential initiative established by executive order, it applied only to executive-branch agencies, and not to the independent regulatory agencies such as the Interstate Commerce Commission (ICC) and the Civil Aeronautics Board (CAB). The independents were urged to conform with the program, but each invoked its right not to be bound by it. Also, unlike its sister program, the Environmental Impact Statement, the EIS did not provide grounds for court action. As ultimately resolved in the *Independent Meat Packers* case (8th Circuit, 1975), an agency's failure to complete an EIS when required or to prepare one conforming to the specifications of the program could not be used to overturn a regulatory decision. In essence, conformance with the program depended on agency support and "policing" by CWPS and OMB.

Experience with the Program

As of mid-April 1977, a total of sixty-five EISs had been prepared—fifty-seven for proposed regulations and eight for proposed legislation. The table (see page 20) lists the date each of these analyses was completed, the responsible agency, the subject matter, and whether the proposal was regulatory or legislative. As can be seen, most EISs have been prepared by a handful of agencies—notably the U.S. Department of Agriculture (USDA), EPA, and OSHA. This reflects the important role these agencies have played recently in generating regulations and legislative proposals.

The quality of the individual EISs varies considerably. Some are quite detailed, broad in scope, and analytically sophisticated. But altogether too many are unduly brief, fail to address the relevant issues, and contain grossly defective analysis. Part of the explanation is that some agencies—for example, EPA and the Department of Transportation—have devoted substantial analytical resources to the task, while others—for example, USDA and the Food and Drug Administration (FDA)—have not. This, in turn, reflects the agencies' relative commitment to the program. While some have given it strong support, others have been hostile to it or, at best, have viewed it as a necessary hurdle.

Overall, the analyses contain reasonably good estimates of costs, but their assessments of benefits are weak, and alternatives are usually ignored. Typically, of course, costs are easier to analyze than benefits and alternatives. But the reluctance of some agencies to go beyond analyzing costs appears to be caused more by pressures from constituents than by an inability to cope with the technical problems of economic analysis. This seems particularly true of OSHA, which, despite repeated criticism from CWPS and OMB, steadfastly refuses to attempt monetary estimates of benefits or to analyze alternatives. Apparently, organized labor believes that its interests are better served by detailed, stringent standards, even though such standards may prove very costly, and objects to having OSHA, or anyone else, perform careful benefit estimates or analyze alter-

natives, either of which might make the proposed standards seem less desirable. For instance, taking a strong position on approaches for reducing worker exposure to harmful substances, organized labor supports the installation of "engineering controls" (exhaust fans, enclosed transport, et cetera) rather than the use of "personal protective devices" (respirators, gloves, special suits, et cetera). Research by CWPS economists indicates that almost invariably the latter approach can reduce worker exposure at a small fraction of the cost of engineering controls.

Has the EIS program improved agency decision-making? It may be too early to tell. Since the gestation period for a proposed regulation or law is generally several years and since the program has been in full swing for only two years, we do not have enough cases to make a definitive judgment. Furthermore, in evaluating the program we are dealing with a very subjective output—the quality of decision-making. Also, even if adequate "before" and "after" comparisons were possible, we must be careful about attributing changes solely to the program; obviously, many factors could have intervened, such as worse or better regulatory appointments, political pressures from the administration and the Congress, and changes in the relative effectiveness of adversaries in regulatory proceedings. These problems make rigorous evaluation impossible at this stage, leaving us with personal and unsystematic appraisals from those who have observed the program or participated in it.

On August 3, 1976, CWPS asked for public comments on the EIS program by means of a notice in the *Federal Register*. Thirty-one replies were received, all favorable. These included comments from Senator Hubert H. Humphrey (then chairman of the Joint Economic Committee of the Congress) and a number of manufacturers and trade organizations. No replies were received from labor organizations, but it was widely reported in the press that certain labor leaders, including George Meany and Leonard Woodcock, were openly hostile to the program, especially as it affected OSHA.

About the same time, CWPS solicited the views of key personnel at the agencies, and followed up with a score of in-depth interviews with agency staff members responsible for the program. In addition, several agencies commented on various drafts of the report prepared by an evaluation team headed by Thomas Hopkins of CWPS. From these various comments we learned several things about how the program is functioning.

First, officials at all of the agencies, except for two, wished the EIS program to continue. Generally, they found the analyses helpful to them in weighing the component parts of a proposal and in making trade-offs to reduce the cost of meeting a given objective. They also found the analyses useful in defending a decision not to adopt as strong a regulation or legislative proposal as some of their more extreme constituents would have liked. This appears to be the primary reason why OSHA supported the program, albeit reluctantly.

The two agencies that formally opposed the program were USDA and the Federal Energy Administration (FEA). Indeed, in late August 1976 the USDA unilaterally stopped complying with the program, arguing that it represented "meaningless paperwork" and denying that regulation could have any impact on inflation. Such an attitude is, perhaps, understandable since, by their very nature, many USDA regulations that come under the EIS program—agricultural marketing orders, price support programs, and the like—can be shown to generate costs in excess of benefits. The reason for the FEA's strong opposition to the EIS program was different. At that agency the program was viewed as an impediment to the deregulation of petroleum prices, despite efforts by those responsible for the program to assure FEA officials that in a relevant sense such action would be *anti*-inflationary—that is, it would stimulate production and reduce excess demand. A major problem was FEA's dependence on macroeconomic, econometric models for predicting the outcomes of policy changes. Such models, by their very design, indicate a price-enhancing effect for deregulation. Moreover, officials were concerned about the public's perception of the effects of deregulation, and in their view the EIS simply drew attention to rising petroleum prices.

A second thing we learned from comments by agency officials and the public is that the program is not well integrated into the proc-

ess of formulating proposals and making decisions about them. Typically, an EIS is prepared *after* a proposal has been drawn up and thus the analysts' task becomes one of justifying the approach taken. One reason for this is that usually the initiative for a new regulation or legislative proposal is taken not by the agency's economists or policy analysts, but by its lawyers and administrators. Their focus tends to be upon meeting the procedural requirements of timeliness, due process, the weighing of constituent interests, and defensibility in the courts, rather than upon the economic costs and benefits of their actions. Thus, the decision-making process often proceeds along two, almost distinct tracks—one for the decision-makers and one for the analysts. It is especially lamentable that typically the EIS is not relied upon as an input at the proposal formulation stage, since that is the time when information on costs, benefits, and alternatives is most likely to affect the ultimate decision. Once an agency has gone into print with its original proposal, the chances it will take a new direction are very slim.

Not surprisingly, then, a third major thing we learned is that the program receives higher marks from agency economists and policy analysts than from lawyers and administrators more directly responsible for the decisions. The lawyers' interest is to ensure ample discretion for the ultimate decision-maker and to minimize the risk that decisions will be challenged and perhaps overturned in court. They see the EIS as narrowing that discretion and as providing a potentially damaging piece of evidence in court. (For this reason, there is some reluctance to make EISs public.) On the other hand, economists and policy analysts generally see the EIS as strengthening their hand within the agency. It may give them somewhat more influence on policy decisions, and it often leads to an increase in their share of agency resources. The program also tends to be supported more strongly by senior officials in the agencies than by junior officials—partly because it is regarded as a means of "controlling the bureaucracy" and partly because it is a presidential program. Senior officials, as political appointees, are more apt to reflect presidential concerns about policy and the responsiveness of the bureaucracy than are employees protected by the Civil Service system.

The fourth thing we learned is that the program costs the agencies little in terms of resources. One reason is that the OMB circular promulgating the program stated that it would be met within the existing budget. The argument was that agencies already possessed a capability for economic analysis and that the EIS program would merely redirect that effort. Predictably, this has proved to be a bone of contention, and nearly every agency has urged that this policy be reconsidered. It appears, however, that few additional resources have been required. Existing policy staffs have been utilized a bit more intensively than they were, with their efforts supplemented on occasion by other personnel in the agency. The major exception is OSHA, which has contracted out its EISs, often at six figures. But even at OSHA *some* economic analysis would have been done in the absence of the EIS program.

On the basis of these conclusions and my own experience with the program, a tentative assessment may be made. First, as noted, the costs of the program appear to be low. Second, despite wide variations among agencies, there is some evidence, albeit highly subjective, that the program is having a substantial effect. Policy-makers now appear to be taking the economic implications of their proposals more seriously than they used to. In agency discussions and in formal proceedings, the EIS is serving as a rallying point for those arguing that regulation should be consistent with economic efficiency. The EIS is often an important component of CWPS filings before regulatory agencies—and, because CWPS is part of the Executive Office of the President and because its interventions are highly publicized, it has considerable clout. Moreover, although agencies seldom alter their proposals once announced, there have been cases where, arguably, the EIS and the attention drawn to it have caused the ultimate outcome to be different than it otherwise would have been. More important, an agency's concern that its EIS may be criticized and that the analysis may undercut, rather than support, its proposal has led to closer coordination between the lawyers and economists at the proposal formulation stage—and, therefore, to more carefully considered proposals and better analyses. Thus, summing up, it appears that the benefits of the program substantially outweigh the costs.

IV

Where Do We Go from Here?

When contemplating the future of the EIS program, one should keep in mind that economic analysis is merely one instrument for improving the quality of decision-making and that there are others—including better regulatory appointments, greater oversight by OMB and the Congress, and revisions in the Civil Service system to improve the quality and accountability of agency staff. While the EIS program alone cannot produce perfection, it can be—and, as we have seen, has been—a useful device. It should be continued. It should also be improved.

First, steps should be taken to improve the overall quality of EISs. Specifically, minimal standards should be established. Clearly, decision-making is not aided if the analysis on which it is based is incompetent. This objective could be addressed by requiring that regulatory agencies, before taking action, obtain CWPS or OMB approval for the quality of their analysis (not the desirability of the proposal). Any impasse between CWPS or OMB and the initiating agency could be resolved by the Economic Policy Group (EPG) or some other representative designated by the President. Changes of this kind might require legislation.

Second, steps should be taken to ensure that the EIS is utilized as an input into the regulatory decision-making process—especially at the proposal formulation stage. One way of bringing this about would be to require agencies to submit their EIS evaluations to CWPS (or perhaps some other group like the EPG) *prior* to publication in the *Federal Register*. This would give proposal formulators the opportunity to draw upon outside expertise and would provide an extra incentive for them to utilize the analyses.

Third, the EISs should be made public and should be featured more prominently by the agencies. As mentioned earlier, the possibility that an EIS will be criticized spurs agencies to improve their analyses and make better use of them. Formal EISs should accompany major legislative proposals sent to the Congress by the administration. In the case of regulatory proposals, the formal EIS (or, if lengthy, an executive summary) should be published in the *Federal Register*.

Fourth, the program needs to be extended to *existing* regulations and programs. This could be done without legislation, utilizing OMB in its normal management and budget roles. Or, to maintain flexibility and avoid undue bureaucratization, CWPS and/or OMB might be given explicit authority to request from each agency each year a limited number of analyses of existing regulations or programs.

Fifth, the program should also be expanded to include the independent regulatory agencies —for example, the ICC, the CAB, the Federal Power Commission, the Federal Communications Commission, and the Federal Trade Commission. These agencies generate important legislative and regulatory proposals whose overall quality could be enhanced by a rigorous application of economic reasoning. This recommendation also would require legislation.

Sixth, all agencies should have the discretion to consider costs and benefits in developing their regulatory proposals and in making their decisions. This would mean, for example, (1) repealing the "Delaney amendment" to the Food, Drug, and Cosmetics Act (which requires the FDA to ban any food additive found to be carcinogenic, regardless of the benefits and costs of such a ban) and (2) modifying the Clean Air Act (which, as it is interpreted by EPA, requires the agency *not* to consider costs and benefits in certain instances).

Seventh, Congress should require that, according to reasonably informed judgment, major new regulations have favorable cost-benefit ratios and meet their given objectives at the lowest cost, considering all the available alternatives. Along with this, Congress might grant interested parties the right not only to appeal in the federal courts but to have the regulatory decision determined in the courts (that is, *de novo* review) if there were clear and convincing evidence that the agency had failed to consider the benefits and costs of the proposal.

IN PRACTICE, regulatory decision-making and legislative proposal-making fall far short of the theoretical ideal. Our objective should be to make them as rational as possible, and the EIS technique is an important contribution to that end. To attain its full usefulness, however, it should be strengthened by administrative action and supplemented by legislation.

ECONOMIC IMPACT STATEMENTS COMPLETED BY FEDERAL AGENCIES

Date EIS Completed	Agency	Subject	Nature of Proposal
March 1975	DOC	proposed Patent Modernization and Reform Act	legislation
March 1975	USDA	standards for beef grading	regulation
April 1975	FEA	proposed Energy Conservation and Production Act	legislation
May 1975	USDA	support for U.S. agricultural exports	regulation
May 1975	USDA	tobacco price supports	regulation
June 1975	USDA	peanut price supports	regulation
June 1975	HUD	construction standards for mobile-home safety	regulation
July 1975	FEA	proposed Electric Power Facility Construction Act of 1975	legislation
July 1975	USDA	U.S. agricultural export program of Commodity Credit Corporation	regulation
July 1975	DOL	proposed Unemployment Compensation Amendments Act	legislation
July 1975	EPA	registration of pesticides	regulation
August 1975	DOL	proposed Work Incentive Program Amendments Act	legislation
September 1975	EPA	drinking water standards	regulation
October 1975	EPA	motorcycle emissions	regulation
October 1975	EPA	effluents from offshore gas and oil production	regulation
October 1975	USDA	milk price supports	regulation
October 1975	USDA	labeling of meat and poultry products	regulation
October 1975	USDA	support and regulation of cotton crop program	regulation
October 1975	DOT	proposed Aviation Act of 1975 (regulatory reform)	legislation
November 1975	EPA	maintenance of ambient air quality standards	regulation
November 1975	EPA	coal mining effluents	regulation
November 1975	HUD	mortgage insurance and assistance	regulation
November 1975	DOT	proposed Northeast Regional Railroads Additional Service Act	legislation
January 1976	USDA	support for U.S. agricultural exports	regulation
January 1976	EPA	effluent guidelines for paper industry	regulation
January 1976	HEW/FDA	ban of diethylstilbestrol (DES) in cattle feed	regulation
February 1976	HEW	discrimination against handicapped persons	regulation
February 1976	DOL/OSHA	worker exposure to coke-oven emissions	regulation
February 1976	FEA	exemption of residual fuel oil from mandatory petroleum allocation and price regulations	regulation
February 1976	EPA	standards for measuring evaporative hydrocarbon emissions from automobiles	regulation
February 1976	EPA	limitations on organic-chemical effluents	regulation
March 1976	USDA	milk price supports	regulation
March 1976	USDA	modifications in food stamp program	regulation

Protecting Workers' Hearing: An Economic Test for OSHA Initiatives

James C. Miller III Thomas F. Walton

THE CRESCENDO of criticism directed toward U.S. health, safety, and environmental regulators has given new impetus to the economist's tool of benefit-cost analysis as a means of improving agency performance. Since 1974, all executive-branch agencies have been required, by presidential executive order, to estimate the benefits and costs of their major regulatory proposals. Pending legislation would codify this requirement and extend it to the independent agencies. In its present and prospective forms, however, the requirement is not subject to judicial review, and thus leaves a considerable amount of room for agency discretion.

On the other hand, a few enabling statutes actually require agencies to analyze benefits and costs and to give the results some weight in their decisions. For example, the Supreme Court, in *Industrial Union Department, AFL-CIO* v. *American Petroleum Institute et al.*, recently concluded that the Occupational Safety and Health Administration (OSHA) must establish that its proposed standards for carcinogens would generate substantial benefits. Whether OSHA must also demonstrate that such benefits would be reasonably related to costs—as held by the Fifth Circuit Court of Appeals—is a question on which the Supreme Court did not rule.

Throughout the debate on the utility of benefit-cost analysis, there has been wide-

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spread skepticism over whether the technique is generally applicable and whether imposing such a requirement as a matter of law would not result in excessive and unproductive litigation. In partial answer to these concerns, we describe here a relatively narrow regulatory issue, but one where judicial interpretations have moved in the direction of requiring that the benefits and costs of a proposal be reasonably related and where benefit-cost analysis may be applied in a fairly routine way.

The issue we address is occupational noise. OSHA has determined that workers exposed to certain levels of noise on the job run a significant risk of permanent hearing impairment. The agency's present Noise Exposure Standard limits the noise level in a work place to 90 decibels (dBA) over an eight-hour day, or higher levels for shorter periods.* When the standard is exceeded, employers are required to adopt administrative or engineering controls to reduce the noise. This usually involves the close monitoring of sound levels and the redesign or alteration of equipment (for example, by placing machines further apart and by constructing sound-reducing enclosures around an entire machine or its especially noisy components).

According to OSHA, it is only when those kinds of controls are not "feasible" that the alternative of personal protection equipment —earplugs or earmuffs—may be considered. Moreover, such controls must be employed to the extent "feasible," even if they cannot reduce noise enough to meet OSHA's noise standard (in which case personal protection equipment must also be worn). Thus, the question of "feasibility" has great importance with respect to both the costs of complying with OSHA's standard and the benefits derived.

Neither OSHA nor the courts interpret the term "feasible" in the strictest sense of being possible at less than infinite cost. OSHA's interpretation concedes that administrative and engineering controls are not feasible if their costs would result in shutting down an industry or a substantial part of it, with a consequent loss of jobs. The courts, however, have increasingly gone beyond this, finding "feasible" to mean that the benefits that would result from an OSHA standard must be "reasonably" related to the costs. Consequently, there has emerged a two-part test of feasibility—technical feasibility (would the controls in fact reduce the noise?) and economic feasibility (would the benefits associated with the controls be reasonably related to the costs?).

Our purpose here is to show how the benefits and costs of an OSHA noise-abatement program can be analyzed, and how such economic analysis can provide an appropriate framework for judging the question of economic feasibility. In order to illuminate the development of the economic feasibility test and to give the reader some sense of the institutional setting in which disputes on these issues are resolved, we first review the pivotal legal decisions that have shaped the benefit-cost relationship of OSHA's initiatives for reducing industrial noise. Then we undertake a benefit-cost analysis of OSHA's proposal for reducing noise in a particular General Motors (GM) plant. While this case is not necessarily representative of all of OSHA's initiatives in this field, it illustrates the importance for all concerned—employers, employees, regulators, and the public—of sorting through the ramifications of a proposed regulatory scheme with utmost care.

The Case Law on Occupational Noise

If an OSHA official cites a firm for violating one of the agency's standards, the firm has the right to demand that the agency explain what measures could be taken to correct the problem. The firm may then either acquiesce in OSHA's plan (or an OSHA-approved substitute), or challenge the plan before the tribunal established to hear such complaints—the Occupational Safety and Health Review Commission. If either party (OSHA or the firm) is displeased with the commission's decision, it may appeal to the federal courts. Thus, decisions by the Review Commission and the courts form the case law on occupational noise.

Review Commission Decisions. The first relevant case to come before the Occupational

* 29 CFR 1910. The standard limits the average sound level to 90 dBA for eight hours, 92 dBA for six hours, 95 dBA for four hours, 97 dBA for three hours, 100 dBA for two hours, 102 dBA for 1.5 hours, 105 dBA for 1.0 hours, 110 dBA for 0.5 hours, and 115 dBA for 0.25 hours or less.

Safety and Health Review Commission was *Love Box Company* (April 7, 1975). Here the commission concluded that OSHA's proposal to force a manufacturer of corrugated boxes to employ administrative controls was infeasible because it would have adverse effects on productivity. The commission stopped short of trying to quantify the benefits and costs of OSHA's proposed remedy, but it did find that they were relevant to the feasibility of that remedy.

Almost a year later, in *Reynolds Metals Co.* (February 25, 1976), the Review Commission rejected as infeasible OSHA's recommendation for a Reynolds Metals plant producing tin cans. Principally at issue was the agency's lack of knowledge concerning the ramifications of its proposed remedy. The commission held that for a plan to be deemed feasible, OSHA must demonstrate that the remedy would in fact be effective in reducing the level of noise. The commission also noted testimony by Reynolds' operations manager that some of the proposed noise-suppressing techniques might reduce productivity and perhaps cause other problems such as a build-up of fumes. This suggests the commission's concern with both benefits and costs.

Of all the decisions on industrial noise handed down by the Review Commission, the most important to date has been *Continental Can* (August 24, 1976). The principal facts in the case were as follows. For a development cost of $1.23 million, an installation cost of some $32 million, and an annual maintenance cost of $175,000, the company could have designed, installed, and maintained enclosures that generally would have reduced the level of noise to 90 dBA. This was OSHA's proposal. Continental responded that it already had in place a hearing protection program that cost only $100,000 a year and was generally viewed as effective. The Review Commission ruled in Continental Can's favor. It concluded that OSHA's noise standard, under which the proceeding had been brought, "only requires the implementation of those engineering controls which are economically, as well as technically feasible." It further stated: "In determining whether controls are economically feasible, all the relevant cost and benefit factors must be weighed." Observing that "[c]learly employers have finite resources available for use to abate health hazards," the commission went on to note that these resources should be allocated to the highest priorities first—namely, hazards that are life-threatening.

Thus, in *Continental Can* the Review Commission established the relevance of benefit-cost analysis to judgments concerning the lawfulness of OSHA's compliance measures. Moreover, it enumerated the types of benefits and costs to be considered. But it was not able to provide a precise estimate of the costs per employee affected.

However, using data from the commission's decision for three of Continental Can's twenty-nine plants, we can provide a rough figure. In those three plants, OSHA's plan would have achieved the noise standard for about 125 employees. The estimated one-time costs of developing and installing the engineering controls were $132,000 and $362,000 respectively, the annual maintenance costs were $2,500, and the annual savings from eliminating the existing program of personal protection were $650. Subtracting savings of $650 from annual maintenance costs of $2,500 yields *net* annual operating costs of $1,850. Dividing total development and installation costs of $494,000 by 10 (for a 10 percent discount rate) yields an annual equivalent of $49,400. Adding to that figure net operating costs of $1,850 and dividing by 125 workers yields an estimated cost of $410 per employee per year. In other words,

... the Continental Can decision implies that an estimated $410 per employee per year is too much to pay for engineering controls when an effective program of personal protection equipment is available.

the *Continental Can* decision implies that an estimated $410 per employee per year is too much to pay for engineering controls when an effective program of personal protection equipment is available.

Thus, in just a year and a half, the Review Commission's concern for the efficacy and possible adverse effects of an OSHA proposal (*Love Box*) evolved into a requirement that OSHA

give evidence that its proposed remedy would be effective and perhaps would not have significant adverse consequences (*Reynolds Metals*), which, in turn, became a requirement that OSHA demonstrate a reasonable relationship between the benefits and costs of its proposal (*Continental Can*).

Thereafter, following the guidelines laid down in *Continental Can*, the Review Commission concluded in several other cases that the costs of the proposed remedy outweighed the potential benefits. For example, in *West Point Pepperell, Inc.* (April 18, 1977; upheld by the appeals court in February 1979), the commission found economically infeasible an OSHA proposal having a first-year cost of about $5.4 million (which implies an annualized cost of $540,000) and a subsequent annual cost of $2.6 million—for a total yearly cost of over $3.1 million. With only 380 employees affected, the annual cost per employee was some $8,300—a figure far higher than the $410 in the case of *Continental Can*. Similarly, in *Castle & Cook Foods* (May 19, 1977), the commission concluded that the annual costs of an OSHA-proposed remedy (ranging from $451 to $1,410 per protected worker) were excessive in comparison with the benefits. One reason for this finding, the commission said (as it had in *Continental Can*), was that resources to reduce employee safety and health hazards are limited and should first go toward solving more hazardous (life-threatening) problems.

It should be noted that in this case the commission concluded that, without the proposed engineering controls, there would be a greater risk of hearing loss. Nevertheless, it ruled that this risk was not enough to justify the estimated cost. A year later, in *Great Falls Tribune Co.* (May 19, 1977), the Review Commission found that OSHA's proposed program of engineering controls was technologically feasible, but that it would not reduce noise to the agency's standard. Consequently, employees would still be required to wear personal protection equipment (earmuffs in this case). With few benefits identified and total costs amounting to $1,250 per employee per year, the proposed program of controls was found to be economically infeasible.

However, in *Louisiana Pacific Corporation* (October 19, 1977), the Review Commission concluded that engineering controls are economically feasible where the cost per employee is modest and the noise reduction substantial. Evidence in the proceeding suggested that personal protection equipment was less effective than the proposed engineering controls, which would reduce the company's noise to meet OSHA's standard for an annual cost per employee of $300 to $500. The commission came to a very similar conclusion in *Carnation Company* (June 20, 1978), now on appeal. In that case the noise reduction was also substantial, while the annual cost per employee ranged from $200 to $1,000.

In *Samson Paper Bag* (June 13, 1980), the Review Commission unanimously remanded the dispute to the administrative law judge for a new trial based on the benefit-cost test of *Continental Can*. Even though two of the three Review Commission judges expressed dissatisfaction with certain aspects of the *Continental Can* precedent, they could not agree on a superior test of economic feasibility. As a result, both judges concurred that, for now, the *Continental Can* decision is "dispositive" on that issue.

Court Decisions. The first major noise-abatement case to be appealed from the Review Commission to the federal courts was *Turner Company* (August 31, 1977). Here the Seventh Circuit Court of Appeals, in setting aside the commission's decision, concluded that an annual cost per employee amounting to $333 was too high in comparison with the benefits that might have resulted from using engineering controls instead of personal protection equipment.

A year later, in *Continental Can* v. *Secretary of Labor, Marshall* (August 8, 1978), Continental won its appeal to the U.S. District Court for Southern Illinois to enjoin OSHA from citing any of the company's plants not specifically covered in the Review Commission's *Continental Can* decision. The district court said that *Turner* "clearly upholds the requirement of economic feasibility, on a comparison basis with personal protective alternatives. . . ." It also emphasized that the capital outlay involved in the *Turner* decision amounted to "only $30,000 in the single plant involved"—that is, $333 per employee per year. Interestingly, the court expressed a concern that an OSHA mandate for engineering controls

might actually increase employee noise exposure in Continental Can's plants, since a noise reduction to meet OSHA's standard could bring about a situation in which the far more effective personal protection equipment would not be worn.

Finally, in *RMI Company* v. *Secretary of Labor et al.* (March 13, 1979), the Sixth Circuit Court of Appeals rejected an OSHA proposal to require RMI to spend upwards of $100,000 to reduce noise exposure by means of engineering controls. (The employees affected were already wearing personal protection equipment.) Here the court treated the feasibility question as resolved, noting that a "consensus is developing among the circuits that the term [feasibility] should encompass both technological and economic feasibility" and that "[n]umerous cases have held that [OSHA] should weigh the estimated costs of compliance against the benefits reasonably expected therefrom when promulgating or enforcing a regulation." In short, the court explicitly affirmed the need to compare benefits and costs as a means of determining whether a proposed noise reduction measure was economically feasible.

A Case Study Involving a GM Plant

As we have seen, both the Review Commission and the courts have found benefit-cost analysis essential to assessing the economic feasibility of OSHA's proposals for reducing occupational noise. Moreover, the courts have recognized that health and safety resources, just as all other resources, are limited and therefore should be allocated carefully, to ensure workers insofar as possible the greatest protection from the most serious risks. In what follows, we attempt to illuminate these precedents and their broader implications, as a step toward creating a model for future OSHA noise litigation. The case in point is a GM plant that was cited by OSHA in 1978 for having noise levels exceeding OSHA's noise standard in certain areas. At issue were ten types of high-speed stamping presses used to produce automobile components.

... both the Review Commission and the courts have found benefit-cost analysis essential to assessing the economic feasibility of OSHA's proposals for reducing occupational noise.

Analysis of Benefits. For many years, GM has maintained an extensive hearing conservation program that uses engineering and administrative controls supplemented by personal protection devices where, in the company's judgment, additional administrative and engineering controls are not feasible. From the standpoint of worker protection, how does this program compare with OSHA's proposal?

Table 1 compares the hearing protection afforded under the two plans. Taking GM's program first, the first three columns give the number of employees working in the areas cited, the ambient or measured noise levels (that is, without any protection for employees), and the level of noise actually perceived by the workers (that is, when wearing protection equipment). The figures for perceived noise in column 3 are based on the ambient noise data in column 2 and on the assumption that the personal protection equipment used in the GM program reduces noise by 26.6 dBA. (This figure is based on tests of the technical properties of the earplugs and earmuffs in use.) Thus column 3 presents our estimates of the levels of noise, around each type of equipment, that actually reach the employees' inner ears. This of course is the key figure in determining the potential for an adverse effect of noise. Under the GM program, the noise levels range from a low of 66.9 dBA for the pole piece press to a high of 80.0 dBA for the slitter press (where the operators presumably do not now wear personal protection equipment because the operation meets OSHA's standard).

Turning now to OSHA's proposal, the last three columns show how it would affect the GM workers. A glance at column 4 indicates that, in some cases, this proposal would actually increase the number of employees working in the noisy areas. This is because more workers would be needed to service the machines and to offset productivity losses if the machines were spaced out and placed in noise-suppressing enclosures (as called for in OSHA's pro-

Table 1
NOISE PROTECTION BENEFITS—
GM PROGRAM VS. OSHA RECOMMENDATION

	GM Program			OSHA Recommendation		
Type of Press	(1) Number of workers	(2) Ambient noise (dBA)	(3) Perceived noise (dBA)[a]	(4) Number of workers	(5) Ambient noise (dBA)[b]	(6) Perceived noise (dBA)[a]
Transfer	31	99.4	72.8	34	92.4	65.8
High Speed	32	98.4	71.8	34	91.4	64.8
OBT	7	94.5	67.9	7	87.5	87.5
Straight Side	22	96.4	69.8	31	89.4	89.4
Welding	26	94.0	67.4	27	87.0	87.0
Pole Piece	2	93.5	66.9	2	86.5	86.5
Slitter	8	80.0	60.0	8	80.0	80.0
Link	10	97.5	70.9	10	90.5	63.9
300 Ton	31	99.4	72.8	32	92.5	65.9
Frame	17	95.4	68.8	17	88.4	88.4
Total/Weighted Average Exposure[c]	186	97.6	72.2	202	90.6	84.6

a Assumes the use of ear protectors producing an attenuation of 26.6 dBA in areas where noise exceeds 90 dBA.
b Assumes enclosures producing a mean attenuation of 7.0 dBA.
c Weighted by the number of workers in each equipment category; decibels averaged in antilog form.

posed remedy). Column 5 is based on the assumption that spacing the equipment out and providing enclosures would reduce the ambient noise level by 7 dBA in each case. (This figure reflects both experience with enclosures of the type OSHA recommended and a computer simulation of machine spacing prepared by a GM consultant.) Column 6, which gives our estimates of the noise levels that employees would perceive under OSHA's program, is based on two assumptions: first, that if ambient noise falls below 90 dBA, workers will no longer wear earplugs or earmuffs, so that perceived noise will equal ambient noise; and second, that if ambient noise remains above 90 dBA, employees will wear the plugs or muffs, which will reduce perceived noise by the 26.6 dBA assumed above. Our estimates of the perceived noise levels under the OSHA plan range from 63.9 dBA for the link press to 89.4 dBA for the straight-side press.

The totals in Table 1 show that, whereas 186 employees are now working in the areas cited, the number would be 202 under OSHA's proposal. Moreover, while the proposal would reduce ambient noise levels by an overall average of 7 dBA, it would actually increase *perceived* noise by 12.4 dBA on average. And presumably it is perceived noise that is of key importance to these GM employees.

Table 2, derived from the data in Table 1, shows the number of employees under both programs who would experience noise levels of 60 dBA and higher (rising in 5 dBA increments). Under OSHA's recommendation, 84 employees would experience noise exceeding 80 dBA, whereas no employees would experience that much noise under GM's program. This may be important because OSHA has claimed that some permanent hearing impairment may occur even at noise levels below 90 dBA (see, for example, 39 *Federal Register* 37773, October 24, 1974). However, there are few who claim that noise levels below 80 dBA do any such harm. These findings and OSHA's expressed concern over noise that is louder than 85 dBA imply that the recommended program, rather than generating benefits for the affected employees, might actually cause them physical harm.

Moreover, while [OSHA's] proposal would reduce ambient noise levels by an overall average of 7 dBA, it would actually increase perceived noise by 12.4 dBA on average.

Analysis of Costs. Compliance with OSHA's recommended program would require both one-time capital costs and recurring costs (wages, operating expenses, utilities, et cetera). In order to compare these two types of costs, we have chosen to convert all the estimated one-time costs to an annual basis, using an assumed interest rate of 10 percent. The results are shown in Table 3. For example, the noise reduction enclosures recommended by OSHA would cost $1.7 million to build and would have a useful life of five years. Using the appropriate amortization formula, we find that this is the equivalent of an annual cost of about $449,000. Similarly, the new press building required would cost about $4.8 million to build and

Table 2
WORKERS EXPERIENCING NOISE OF 60 dBA AND ABOVE—GM PROGRAM VS. OSHA RECOMMENDATION

Perceived noise (dBA)	Number of Workers	
	GM program	OSHA recommendation
Over 85	0	84
Over 80	0	84
Over 75	8	92
Over 70	112	92
Over 65	186	158
Over 60	186	202

Table 3
ANNUAL COSTS OF OSHA'S RECOMMENDATION

Type	Annual Costs (in thousands)
Capital Costs	
Construction of machine enclosures	$ 449
Construction of addition to plant	517
Shutdown of press area	91
Relocation of equipment	159
Subtotal	$1,216
Recurring Costs	
Direct labor	$ 168
Indirect labor	228
Added operating expense	293
Additional utilities	190
Personal protection equipment	(2)
Subtotal	$ 937
Total Costs	$2,153

would be expected to last almost twenty-nine years, which works out to an annual cost of some $517,000. As for the other one-time costs (shutdown and relocation), we have assumed they would not be depreciated, and have converted them to annual costs by multiplying them by 0.10, reflecting a 10 percent rate of discount.

These annualized capital costs, plus the recurring costs shown in the bottom half of the table, produce total compliance costs of a little over $2.1 million. If that cost is assigned to the total number of employees covered (202), the cost per employee is some $10,700 a year. Alternatively, if the cost is assigned just to those 74 employees who, under the proposal, would no longer be required to wear personal protection equipment, the cost per employee is over $29,000 a year. Both figures are, of course, much higher than the costs found economically infeasible by the Review Commision and the courts.

Benefit-Cost Comparison. It is difficult to relate the benefits of OSHA's scheme to the costs, for the simple reason that on the whole the scheme would apparently generate *costs* for workers rather than benefits. In any event, assuming our analysis is correct, adoption of OSHA's program would represent the worst kind of expenditure of the nation's resources. Spending initiatives might be categorized into four types, listed here in order of their desirability: (a) spending a given amount of resources and getting in return something that has greater value, (b) spending a given amount of resources and getting in return something that has less (though positive) value, (c) spending a given amount of resources and getting nothing in return, and (d) spending a given amount of resources and losing something in addition. The noise reduction program that OSHA has recommended for the GM plant appears to be of the last variety—it would impose compliance costs of about $2.1 million in return for more noise reaching the workers' ears.

The noise reduction program that OSHA has recommended for the GM plant ... would impose compliance costs of about $2.1 million in return for more noise reaching the workers' ears.

Concluding Remark

Our purpose here has not been to provide a simplistic formula for use in all future OSHA noise-reduction disputes. Rather, we have tried to show how economic analysis can help the Review Commission and the courts judge the economic feasibility of proposed noise-abatement programs. Such analysis can also be useful, we believe, to OSHA in carrying out its mandate—as well as to employers and employees in designing and evaluating the desirability of *voluntary* occupational safety and health programs. ■

James C. Miller III and Bruce Yandle

Benefit/Cost Analysis: New Thermostat for the Regulatory Caldron

The soaring growth of regulation during the 1970s has prompted an increased concern for its economic consequences. Benefit/cost analysis may lend direction and thereby increase benefits, reduce social costs, and help ease inflation.

REGULATION of the U.S. economy to promote certain "social" goals such as a cleaner environment, safer products, and a healthier workplace is certainly not new. What is new is that during the 1970s the federal government's regulatory role has greatly expanded. Indeed, the rate of growth and the all-pervading nature of regulation have raised another serious concern: the stubborn flames of inflation may have a new source of fuel. In fact, there is growing awareness of a linkage between regulation and inflationary pressures. Because of this linkage, and for other reasons, the benefits and costs of government regulatory actions must be considered with extreme care.

Consider the growth of new regulation during the past decade. In 1970 the Environmental Protection Agency (EPA) was established, followed by the Occupational Safety and Health Administration (OSHA) in 1971, and the Consumer Product Safety Commission (CPSC) in 1972. Since 1970 the number of major federal social regulatory agencies has increased from 12 to 17, their annual expenditures have risen fivefold, and the number of pages printed annually in the *Federal Register* has tripled.

This growing edge of federal regulation is not only large, but different in character from that of the past. Instead of more traditional economic regulation dealing with rates and services of specific firms and industries (for example, airlines, truckers, broadcasters, telephone and power companies), the new social regulations cover a broad range of industries and types of commercial activity. Moreover, the new requirements are highly specific. For example, regulations dictate the contents of labels attached to consumer products, prescribe in minute detail a multitude of work practices, mandate specific processes for the treatment of

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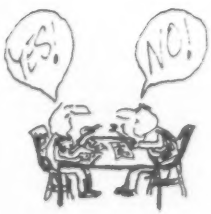
industrial wastes, and establish uniform designs for products as simple as book matches or as complex as automobiles.

If one theme underlies the statutory approach to social regulation, it is the desire for *perfection*—for a world without risk. While everyone dreams of utopia, at some point society is forced to ask, is such perfection in fact feasible? And if so, are further steps in that direction worth the cost? In short, social problems and their solutions take on an economic dimension. The old problems of scarcity and necessary trade-offs cannot be avoided. Nor should they be ignored.

Benefit/Cost Analysis

Economists have developed a technique, called "benefit/cost analysis," for evaluating programs that involve scarcity and trade-offs. Although much maligned by its detractors, benefit/cost analysis can be most useful to a policy maker and quite valuable to the rest of society. Basically, it entails weighing the benefits and costs of a proposal before action is taken. At one extreme, the analysis might be no more quantitative than the policy maker's conclusion that he or she "feels" the benefits of an action outweigh the costs (or the other way around). At the other extreme are highly sophisticated estimates of benefits and costs.

Without question, estimating benefits and costs is often difficult, especially in areas where the benefits may be in terms of lives saved or pain and suffering avoided. Some say this means putting a value on human pain, suffering, and death—which is not only ludicrous, but downright immoral. If anything, we would argue, the reverse is true. Since resources are limited, we cannot avoid the need to identify—and, in some way, to estimate—benefits and costs. Indeed, the more compassion we have for our fellow human beings, the more important this becomes.



One of the most important advantages of benefit/cost analysis is that it can free regulators to focus more on the subjective areas of benefits and costs where quantification in money terms is more difficult. Let us imagine a simple ledger to be used by a regulator for a given regulatory initiative. On the left side are listed first those benefits that can be quantified in money terms and second those that cannot. On the right side are listed first those costs that can be quantified, and then those costs that cannot. By cancelling out the quantified benefits and costs, the regulator is then able to focus on those pluses and minuses that are not easily capable of quantification. An analogy might illustrate the point. Imagine two very large piles of sand, and you are asked which is the larger. If the piles are comparable in size, the decision is very difficult. However, if a "bucket brigade" were organized and equal bucketfuls were taken from each pile in sequence, it would become progressively easier to tell which had been the larger. That is, as their absolute sizes diminish (as the quantified benefits and costs are cancelled out), their *relative* sizes become more apparent.

Thus benefit/cost analysis is merely a short summary of who would benefit by how much from a proposed policy change, and who would be forced to sacrifice, at what cost. When applied, benefit/cost analysis can point the way toward increasing the degree of perfection by identifying ways to minimize costs. Whether or not benefit/cost studies are used, however, *every* policy action reveals that, in the mind of the decision maker(s), benefits do exceed costs and that the distribution of benefits and costs is socially desirable. Thus all policy decisions—whether to adopt a new initiative, to modify existing rules, or to accept the status quo—reveal an implicit benefit/cost analysis, though this is not always admitted by the decision maker.

The Link to Inflation

Benefit/cost analysis focuses on the inflationary effects of regulation in two ways. First, public decision makers are aided when deciding whether a given proposal should be adopted. That is, if the benefits (somehow measured) fall short of the costs (also somehow measured), the proposed project could yield net costs to society. That would be inflationary. The second dimension of benefit/cost analysis has to do with analyzing alternatives—are there alternate ways of securing the same social objective that will impose lower costs on society, or perhaps distribute the costs differently? Or, for a given cost, are there alternatives that would come closer to the goal of perfection, or at least result in a different distribution of

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benefits? This use of benefit/cost analysis is sometimes called "cost-effectiveness analysis," and when applied can cause real incomes to rise, once again reducing inflationary pressures.

Public scrutiny of the possible inflationary effects of regulation was focused initially in President Ford's Council on Wage and Price Stability and has now been expanded with President Carter's creation of the Regulatory Analysis Review Group, the U.S. Regulatory Council, and the Office of the Advisor to the President on Inflation. From the beginning, professional economists staffing these organizations have argued that a narrow focus on federal regulations' impact on conventional price indexes, such as the consumer price index (CPI), would not be particularly helpful. The impact on a gross statistic such as the CPI of even the most costly regulation would be minimal and difficult to determine with any precision. Instead, these groups by and large have adopted the view that the major policy instruments determining the rate of inflation are fiscal and monetary policy, but that, regardless of the fiscal and monetary policies chosen, any policy action that increases the supply of goods and services will lower the rate of inflation and vice versa. This means that a government regulation that generates benefits (that is, addition to aggregate supply) greater than costs (subtraction from aggregate supply) is in a real sense anti-inflationary.

Experience With Analysis

For several years now regulatory agencies (at least those within the executive branch) have produced economic analyses of their major regulatory proposals. In some cases the analyses have been superficial or entirely misdirected—that is, they have not had any particular bearing on the potential inflationary impacts of the proposal or on whether, from the standpoint of benefits and costs, it should be adopted. In other cases the analyses have been an academic exercise, reflecting that the political momentum behind the regulation was so great that it would overpower any finding. Other analyses have been used as a vehicle for an agency staff to perpetuate its pet views on the need for regulation and how it should be carried out. In some of the cases, data relevant to an effective benefit/cost analysis lay buried in the study, while less precise information was highlighted by the agency. Still, these analyses, however imperfect on the whole, have provided useful insights into the reasoning of regulatory agencies (their implicit benefit/cost calculus) and their performance in the public interest.

One reason the agency analyses have been useful and have been no poorer in quality (in fact, some have been excellent) is that many have been scrutinized by a small staff of economists at the Council on Wage and Price Stability. The product of that staff has taken several forms. In most cases, the council's views have been expressed through official written comments or "filings" that have become a part of the formal record in regulatory proceedings. In other instances, detailed analyses have been provided to agencies as a part of an internal review procedure. In practically every instance, these filings or comments have contained benefit/cost analyses of the regulatory proposal(s). A few examples will illustrate.

In March 1976, EPA proposed regulations to impose stricter standards on the effluents discharged by iron and steel plants. As are typical of EPA effluent guidelines, all plants in the industry were to install engineering controls at each major source of effluent in order to reduce certain specified pollutants by some fixed percentage. EPA broke steelmaking into its various process components and defined for each the maximum effluent permitted. Dr. Robert L. Greene, a senior economist at the council, reviewed the EPA proposal and the economic analysis that accompanied it. By ascertaining the incremental cost of pollution control in each of the steelmaking processes, Greene concluded that the overall reduction in effluent contemplated by EPA's proposal could be obtained at much lower cost by tightening the standards for those processes where the incremental costs were low and loosening the standards where the incremental costs were high. For example, Dr. Greene's calculations showed that the annual incremental cost per ton of total suspended solids removed ranged from $1,957 per ton for one steelmaking process to $18,000 per ton for another. Greene concluded that current standard specification could save approximately $16,000 for each ton of solids removed.

A 1976 proposal by the CPSC to improve the safety of book matches was analyzed by Dr. Milton Z. Kafoglis of the council staff. The proposed standard required such things as improved quality control in match manufacturing to reduce the incidence of match head fragmentation, reverse striking surfaces on all match books, delayed ignition, self-extinguishing flame, and a safety latch to inhibit access by children. The standard carried an annual estimated cost of $68 to $70 million. (This contrasted with annual sales revenues of the industry of only $120 million.)

"With such ferment in the regulatory caldron, we feel safe in concluding that the impact of benefit/cost analysis of social regulation will be far more significant in the future."

In its analysis of the proposal, CPSC had not considered the benefits and costs of each component of the proposed standard. Dr. Kafoglis demonstrated that while quality control and reverse friction might be cost-effective, the cover-latch requirement failed to meet the benefit/cost test. CPSC was urged to provide a more careful analysis of the proposed standard before going forward with its final rule, and in the end the latch requirement was dropped.

The occupational-noise standard proposed by OSHA provides yet another example of the application of benefit/cost analysis to social regulation. OSHA's proposal set 90 decibels as the maximum noise level to which workers could be exposed in an eight-hour day. In typical fashion, the proposal required application of engineering controls where feasible, continuous monitoring where noise levels exceeded 85 decibels, and maintenance of certain noise and health records. OSHA estimated the capital cost for compliance at $10 billion.

In his analysis of OSHA's standard, council economist Dr. John F. Morrall

III demonstrated important shortcomings in OSHA's approach. Morrall estimated the incremental benefits and costs associated with various levels of noise reduction for different industries. He also examined the regulatory alternatives: OSHA's proposal for engineering controls, hearing protectors for workers, and combinations of the two. Dr. Morrall determined that significant reductions in hearing loss could be obtained at a lower cost if hearing protectors were used instead of, or in combination with, engineering controls.

In a second part of his analysis, Morrall considered worker exposure to noise on an industry-by-industry basis. From this study he was able to demonstrate that more workers could be protected for the same cost if the standard were varied by industry. In other words, the focus of the standard needed to be directed toward the number of workers exposed to noise and the cost of noise reduction, not to the level of noise itself. Along these lines, it was shown that for the same cost 12 times as many workers could be protected with a 90-decibel standard in the electrical machinery industry as could be protected in the textile, lumber, primary metals, or nonelectrical machinery industry. This suggested that while perhaps engineering controls were cost-effective in some industries, hearing protectors were more cost-effective for others.

The OSHA noise standard is just one example of a very costly regulatory proposal that contained the prospects of greater benefits at a much lower cost. The council's focus on marginal analysis and economic efficiency called attention to these considerations—often cast aside in an agency's rush to regulate.

Three Conclusions

The experience to date with regulatory analyses suggests three propositions that command a fair degree of consensus. First, beyond the analyses themselves, one is impressed by the tremendous variation in statutory standards and agency approaches to generically similar issues—such as the regulation of carcinogens. At one extreme, in many regulatory activities of the CPSC, the statutes require that costs as well as benefits be taken into account. At the other extreme, food additives for which there is any evidence of a risk of cancer must, by statute, be banned—regardless of costs. In the middle category, an agency has some discretion to use benefit/cost analysis but chooses a policy that may or may not involve a careful weighing of benefits and costs. An example is OSHA's proclivity to eliminate worker exposure to unhealthful substances so long as this doesn't bankrupt the industry involved and thus put the protected workers out of a job.

A second lesson is that agencies develop considerable momentum and tend to reflect the views of those constituents that urged their formation and support their continuation. Thus, for example, CPSC proposals are typically tough on the side of consumers, OSHA proposals are responsive to the views of organized labor, and proposals by EPA generally reflect the views of environmentalists.

A third lesson is the importance of monitoring the performance of regulatory agencies. Since agencies do not typically overlap in their regulatory responsibilities, there is not the spur of competition that exists in the private sector. That is, inefficient agencies are not weeded out and supplanted by more efficient ones. For this reason, it is extremely important that the performance of agencies be monitored closely, and benefit/cost analysis can assist in that task.

With such ferment in the regulatory caldron, we feel safe in concluding that the impact of benefit/cost analysis of social regulation will be far more significant in the future. As more and more critical attention is directed toward regulatory phenomena, agency personnel will express far greater interest in acquiring the skills of economic analysis and in using that skill to guide their decision-making processes. With such a multitude of regulations yet to be written, there will be many opportunities to apply benefit/cost analysis in ways that can expand benefits and reduce costs. In the process, the heat of inflation may be lowered a perceptible degree.□

QUESTIONS POSED TO MR. MILLER BY SENATOR LAXALT

Question 1. Assuming that the President or his designee is given the authority to designate certain rules as "major," do you feel that the President or his designee should also have the power to waive regulatory analysis for certain major rules? If you support such waiver authority, please give specific examples (in addition to IRS rules) of rules for which such a waiver power would be needed. If you favor such waiver power, but with criteria set out in the statute, please elaborate on the details of such criteria. In addition, if you favor the addition of a waiver power, please explain why you do not feel that putting such discretion in the Executive inserts a major loophole in the requirements of S. 1080. Should the exercise of such a power be subject to judicial review?

Answer. The answer to this depends on the structure of the bill itself. There is a critical link in our view between the need for flexibility and the provisions for Executive oversight and judicial review of major rule determinations. If there is going to be judicial review of major rule determinations, in particular the determinations under subparagraphs (ii) and (iii) of the definition, then we believe there must also be a waiver provision. The specifications in those subparagraphs are sufficiently broad that almost any rule could arguably be considered major. The agencies would be forced into an untenable choice of either performing a full regulatory impact analysis of all rules conceivably within those definitions, or taking the risk of proceeding without the analysis. In the first case, the requirement would become unmanageable; in the second case, there would be the constant risk of judicial reversal. The solution to this, in our view, is a limitation of the judicial review provision to subparagraph (i) of the definition. The definitions in subparagraphs (ii) and (iii) would remain, but the determination of whether a rule fits within the definitions would be left to the President or his designee. The definition in subparagraph (i) should also be clarified, as suggested in our testimony and in our response to question No. 6. We believe that such changes would serve the need for flexibility without creating the kind of waiver that could constitute a major loophole in S. 1080.

There is also, of course, an immediate need to preserve flexibility in the initial phases of our regulatory relief program. We are still in the learning process with respect to the implementation of Executive Order 12291, and our authority under the Order to waive the regulatory impact analysis requirement is essential to that learning process. As it is now drafted, S. 1080 addresses this concern by providing for a delayed effective date of January 1, 1983. We want to emphasize that this delayed effective date is critical, and without it, we would strongly urge a limited waiver provision.

Question 2. When considering the definition of a major rule, most witnesses addressed subparagraph (i), dealing with $100,000 million in compliance costs. Do you feel that subparagraphs (ii) and (iii) are too vague to be practically useful? Are these subparagraphs necessary?

Answer. We believe that subparagraphs (ii) and (iii) serve a useful purpose, provided that the determination of whether a rule falls within one of these categories is left to the Executive Branch and is not subject to judicial review.

Question 3. Do you feel that the provision excluding IRS regulations from the definition of a "major rule," and thereby exempting such rules from regulatory analysis, is necessary? If you do, would such an exclusion be necessary if the Executive was given the power to waive regulatory analysis?

Answer. We agree with the exclusion of IRS regulations from the definition of "major rule" so long as it is clear that this exclusion does not affect the President's authority to require IRS to comport with such programs as detailed in Executive Order 12291. The ability of the President to "fill in the gaps" of the legislation is, in our view, preferable to having the legislation cover everything and then relying on a waiver authority to make the requirements workable.

Question 4. One of the witnesss spoke of the different balances of regulatory benefits and costs set by Congress in other statutes. Has Congress set such "balances" in other statutes? If so, do those Congressional judgments in other statutes preclude the application of S. 1080's regulatory analysis? Please be specific in your references to provisions in other statutes.

Answer. We do not have a complete list of all statutes that preclude or limit application of a full benefit-cost analysis, but this is certainly a problem. For instance, the Delaney Amendment to the Food, Drug and Cosmetic Act may preclude any weighing of benefits and costs, once evidence is found that a food additive may be carcinogenic. Some court decisions have also construed the OSHA statute and portions of the Clean Air Act as precluding consideration of costs and benefits.

The President's Executive Order deals with this problem by requiring a benefit-cost analysis for all major rules, even though the ultimate decision may be limited by Congressional mandate. In this way, the advantages of a thorough analysis are achieved without frustrating Congressional intent. This same result, we believe, would be achieved by S. 1080.

Question 5. In the past, some have suggested that all judicial review of rule making be vested in the Court of Appeals. Do you support such a change in jurisdiction? If so, please discuss the practical application of such a change. How would such a jurisdictional change affect post-enforcement review of rules? Don't the District Courts offer more opportunities for settlement than the more rigid procedures of the Courts of Appeals?

Answer. We do not suggest that all judicial review of rulemaking be vested in the Courts of Appeals. Indeed, we would be concerned that such a change would overload the Courts of Appeals.

Question 6. Should a deregulatory rulemaking be subject to regulatory analysis?

Answer. This may be a definitional problem as much as anything else. For instance, if there is an existing regulatory program that imposes compliance and enforcement costs of over $200 million and a regulatory change in that program would lower the cost to $100 million, we do not think the rulemaking change should be considered "major." That category should be reserved for rulemakings that will increase costs. On the other hand, the fact that a rule is not major should not exempt it from some form of regulatory analysis. All rulemaking should be subject to a careful analysis of the objectives of the rule and its potential consequences, whether the rules are major, nonmajor, or "deregulatory." In determining what class of rule requires the closest economic scrutiny, however, it only makes sense to focus on those rules that will lead to substantial increases in costs.

Question 7. Many have said that regulatory analysis should not be the sole criterion of a rulemaking. What impact should regulatory analysis, as provided in S. 1080, have on a particular regulatory decision? What other criteria should be guiding a regulator in addition to the regulatory analysis?

Answer. We think that full-fledged regulatory analysis of proposed regulation is rarely sufficient by itself. Sometimes its use could be non- or counterproductive. If, for example, you are dealing with a minor rule, you could end up spending sums on the analysis that are greater than the costs of the rule itself. That would be on the order of trying to hit a mosquito with a shotgun.

In terms of the other criteria, they must be determined on a case-by-case basis. There are values and factors which may be nonquantifiable, but of great importance to an overall analysis. The point of a good regulatory analysis is to present in a systematic way the information that is available for comparison and to highlight areas where judgment and/or more data are needed. We are dealing with an emerging art, where discretion and individual judgment must be employed, not a hard science where formulae can automatically be applied with mathematical precision.

Question 8. What will happen to Executive Order 12291 if S. 1080 becomes law?

Answer. The Executive Order would continue as an important part of this Administration's regulatory program. Its exact role will depend on the final scope of S. 1080.

It is our understanding that S. 1080 does not intend to preempt the assertion of Executive authority contained in E.O. 12291. That means, at a minimum, that E.O. 12291 will govern in those areas that S. 1080 does not cover, such as IRS rules, and that a regulatory impact analysis can be required under E.O. 12291, even though not required under S. 1080. In addition, OMB and the Task Force's role in monitoring and ensuring compliance with the principles set forth in S. 1080 and E.O. 12291 would continue. This is inherently an Executive function, and we think S. 1080 should make this point clear. Finally, S. 1080 would affect the current authority contained in E.O. 12291 that allows OMB or the Task Force to waive the requirement of a regulatory impact analysis. Properly analyzed, S. 1080 does not deprive the Executive Branch of this authority, but rather makes it subject to judicial review under the "arbitrary and capricious" standard. This is a problem that, as we have indicated earlier, can be resolved through minor drafting changes.

Question 9. During the last Congress, the Congressional Budget Office "assumed that the regulatory analysis proposed in legislation at that time would cost $100,000 for each analysis." I say "assumed" because that is the word they used, and they did not provide further information for us to see how they arrived at that assumption.

How much would you estimate a regulatory impact analysis under the Executive Order to cost? Would the cost be roughly the same for an analyis under S. 1080?

Please submit several Regulatory Impact Analyses as examples.

Answer. Prior experience with regulatory impact analyses indicates that their cost varies significantly depending on the individual agency and regulation involved. In the past, the costs have ranged from $10,000 to $400,000. CBO's $100,000 estimate for the average analysis is, we believe, reasonably accurate, although perhaps on the low side. The cost would be roughly the same for an analysis under S. 1080.

We are sending under separate cover the Regulatory Impact Analysis prepared by the National Highway Transportation Safety Administration in connection with its final rule postponing the effective date of the passive restraint requirements.

Question 10. In his 1977 article, "Lessons of the Economic Impact Statement Program," Mr. Miller wrote:

"The fourth thing we learned is that the program the EIS program costs the agencies little in terms of resources. One reason is that the OMB circular promulgating the program stated that it would be met within the existing budget. The argument was that agencies already possessed a capability for economic analysis and that the EIS program would merely redirect that effort. Predictably, this has proved to be a bone of contention, and nearly every agency has urged that this policy be reconsidered. It appears, however, that few additional resources have been required. Existing policy staffs have been utilized a bit more intensively than they were, with their efforts supplemented on occasion by other personnel in the agency."

Has this experience under President Ford's EIS program been repeated under E.O. 12291? Have the agencies requested additional staff and larger budgets in order to satisfy the requirements of E.O. 12291? If so, please describe the requests, including the specific staff and budgetary increases sought, and the responses made to such requests.

Answer. We are not aware of any requests for additional staff and larger budgets to satisfy the requirements of E.O. 12291.

In between E.O. 12291 and President Ford's EIS program was E.O. 12044. E.O. 12044 required regulatory analyses of all malor rules, as does E.S. 12291. The major differences between Executive Orders 12044 and 12291 are: (1) E.O. 12291 requires selection of that alternative which results in a net positive benefit to the society and is least burdensome; and (2) E.O. 12291 imposes an OMB review requirement before a regulatory proposal is published in the Federal Register.

Agencies are thus not expected to do significantly more analysis than they were supposed to do under E.O. 12044. Rather, they will be required to pay more attention to the results of the cost-benefit analysis. Additionally, the OMB review process will ensure that agencies prepare analyses in support of their rules.

All agencies had developed analytical staffs to comply with E.O. 12044. Even though these analyses are not of the same caliber, resources exist to prepare such analyses. Therefore, we do not anticipate agencies will require substantial additionally resources to comply with E.O. 12291. It should be noted that for those agencies that did not comply with E.O. 12044, some additional resources would be needed. We expect such deficient agencies to comply with E.O. 12291 by reprogramming their existing resources.

Question 11. OMB or the Regulatory Relief Task Force operates without the procedural safeguards for fairness mandated by the Administrative Procedure Act. Is it wise to shape regulatory policy in a manner insulated from those procedures, through a mechanism like OMB or the Task Force?

Answer. In fact, Executive Order 12291 does establish procedureal safeguards. The Order requires that OMB's views on a final regulatory impact analysis be incorporated into the agency's rulemaking file, along with the agency's response to those views. This insures that any critical factual information developed in the review process will be made part of the public record.

In addition, we are publishing guidelines governing contacts between the public and OMB or the Task Force staff (see attachment). These guidelines underscore our commitment to having all material factual information placed in the public record and to maintaining complete procedural fairness.

Question 12. The "General Requirements" of E.O. 12291 (Section 2) are imposed "to the extent permitted by Law." What does this phrase mean? What law does not permit the requirements of E.O. 12291 to be applied to regulatory action? What law limits the application of E.O. 12291?

The phrase refers to the limitations Congress has imposed on the consideration of benefits and costs for a particular regulatory program. As we indicated in answer to question No. 4, these statutory provisions do not preclude an agency from conducting a benefit-cost analysis, but may preclude the agency from adopting the alternative suggested by such an analysis.

QUESTIONS POSED TO MR. MILLER BY SENATOR LEAHY

Question 1. The Executive Order directs the agencies when they issue regulations, to choose the least costly alternative as well as the alternative which maximizes the net benefits to society.

Unless the goal of the regulation is quite specific, are there not situations where these two standards will be inconsistent?

Answer. No. The first requirement is that for any regulatory goal the least costly method of meeting that goal be adopted. The requirement for maximizing net benefits goes to the question of choosing among goals. To the extent allowed by law, the Executive Order requires the agency to choose among definable goals that where the benefits exceed the costs by the greatest amount.

An example might illustrate. Suppose that an agency were establishing a standard for exposure to a hazardous substance. If the benefit of reducing exposure to the "0.02" level were $500 million, and if technologies were available for securing this goal costing $1 billion, $400 million, and $300 million respectively, then obviously the third technology is cost-effective. Support further that three alternatives, legally permissible goals are considered: "0.05," with benefits of $200 million and costs of $100 million; "0.02" exposure, as described; and "0.01" exposure, with benefits of $600 million and costs of $550 million. In such a case, obviously the second alternative should be chosen.

Question 2. One of my chief concerns is that by focusing on the costs and benefits of individual rules, we may end up ignoring a more important question which is what are the aggregate costs our various regulatory programs are imposing on individual industries and on the American public in general. How would you suggest we on this Subcommittee address that question?

Answer. This is a very real and very realistic concern. We are convinced that this entire area of coordinating and rationalizing the impacts of multi-levels of regulation will be one of the issues for the coming decade. Some have put forward the idea of a "regulatory budget" as a way of focusing the kind of systemic review of regulation that is needed. We have a great deal of enthusiasm for this concept, although it is absolutely crucial that we do not overstep ourselves here since implementation problems may be the big stumbling block. The Subcommittee can continue its valuable work by drawing attention, first, to the need for coordination among regulatory programs and agencies, not just by the Executive Branch, but also in Congress as the time for renewing or enacting major laws arrives. Second, the Subcommittee can be of great service in beginning the process of discussing alternative means of ensuring coordination—for both the Executive and the Legislative Branches—as well as the potential mis-steps to be avoided.

Question 3. I read with interest, an interview you gave to the Washington Post in March of this year. You're quoted in the article as saying "there is a strong feeling on the part of the White House Staff that we ought to be decentralizing" regulatory enforcement. I am interested in who that enforcement authority is going to be decentralized to. (1) Have you heard from state and local governments that they are demanding additional authority to police violations of the Clean Air Act and the Occupational Safety and Health Act? (2) Did you mean by that statement that perhaps the regulated industries ought to try to police themselves? (3) If we are going to decentralize to state and local governments, where are they going to get the resources to effectively implement environmental or health regulatory programs?

Answer. State and local governments are in fact asking for additional authority. In the context of the Clean Air Act, for instance, we have heard from the State and Territorial Air Pollution Program Administrators, the National Governors Association, and other state and local groups, all arguing that greater authority should be given to the states in the development of State Implementation Plans. These groups are confident that they have the ability to implement such programs and we share that confidence. In fact, in the current situation, the federal government's involvement does not relieve the states of an administrative burden, but rather imposes an additional and duplicative level of review. Federal assistance and support will still be available, however, particularly in technical areas where the federal government has the necessary resources and expertise.

Question 4. I understand you have had many conversations with a wide variety of representatives of private interest groups since the Administration took office in January. Have any of these contacts involved discussions of specific rulemakings?

Did you place a summary of the substance of those conversations in the rulemaking record?

Are you working on rules to govern ex parte contacts with OMB?

Do you intend to solicit public comment on the nature of any ex parte rules you adopt?

Answer. In all our conversations with outside groups, we have followed a simple rule: We will only discuss factual material related to a rulemaking if that material has been given to the agency involved. This is, in our view, the appropriate procedure to follow and avoids any questions of improper *ex parte* communications. See *Sierra Club* v. *Costle*, —— F.2d —— (D.C. Cir. April 29, 1981), which explains the principles which we have been following since the Executive Order was signed and which we shall continue to follow.

We have just issued guidelines on this matter and we will, of course, entertain revisions based on any comments we receive.

Question 5. You are quoted in the April 1, 1981 Washington Post as saying, "When people talk about the money earned because of regulations, that's cost to society, that's not a benefit. This means that resources are going into that when they could go into productive operations. By definition, that's a cost." I take you to mean, Dr. Miller, that a rule which helps prevent a coal miner from contracting black lung disease is unproductive because it produces no good or service. Is that correct? Do you believe that regulation which results in cleaner air or cleaner water is not producing something productive and valuable to the society? Why shouldn't we measure this as an output of our economy?

When we manufacture products which are unsafe or unhealthy, but are produced less expensively than products which avoid these hazards, aren't we building in hidden costs which will be paid by the society in years to come?

Answer. I think you have misunderstood the meaning of my remarks. I agree entirely that regulations resulting in a healthier and safer environment are productive and valuable to society; those are the benefits of the regulation. But to also characterize the resources used to achieve these benefits as an additional benefit is double-counting of the worst sort. Resources used in reducing worker exposure to coal dust are the cost of securing a reduction in the incidence of black lung (the benefit). Resources used to manufacture pollution control devices are the cost of securing cleaner air and water (the associated benefit).

Unsafe or unhealthy products have associated costs which may be hidden or not, depending on the situation.

Question 6. You've asked the regulatory agencies to do a substantial amount of economic analysis. What makes you think that the agencies have the staff resources to do a professional job of implementing the requirements of the Executive Order? Have you talked to Director Stockman about ensuring that fiscal year 1982 budgets of the regulatory agencies have sufficient money allocated to do adequate regulatory analyses? You are quoted in a recent issue of Regulation Magazine as saying "There's plenty of fat in agencies' budgets for that," referring to money needed to do regulatory impact analyses. Mr. Miller, how do you know that? Have you done a study of waste and abuse in regulatory agency budgets? Has Director Stockman? Have you discussed it with the Director?

First, I am not aware of any requests for additional staff or larger budgets to satisfy the requirements of Executive Order 12291. It must be remembered that President Carter's Executive Order 12044 required regulatory analysis of all major rules, as does E.O. 12291. The major differences between the Orders are: (1) E.O. 12291 requires selection of that alternative which results in a net positive benefit to society and is least burdensome; and (2) E.O. 12291 imposes an OMB review requirement before a regulatory proposal is published in the Federal Register.

Agencies are thus not expected to do significantly more analysis than they were supposed to do under E.O. 12044. Rather, they will be required to pay more attention to the results of their benefit-cost analyses.

All agencies have developed analytical staffs to comply with E.O. 12044. Therefore, we do not anticipate agencies will require additional resources to comply with E.O. 12291. For those agencies whose compliance with E.O. 12044 was deficient, we expect compliance with E.O. 12291, if necessary, a reallocation of existing resources.

Question Posed to Mr. Weidenbaum by Senator Leahy

Question 7. The Vice President's Task Force has the authority to review and recommend changes in a notice of proposed rulemaking or a final agency regulation. What is the process if the agency and the task force disagree? Can the task force order the agency to adopt a position different from the one it believes to be correct? If the task force and the agency disagree, but the agency is convinced by the task force to make changes in a rule based on the task force's recommendations, how is the public made aware of the thinking behind the rule which really took place outside the agency?

Answer. It is important to remember that it is the agency which continues to have the final responsibility for the regulations it issues, subject of course to the

President and the dictates of law. To view the relation of the Task Force to the agencies as simply one of boss and employee would be a fundamental misconception. Rather, the relationship is more one of colleagues in a joint effort who attempt to reason with each other through the logic of their position—and their consistency with the President's programs and principles—rather than through a hierarchical structure. If in the course of discussion the Task Force convinces the agency of a particular point—or vice versa—it simply means that several heads have gotten together and hopefully arrived at a better result.

I stressed that the agency maintains its authority in the final analysis because that is the way the system operates. If the agency were to go ahead with a proposal over the objection of the Task Force, it would run the risk of action by the President, but it is up to the agency to decide whether to take that risk. Similarly, if an agency adopts after reflection what was originally the Task Force's view, it does so only because that is what the agency views as correct after detailed study. Either way, the public is made aware of the thinking of the agency which is determinative of what steps the agency will or will not take.

QUESTIONS POSED TO MR. MILLER BY SENATOR LEAHY

Question 8. The Administration has petitioned the Supreme Court to remand the OSHA Cotton Dust rule so that the agency can do a regulatory impact analysis of that regulation. I understand that the Carter Administration did an extensive regulatory analysis under Executive Order 12044. Did you advise the Department of Labor that the analysis under President Carter's Executive Order was inadequate?

Answer. Yes.

Question. Don't you think it would have been reasonable for the Labor Department to have decided that the regulation issued by the Carter Administration was not cost-effective before seeking a remand of a case which had already been argued before the Supreme Court?

Answer. No, because a Supreme Court decision could have mooted the point.

Question. Would you provide the Committee with any correspondence either of you or your offices had with the Department of Labor on this matter?

Answer. There was no such correspondence.

QUESTIONS POSED TO MR. WEIDENBAUM BY SENATOR LEAHY

Question 9. Many of our witnesses today have criticized S. 1080's definition of a "major rule." Some view it as too broad, others as too narrow. How would you characterize the major rule definition?

Do you think an Agency's determination that a rule is major should be subject to judicial review?

Answer. We believe that the $100 million test contained in subparagraph (i) of the definition is a reliable benchmark for major rule determinations, provided that the definition is limited to increased costs of $100 million. The more subjective definitions contained in subparagraphs (ii) and (iii) are also useful, but the determination of whether a rule falls within one of those categories should be left to the Executive Branch.

Judicial review, in our view, should be limited to the $100 million test. Otherwise, agencies would be forced into an untenable choice of either performing a full regulatory impact analysis of all rules conceivably covered by subparagraphs (ii) or (iii), or taking the risk of proceeding without the analysis. In the first case, the requirement would become unmanageable; in the second case, there would be the constant risk of judicial reversal.

QUESTIONS POSED TO MR. MILLER BY SENATOR LEAHY

Question 10. Please describe any guidelines you have prepared for the agencies to use in implementing Executive Order 12291, including guidelines on the preparation of a Regulatory Impact Analysis and the logging or other handling of ex parte communications.

Answer. Attached are interim guidelines for the preparation of Regulatory Impact Analysis, as well as guidelines on ex parte communications.

ATTACHMENT TO QUESTION NO. 10

EXECUTIVE OFFICE OF THE PRESIDENT,
OFFICE OF MANAGEMENT AND BUDGET,
Washington, D.C.

INTERIM REGULATORY IMPACT ANALYSIS GUIDANCE

A Regulatory Impact Analysis (RIA) should demonstrate that a proposed regulatory action satisfies the requirements of Section 2 of Executive Order 12291. To do so, it should show that:

There is adequate information concerning the need for and consequences of the proposed action;

The potential benefits to society outweigh the potential costs; and

Of all the alternative approaches to the given regulatory objective, the proposed action will maximize net benefits to society.

The fundamental test of a satisfactory RIA is whether it enables independent reviewers to make an informed judgment that the objectives of E.O. 12291 are satisified. An RIA that includes all the elements described below is likely to fulfull this requirement. Although variations consistent with the spirit and intent of the Executive Order may be warranted for some proposed or existing rules, most RIAs are expected to include these elements.

This document is written primarily in terms of proposed regulatory changes. However, it is equally applicable to the review of existing regulations. In the latter case, the impact of the regulation under review should be compared to a baseline case of no regulation and to reasonable alternatives.

ELEMENTS OF A REGULATORY IMPACT ANALYSIS

Preliminary and final Regulatory Impact Analyses of major rules should contain five elements.

1. Statement of need for and consequences of the proposal

The statement of the need for and consequences of the proposed regulatory change should address the following questions:

(a) What precisely is the problem that needs to be corrected? (That is, what market imperfection(s) give(s) rise to the regulatory proposal? Causes, not just symptoms, should be identified.)

(b) How would the regulatory proposal, if promulgated, improve the functioning of the market, or otherwise meet the regulatory objective(s)? Since regulatory failure may be a real possibility, is it clear that the proposed regulation would produce better results than no regulatory change? (Imperfectly functioning markets should not be compared with idealized, perfectly functioning regulatory programs.)

2. An examination of alternative approaches

The RIA should show that the agency has considered the most important alternative approaches to the problem and must provide the agency's reasoning for selecting the proposed regulatory change over such alternatives. Although only the most promising alternatives need be evaluated at length, the agency should consider:

(a) The consequences of having no regulation. (Are there existing or potential market, or judicial, or state or local regulatory, mechanisms that could resolve the problem? For example, RIAs for health and safety regulations should consider the adequacy of tort law or state programs such as workmen's compensation.)

(b) The major alternatives (if any) that might lie beyond the scope of the specific legislative provision under which the proposed regulation is being promulgated. (This may require a broad comparison across programs, including those both within and outside the jurisdiction of the issuing agency.)

(c) Alternatives within the scope of the specific legislative provision. These include: (i) Alternative stringency levels; (ii) Alternative effective dates; and (iii) Alternative methods of ensuring compliance.

(d) Alternative, market-oriented ways of regulating (whether or not they are explicitly authorized in the agency's legislative mandate), including: (i) Information or labeling (to enable consumers or workers to evaluate hazards themselves); (ii) Performance rather than design standards; and (iii) Economic incentives, such as fees or charges, marketable permits or offsets, changes in insurance provisions, or changes in property rights.

3. Analysis of benefits and costs

(a) Benefit estimates:

The RIA should state the beneficial effects of the proposed regulatory change and its principal alternatives. It should include estimates of the present value of all potential real incremental benefits to society. Benefits that can be estimated in monetary terms should be expressed in constant dollars. Other favorable effects should be described in detail and quantified where possible. An annual discount rate of 10 percent should be used; however, where it appears desirable, other discount rates also may be used to test the sensitivity of the results. Assumptions should be stated, and the RIA should identify the data or studies on which the analysis is based.

There shoud be an explanation of the mechanism by which the proposed action is expected to yield the anticipated benefits.

A schedule of benefits should be included that would show the type of benefit, to whom it would accrue, and when it would accrue. The numbers in this table should be expressed in constant dollar terms.

(b) Cost estimates:

The analysis should include estimates of the present value of all the real incremental costs of the proposed regulatory change and its principal alternatives (i.e., the costs that would be incurred by society as a result of taking the proposed action or an alternative). All costs that can be estimated in monetary terms should be expressed in constant dollars. Other costs should be described completely and quantified where possible. An annual discount rate of 10 recent should be used; however, where it appears desirable, other discount rates also may be used to test the sensitivity of the results.

To support the present value estimates, a schedule of costs should be included that would identify the type of cost (capital, recurring, etc.), who would bear that cost, and when that cost would be incurred. The numbers in this table should be expressed in constant dollar terms. Assumptions should be stated, and the RIA should identify the data or studies on which the analysis is based.

Where possible, various adverse effects of the regulation—such as those from reductions in competition, innovative activity, or productivity growth—should also be identified.

Transfer payments from one group to another, such as taxes and insurance premiums, should not be included in the calculation of real resource costs, but they nevertheless should be identified. Any major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions also should be identified.

(c) Net benefit estimates: The monetary social cost should be subtracted from the monetary social benefit to obtain the monetary net benefit estimate (which could be negative). Any remaining nonmonetary but quantifiable benefit and cost information also shoud be presented. Then, nonquantifiable benefits and costs should be listed, in a way that facilitates making an informed final decision. Where many benefits are not easily quantified, the results should show the cost-effectiveness of the several alternatives. When there are major uncertainties affecting the assumptions or the methodology, the most likely or best estimates should be used, but reasonable alternative assumptions also should be examined to test the sensitivity of the results to changes in assumptions. The results should be arrayed so that the policymaker can easily see the effects of the different assumptions.

4. Rationale for choosing the proposed regulatory action

The RIA should include an explanation of the reasons for choosing the selected regulation. Ordinarily the regulatory alternative selected should be the one that achieves the greatest net benefits. If legal constraints prevent this choice, they should be identified and explained, and their net cost should be estimated.

5. Statutory authority

The RIA should include a statement of determination and explanation that the proposed regulatory action is within the agency's statutory authority.

EXECUTIVE OFFICE OF THE PRESIDENT,
OFFICE OF MANAGEMENT AND BUDGET,
Washington, D.C., June 11, 1981.

Memorandum: For heads of executive departments and agencies.
From: David A. Stockman, Director.
Subject: Certain Communications Pursuant to Executive Order 12291, "Federal Regulation."

Regulatory relief is one of the cornerstones of President Reagan's program of economic recovery. As an important step in achieving regulatory relief, on February

17, 1981, the President issued Executive Order 12291, "Federal Regulation." This memorandum explains how the Presidential Task Force on Regulatory Relief and the Office of Management and Budget (OMB) will communicate with the public and the agencies regarding proposed regulations covered by E.O. 12291. It also described certain obligations of the public and agencies in this regard.

A major purpose of the Executive Order is to ensure that, to the extent permitted by law, regulatory decisions are based upon sound analysis of the potential consequences. Toward this end, a comprehensive factual basis is essential to assist agencies and other interested parties in assessing the economic and other ramifications of proposed regulations.

Under the Executive Order, both the Task Force and OMB will be reviewing factual materials related to regulatory proposals. Both the public and the agencies should understand that the primary forum for receiving factual communications regarding proposed rules is the agency issuing the proposal, not the Task Force or OMB. Factual materials that are sent to the Task Force or OMB regarding proposed regulations should indicate that they have also been sent to the relevant agency. Pursuant to this policy, the Task Force and OMB will regularly advise those members of the public with whom they communicate that relevant factual materials submitted to them should also be sent to the agency for inclusion in the rulemaking record. Accordingly, agencies receiving such materials from the public should take care to see that they are placed in the record.

On occasion, the Task Force staff and OMB will receive or develop factual material which they believe should be considered by an agency during a particular informal rulemaking. In accordance with advice provided by the Department of Justice, such material, when submitted to an agency for its consideration, will be identified as material appropriate for the whole record of the agency rulemaking.

Two additional matters should be noted. First, our procedures will be consistent with the holding of and policies discussed in *Sierra Club* v. *Costle*, No. 79-1565, slip op. at 212-20 (D.C. Cir. April 29, 1981). Second, these procedures apply only to informal rulemaking proceedings and are not in any sense intended to affect the more stringent ex parte rules applicable to agency adjudications and formal rulemakings. (Such proceedings are expressly intended by Congress to be more in the nature of formal judicial proceedings and involve bars against various forms of ex parte communication.)

Question 11. Please list those rules or classes of rules for which the Task Force has waived the Regulatory Impact Analysis requirements of the Executive Order.

Answer. In order to prevent unnecessary delays for certain classes of routine regulations, the Director of OMB has granted waivers to cover certain generic classes of regulations. These have been granted with the condition that any rule within these groups may still be designated as major and that OMB reserves the right to withdraw the waiver at any time. Waivers of this type have been granted to the Department of Transportation for airworthiness directives, airspace control requirements, standard instrument approach regulations, enroute altitude regulations, Coast Guard regatta regulations, safety zone regulations, and security zone regulations; to the Treasury Department for revenue rulings and procedures, customs decisions, legal determinations and other similar rulings; and to the Environmental Protection agency for a class of pesticide tolerance rulings. In addition, OMB waived the impact analysis requirements for a Department of Commerce rule defining "coastal zone," a Farmers Home Administration rule relating to the Emergency Loan Program, and a Department of Transportation rule relating to Minimum Levels of Financial Responsibility for Motor Carriers.

Question 12. Please list those rules or classes of rules which the Task Force designated as "major" after the agency determined that they were not major rules.

Answer. The only such rule is a Department of Transportation rule relating to Minimum Levels of Financial Responsibility for Motor Carriers (BMCS Dkt. No. MC-94).

Question 13. Has the Regulatory Impact Analysis requirement been waived in any case where the agency did not make the request for the waiver?

Answer. No.

Question 14. Has the Regulatory Impact Analysis requirement been waived in any case at the request of a party outside the government?

Answer. No.

Question 15. When the Task Force waives the Regulatory Impact Analysis requirement or designates a rule as major after an agency has determined that it is not a major rule, do you submit detailed reasons for that action in writing? Are the reasons for the Task Force's actions or a summary of those reasons published or otherwise available to the public?

Answer. Attached are the letters setting forth the waivers described in response to Question 11, as well as the letters sent to the various agencies informing them of rules that must be reviewed pursuant to Section 3(i) of the Executive Order, and the letter designating a rule as major pursuant to Section 6(a)(i).

ATTACHMENT TO QUESTION NO. 15

EXECUTIVE OFFICE OF THE PRESIDENT,
OFFICE OF MANAGEMENT AND BUDGET,
Washington, D.C., March 26, 1981.

Memorandum: For the Secretary of the Treasury.
Subject: Executive Order 12291.

By virtue of the authority vested in me under Executive Order 12291, I hereby partially exempt from the requirements of that Order regulations and rulings of the Department of the Treasury pursuant to the attached memorandum.

DAVID A. STOCKMAN, *Director*

Attachment.

[Memorandum]

TREASURY AND OMB IMPLEMENTATION OF EXECUTIVE ORDER 12291

GENERAL

Treasury economists will be responsible for: (a) Identifying economic issues in Treasury regulations; (b) Designating regulations or rulings of possible interest to OMB; and (c) Preparing Regulatory Impact Analyses, when required.

IRS, ATF, AND CUSTOMS

Rulings

(a) E.O. provisions are waived with respect to revenue rulings & procedures, Customs decisions, legal determinations, and other similar ruling documents.

(b) Treasury will be responsible for alerting OMB to any ruling document that reasonably could be expected to have a significant economic impact, particularly rulings in which the bureaus have a wide range of viable options with varying degrees of economic impact.

(c) OMB reserves the right to designate a particular ruling as "major" under the Order to review economic and benefit/cost issues.

Regulations

(a) "Major" legislative regulations will be covered fully by the provisions of the Order. To permit timely participation by OMB and to avoid delay, Treasury will provide a copy of the regulation workplan to OMB. OMB will designate a contact to work with Treasury in framing economic issues and in preparing regulatory impact analyses. The highest OMB official responsible for clearing the regulation for publication after final drafting and OMB consultation will review the workplan.

(b) All other regulations will be treated like rulings except that: 1. Treasury will refer workplans on selected regulations to OMB. 2. Treasury will provide OMB a monthly agenda of regulations in process.

COMPTROLLER OF THE CURRENCY

All regulations, bulletins, circulars, and other rulings subject to the Executive Order will be covered fully by its provisions, except for supervisory and enforcement activities not of general applicability or otherwise not covered by the Order.

This memorandum takes no position regarding the applicability of the Order to the Federal Examinations Council.

EFFECTIVE DATES

These procedures will become effective immediately and will expire in one year.

R. T. MCNAMAR,
Deputy Secretary of the Treasury.
JAMES C. MILLER,
Administrator for Information and Regulatory Affairs.

EXECUTIVE OFFICE OF THE PRESIDENT,
OFFICE OF MANAGEMENT AND BUDGET,
Washington, D.C., April 17, 1981.

Memorandum: For Secretary of Transportation.

Subject: Limited exemption from Executive Order 12291.

By virtue of the authority vested in me under Executive Order 12291, and pursuant to discussions between our respective staffs, I hereby exempt from Sections 3, 4, 7, and 8 of the Order the following regulations when they are not major as defined in Section 1(b) of the Order:

A. ALL OFFICES OF THE DEPARTMENT OF TRANSPORTATION

1. Amendments to regulations that merely delay the compliance dates of reguations already in effect.

B. COAST GUARD

1. Regatta regulations; 2. Safety zone regulations; and 3. Security zone regulations.

C. FEDERAL AVIATION ADMINISTRATION

1. Standard instrument approach procedure regulations; 2. Enroute altitude regulations; 3. Routine air space actions; and 4. Airworthiness directives.

OMB retains the right to designated as major any of the regulations exempted by this memorandum under the Order.

This limited exemption expires automatically one year hence.

DAVID A. STOCKMAN,
Director.

APRIL 30, 1981.

WALTER C. BARBER,
Acting Administrator, Environmental Protection Agency,
Washington, D.C.

DEAR MR. BARBER: Pursuant to discussions between our respective staffs, I hereby exempt from Section 3, 4, and 7 of Executive Order 12291 all proposed and final pesticide tolerances, temporary tolerances, tolerance exemptions, and food additives regulations. The exemption does not apply to regulations that are major as defined in section 1(b) of the Order, nor does it apply to actions to make an existing tolerance more stringent. We retain the right to designate any of these actions major under the Executive Order, and we remain free to designate individual tolerances for pre-promulgation review and to review EPA's performance in issuing tolerances.

The exemption will expire in two months, during which time our staffs will propose a more comprehensive exemption covering other types of EPA regulations, we well as pesticides.

Sincerely yours,

JAMES C. MILLER III,
Adminstrator for Information and Regulatory Affairs.

EXECUTIVE OFFICE OF THE PRESIDENT,
OFFICE OF MANAGEMENT AND BUDGET,
Washington, D.C.

HON. JAMES BARNES,
General Counsel-Designate,
Department of Agriculture, Washington, D.C.

DEAR JIM: As you know, on March 25, 1981 the Vice President, as Chairman of the Presidential Task Force on Regulatory Relief, identified 27 existing regulations (or regulatory programs) for agency review in accordance with the requirements of Executive Order 12291. Of those on the list, three involve the Department of Agriculture: (1) Regulations establishing requirements for the production, use and labeling of mechanically processed species product; (2) regulations implementing fruit and vegetable marketing orders; and (3) regulations establishing standards and

guidelines for land and resource management planning for National Forest System lands under the National Forest Management Act.

The first purpose of this letter is to communicate an official notification of the above information on behalf of the Director pursuant to §3(i) of the Executive Order. The second purpose is to request that you inform me by May 15, 1981 of your schedule for completing the review of these regulations or regulatory programs.

The review of the 27 existing regulations identified on the March 25 list is only one aspect of the critical overall effort to achieve prompt and well-reasoned regulatory relief. The effort must be an ongoing one if we are to achieve the goals established by the President.

Thank you for your continuing cooperation and leadership in this vital area.

Sincerely yours,

JAMES C. MILLER III,
Adminstrator, Office of Information and Regulatory Affairs.

EXECUTIVE OFFICE OF THE PRESIDENT,
OFFICE OF MANAGEMENT AND BUDGET,
Washington, D.C., May 1, 1981.

Hon. SHERMAN UNGER,
General Counsel-Designate,
Department of Commerce, Washington, D.C.

DEAR SHERMAN: As you know, on March 25, 1981 the Vice President, as Chairman of the Presidential Task Force on Regulatory Relief, identified 27 existing regulations (or regulatory programs) for agency review in accordance with the requirements of Executive Order 12291. Of those on the list, one involves the Department of Commerce: National Marine Fisheries Service regulations implementing various fishery management plans.

The first purpose of this letter is to communicate an official notification of the above information on behalf of the Director pursuant to §3(i) of the Executive Order. The second purpose is to request that you inform me by May 15, 1981 of your schedule for completing the review of these regulations or regulatory programs.

The review of the 27 existing regulations identified on the March 25 list is only one aspect of the critical overall effort to achieve prompt and well-reasoned regulatory relief. The effort must be an ongoing one if we are to achieve the goals established by the President.

Thank you for your continuing cooperation and leadership in this vital area.

Sincerely yours,

JAMES C. MILLER III,
Administrator, Office of Information, and Regulatory Affairs.

EXECUTIVE OFFICE OF THE PRESIDENT,
OFFICE OF MANAGEMENT AND BUDGET,
Washington, D.C., May 1, 1981.

Hon. THEODORE SKY,
Acting General Counsel,
Department of Education, Washington, D.C.

DEAR TED: As you know, on March 25, 1981 the Vice President, as Chairman of the Presidential Task Force on Regulatory Relief, identified 27 existing regulations (or regulatory programs) for agency review in accordance with the requirements of Executive Order 12291. Of those on the list, one involves the Department of Education: The regulations implementing the Education of Handicapped Children Act of 1975 (P.L. 94-142).

The first purpose of this letter is to communicate an official notification of the above information on behalf of the Director pursuant to §3(i) of the Executive Order. The second purpose is to request that you inform me by May 15, 1981 of your schedule for completing the review of these regulations or regulatory programs.

The review of the 27 existing regulations identified on the March 25 list is only one aspect of the critical overall effort to achieve prompt and well-reasoned regulatory relief. The effort must be an ongoing one if we are to achieve the goals established by the President.

Thank you for your continuing cooperation and leadership in this vital area.
Sincerely yours,

JAMES C. MILLER III,
Administrator, Office of Information,
and Regulatory Affairs.

EXECUTIVE OFFICE OF THE PRESIDENT,
OFFICE OF MANAGEMENT AND BUDGET,
Washington, D.C., May 1, 1981.

Mr. JOHN CASCIOTTI,
Deputy Executive Secretary,
Department of Health and Human Services, Washington, D.C.

DEAR JOHN: As you know, on March 25, 1981 the Vice President, as Chairman of the Presidential Task Force on Regulatory Relief, identified 27 existing regulations (or regulatory programs) for agency review in accordance with the requirements of Executive Order 12291. Of those on the list, three involve the Department of Health and Human Services: (1) The regulations governing the submission and review of new drug applications; (2) Medicaid regulations affecting States; and (3) health care institution certifications and surveys.

The first purpose of this letter is to communicate an official notification of the above information on behalf of the Director pursuant to § 3(i) of the Executive Order. The second purpose is to request that you inform me by May 15, 1981 of your schedule for completing the review of these regulations or regulatory programs.

The review of the 27 existing regulations identified on the March 25 list is only one aspect of the critical overall effort to achieve prompt and well-reasoned regulatory relief. The effort must be an ongoing one if we are to achieve the goals established by the President.

Thank you for your continuing cooperation and leadership in this vital area.
Sincerely yours,

JAMES C. MILLER III,
Administrator, Office of Information,
and Regulatory Affairs.

EXECUTIVE OFFICE OF THE PRESIDENT,
OFFICE OF MANAGEMENT AND BUDGET,
Washington, D.C., May 1, 1981.

Hon. JOHN KNAPP,
General Counsel,
Department of Housing and Urban Development, Washington, D.C.

DEAR JOHN: As you know, on March 25, 1981 the Vice President, as Chairman of the Presidential Task Force on Regulatory Relief, identified 27 existing regulations (or regulatory programs) for agency review in accordance with the requirements of Executive Order 12291. Of those on the list, one involves the Department of Housing and Urban Development: The Minimum Property Standards for one- and two-family dwellings and multi-family dwellings.

The first purpose of this letter is to communicate an official notification of the above information on behalf of the Director pursuant to § 3(i) of the Executive Order. The second purpose is to request that you inform me by May 15, 1981 of your schedule for completing the review of these regulations or regulatory programs.

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JAMES C. MILLER III,
Administrator, Office of Information
and Regulatory Affairs.

EXECUTIVE OFFICE OF THE PRESIDENT,
OFFICE OF MANAGEMENT AND BUDGET,
Washington, D.C., May 1, 1981.

Mr. KENNETH STARR,
Counselor to the Attorney General,
Department of Justice, Washington, D.C.

DEAR KEN: As you know, on March 25, 1981 the Vice President, as Chairman of the Presidential Task Force on Regulatory Relief, identified 27 existing regulations (or regulatory programs) for agency review in accordance with the requirements of Executive Order 12291. Of those on the list, one involves the Department of Justice: The regulations implementing Executive Order 12250.

The first purpose of this letter is to communicate an official notification of the above information on behalf of the Director pursuant to § 3(i) of the Executive Order. The second purpose is to request that you inform me by May 15, 1981 of your schedule for completing the review of these regulations or regulatory programs.

The review of the 27 existing regulations identified on the March 25 list is only one aspect of the critical overall effort to achieve prompt and well-reasoned regulatory relief. The effort must be an ongoing one if we are to achieve the goals established by the President.

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Sincerely yours,

JAMES C. MILLER III,
Administrator, Office of Information and Regulatory Affairs.

EXECUTIVE OFFICE OF THE PRESIDENT,
OFFICE OF MANAGEMENT AND BUDGET,
Washington, D.C., May 1, 1981.

Hon. TIMOTHY RYAN,
Solicitor, Department of Labor,
Washington, D.C.

DEAR TIM: As you know, on March 25, 1981 the Vice President, as Chairman of the Presidential Task Force on Regulatory Relief, identified 27 existing regulations (or regulatory programs) for agency review in accordance with the requirements of Executive Order 12291. Of those on the list, five involve the Department of Labor: (1) Occupational noise regulations; (2) federal contract compliance programs administered under the authority of Executive Order 11246; (3) prevailing wage regulation under the Davis-Bacon and Service Contract Acts; (4) OSHA's policy with respect to the uses of personal protective devices; and (5) OSHA's carcinogen policy.

The first purpose of this letter is to communicate an official notification of the above information on behalf of the Director pursuant to § 3(i) of the Executive Order. The second purpose is to request that you inform me by May 15, 1981 of your schedule for completing the review of these regulations or regulatory programs.

The review of the 27 existing regulations identified on the March 25 list is only one aspect of the critical overall effort to achieve prompt and well-reasoned regulatory relief. The effort must be an ongoing one if we are to achieve the goals established by the President.

Thank you for your continuing cooperation and leadership in this vital area.

Sincerely yours,

JAMES C. MILLER III,
Administrator, Office of Information and Regulatory Affairs.

EXECUTIVE OFFICE OF THE PRESIDENT,
OFFICE OF MANAGEMENT AND BUDGET,
Washington, D.C., May 1, 1981.

Hon. JOHN FOWLER,
General Counsel, Department of Transportation,
Washington, D.C.

DEAR JOHN: As you know, on March 25, 1981 the Vice President, as Chairman of the Presidential Task Force on Regulatory Relief, identified 27 existing regulations (or regulatory programs) for agency review in accordance with the requirements of Executive Order 12291. Of those on the list, one involves the Department of Transportation: Rules relating to access for the handicapped to mass transit systems.

The first purpose of this letter is to communicate an official notification of the above information on behalf of the Director pursuant of § 3(i) of the Executive Order. The second purpose is to request that you inform me by May 15, 1981 of your schedule for completing the review of these regulations or regulatory programs.

The review of the 27 existing regulations identified on the March 25 list is only one aspect of the critical overall effort to achieve prompt and well-reasoned regulatory relief. The effort must be an ongoing one if we are to achieve the goals established by the President.

Thank you for your continuing cooperation and leadership in this vital area.

Sincerely yours,

JAMES C. MILLER III,
Administrator, Office of Information and Regulatory Affairs.

EXECUTIVE OFFICE OF THE PRESIDENT,
OFFICE OF MANAGEMENT AND BUDGET,
Washington, D.C., May 1, 1981.

Mr. GEORGE CROSS,
Assistant to the Secretary,
Department of the Treasury, Washington, D.C.

DEAR GEORGE: As you know, on March 25, 1981 the Vice President, as Chairman of the Presidential Task Force on Regulatory Relief, identified 27 existing regulations (or regulatory programs) for agency review in accordance with the requirements of Executive Order 12291. Of those on the list, one involves the Department of the Treasury: Regulations concerning the use of published indices to determine the value of inventory under a LIFO accounting system.

The first purpose of this letter is to communicate an official notification of the above information on behalf of the Director pursuant of § 3(i) of the Executive Order. The second purpose is to request that you inform me by May 15, 1981 of your schedule for completing the review of these regulations or regulatory programs.

The review of the 27 existing regulations identified on the March 25 list is only one aspect of the critical overall effort to achieve prompt and well-reasoned regulatory relief. The effort must be an ongoing one if we are to achieve the goals established by the President.

Thank you for your continuing cooperation and leadership in this vital area.

Sincerely yours,

JAMES C. MILLER III,
Administrator, Office of Information and Regulatory Affairs.

EXECUTIVE OFFICE OF THE PRESIDENT,
OFFICE OF MANAGEMENT AND BUDGET,
Washington, D.C., May 1, 1981.

Hon. MICHELLE CORASH,
General Counsel, Environmental Protection Agency.
Washington, D.C.

DEAR MICHELLE: As you know, on March 25, 1981 the Vice President, as Chairman of the Presidential Task Force on Regulatory Relief, identified 27 existing regulations (or regulatory programs) for agency review in accordance with the requirements of Executive Order 12291. Of those on the list, three involve the Environmental Protection Agency: (1) The Agency's BCT effluent guidelines; (2) hazardous waste disposal regulations; and (3) the electroplating pretreatment and general pretreatment standards.

The first purpose of this letter is to communicate an official notification of the above information on behalf of the Director pursuant of § 3(i) of the Executive Order. The second purpose is to request that you inform me by May 15, 1981 of your schedule for completing the review of these regulations or regulatory programs.

The review of the 27 existing regulations identified on the March 25 list is only one aspect of the critical overall effort to achieve prompt and well-reasoned regulatory relief. The effort must be an ongoing one if we are to achieve the goals established by the President.

Thank you for your continuing cooperation and leadership in this vital area.
Sincerely yours,

JAMES C. MILLER III,
Administrator, Office of Information and Regulatory Affairs.

JUNE 9, 1981.

Hon. DREW LEWIS,
Secretary of Transportation,
Washington, D.C.

DEAR DREW: We have completed review of your final regulation, "Minimum Levels of Financial Responsibility for Motor Carriers" BMCS Docket No. MC-94. Our review has involved frequent, intensive, and highly productive consultations between us and your staff. I believe these continuous dialogues have resulted in an effective, less burdensome and less costly regulatory requirement for both the motor carrier and insurance industries.

Even though we now fundamentally agree with the overall strategy for the final regulation, I have two concerns which need to be addressed in keeping with our obligations under the Executive Order. These issues can be handled without jeopardizing the need to publish this regulation now.

First, since this regulatory action will impose significantly increased costs on the motor carrier industry, we feel inclined to designate this proposed final regulation as a major rule under Section 6(a)(1) of Executive Order 12291. However, I am waiving the requirement to conduct a final Regulatory Impact Analysis before promulgation, because of the statutory deadline and because our review of the proposed final regulation found it generally consistent with the principles of Executive Order 12291. Notwithstanding that waiver, we ask that during the two-year phase-in period you conduct additional analyses to determine if changes should be made to assure that this regulation utilizes the most effective and least burdensome approaches to enhance public safety.

My second concern pertains to the record-keeping requirements this proposed final regulation will impose upon both the motor carrier and insurance industries. Since the Interstate Commerce Commission presently collects data to assure adequate financial responsibility of the motor carrier industry, another set of financial responsibility forms could be confusing and probably represents an undue burden. Therefore, pursuant to our responsibilities under the Paperwork Reduction Act, we cannot approve the record-keeping requirements of this final regulation until a careful review of both the Department's proposed record-keeping requirements and those of the Interstate Commerce Commission has been conducted. We anticipate that this review can be completed before this rule goes into effect on July 1, 1981.

I appreciate the sensitivity and urgency of this regulation, and I hope you will agree that we have accommodated these while ensuring our major concerns are addressed in the longer run.

Sincerely yours,

JAMES C. MILLER III,
Administrator for Information and Regulatory Affairs.

U.S. DEPARTMENT OF AGRICULTURE,
FARMERS HOME ADMINISTRATION,
Washington, D.C., May 18, 1981.

Subject: Waiver—section 6(a)(4), E.O.12291, emergency loan program.

Ms. GAIL COAD,
Assistant Administrator, Regulatory Affairs,
Office of Management and Budget, Washington, D.C.

DEAR MS. COAD: This concerns a telephone conversation on Friday, May 15, 1981, confirming that the Director, Office of Management and Budget, has granted a waiver under Section 6(a)(4) of Executive Order 12291 of the requirements of Sections 3 and 4 of that Executive Order. Accordingly, the Farmers Home Administration is to submit a final emergency rule to the Federal Register for the Emergency Loan Program.

The telephone discussion covered the nature of the waiver which is as follows:

The Farmers Home Administration has determined that this is a major rule pursuant to Section 1(b) of Executive Order 12291; however, due to the extensive

review, analysis and consultation that has been conducted jointly by the Farmers Home Administration and Office of Management and Budget and their judgment that this review is consistent with the purposes of the Executive Order, the Director of the Office of Management and Budget, under the authority of Section 6(a)(4) has waived the requirements of Sections 3 and 4 of Executive Order 12291.

A copy of the material being submitted to the Federal Register for publication of the revised Emergency Loan Program will be delivered to your office on the date of delivery to the Federal Register.

DWIGHT O. CALHOUN,
Acting Administrator.

Hon. DWIGHT O. CALHOUN,
Acting Administrator, Farmers Home Administration,
Washington, D.C.

DEAR MR. CALHOUN: As indicated by your May 18 letter, the Director, Office of Management and Budget, has waived requirements of Executive Order 12291 for the purpose of Farmers Home Administration issuance of a final emergency rule, 7 CFR 1945 Subpart L, to affect the Emergency Loan Program. Under Section 6(a)(4) of the Executive Order, Sections 3 and 4 of that Order have been waived.

Your letter proposes language citing this action by the Director for incorporation in the Federal Register publication of this rule. The proposed language is acceptable.

Sincerely,

JIM J. TOZZI,
Deputy Administrator,
Office of Information and Regulatory Affairs.

U.S. DEPARTMENT OF COMMERCE,
NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION,
Washington D.C., May 11, 1981.

To: John McNicholas, Acting Assistant Administrator for Information Policy, Office of Management and Budget.
From: JoAnn Chandler, Director, Office of Policy, Evaluation, and External Relations, Office of Coastal Zone Management, NOAA.
Subject: Waiver of Requirements of section 3 of Executive Order 12291.

This memorandum confirms our telephone conversations of May 9 and May 10, 1981, concerning the application of the requirements of Section 3 of Executive Order 12291 to the proposed regulations defining the term "directly affecting" as used in Section 307 of the Coastal Zone Management Act. You informed me that the Director of the Office of Management and Budget, under Section 6(a)(4) of the Executive Order, had granted a waiver of the requirements of Section 3, Regulatory Impact Analysis and Review, for these regulations and that we could submit a Notice of Proposed Rulemaking concurrently to the Federal Register and to the Office of Managment and Budget.

On May 10, 1981, I read to you the section of the Notice of Proposed Rulemaking (NPR) which reflected the waiver as follows:

NOAA has determined that this NPR is a "major rule" as defined in Section 1 of Executive Order 12291. However, due to the extensive review, analysis and consultation which has already been conducted, the consideration of comments received from the states and other interested parties in response to the issue paper distributed by NOAA on February 27, 1981, and the judgment by NOAA and OMB that these proposed regulations adhere to the General Requirements of Executive Order 12291, the Director of the Office of Management and Budget, under the authority of Section 6(a)(4), has waived the requirements of Section 3 of Executive Order 12291.

You concurred in this formulation. I am transmitting today copies of the NPR to you concurrently with submission to the Federal Register. Please do not hesitate to call me if any questions remain (202/634-4245).

Thank you for your assistance.

Attachments.

To date, has any agency done a Regulatory Impact Analysis which you would consider adequate? If so, please submit a copy of the Anaylsis with the comments OMB has made in response to it.

We are sending under separate cover the National Highway Transportation Safety Administration's impact analysis accompanying its final rule postponing the

effective date of the passive restraint requirements. No OMB comments were submitted to NHTSA.

Please list the individuals and organizations the Task Force has asked to give their views on ways to achieve regulatory relief.

We are sending under separate cover a list of organizations that either voluntarily or at our request submitted materials in response to the Vice President's letter of March 25.

Senator LAXALT. I would like unanimous consent that the statement of Senator Dole, who is occupied in Finance working on the tax bill, be included in the record.

If there is no objection, it will be so ordered.

[Senator Dole's prepared statement follows:]

Prepared Statement of Senator Bob Dole

MR. CHAIRMAN, THE SENATOR FROM KANSAS WHOLEHEARTEDLY COMMENDS THE SUBCOMMITTEE ON REGULATORY REFORM HOLDING HEARINGS ON S. 1080 SO QUICKLY AFTER ITS INTRODUCTION. AS ONE OF THE ORIGINAL CO-SPONSORS OF THE BILL, THE SENATOR FROM KANSAS LOOKS FORWARD TO THE EXPEDITIOUS PASSAGE OF S. 1080, WHICH TODAY'S HEARINGS SHOULD HELP ENSURE.

S. 1080, "THE REGULATORY REFORM ACT OF 1981," IS THE EXPANDED VERSION OF S. 405, A REGULATORY REFORM MEASURE INTRODUCED BY THE SENATOR FROM KANSAS ON FEBRUARY 5, 1981. THROUGH THE CAREFUL, BUT PERSISTENT, WORK OF SENATOR LAXALT AND HIS STAFF, THIS REGULATORY REFORM LEGISLATIVE PACKAGE HAS BEEN CO-SPONSORED BY 78 SENATORS AND SUPPORTED BY THE REAGAN ADMINISTRATION.

HOPEFULLY, TESTIMONY FROM TODAY'S HEARINGS, WITH 28 WITNESSES FROM THE ADMINISTRATION, BUSINESS, LABOR, PUBLIC INTEREST GROUPS, AND ACADEMIA, WILL PROVIDE A COMPLETE EXPLANATION FOR THE RECORD ON PROVISIONS OF THE BILL. THE LAST PANEL, PROVIDING A DEBATE OVER THE "PRACTICALITY" OF THE REQUIREMENTS OF S. 1080, IS VERY NOVEL AND SHOULD BE EXTREMELY ENLIGHTENING.

MR. CHAIRMAN, WITH THE IMPERILED SHAPE OF THE U.S. ECONOMY, WE CAN NO LONGER AFFORD LAWS AND REGULATIONS, WHICH ULTIMATELY COST THE AMERICAN PEOPLE BILLIONS OF DOLLARS ANNUALLY, UNLESS SUCH MEASURES PRODUCE WIDESPREAD PRONOUNCED BENEFITS. PASSAGE OF S. 1080 WOULD AT LAST SIGNAL TO THE AMERICAN PEOPLE THAT WE IN CONGRESS ARE ATTEMPTING TO BRING UNDER RATIONAL CONTROL THE REGULATORY MONSTER WE HAVE CREATED. REGULATION, AT ITS BEST, SAVES LIVES AND MAKES FOR A BETTER ENVIRONMENT. BUT AT WORST, IT CAN CAUSE ECONOMIC DISASTER AND PERHAPS DIMINISHES THE LIVES AND FUTURE HAPPINESS OF OUR CITIZENS. THE SENATOR FROM KANSAS FEELS THAT S. 1080 WILL HELP ENSURE THAT GOVERNMENT REGULATION IS AT ITS BEST AND HOPES THAT TODAY'S HEARING WILL PROVIDE STRONG SUPPORT FOR THE PROPOSAL.

Senator LAXALT. Our second panel includes representatives of two labor unions. Howard Marlowe is the associate director of legislation of the AFL–CIO. We welcome you, Mr. Marlowe.

He is accompanied by Laurence Gold, special counsel to the AFL–CIO. We welcome you, Mr. Gold.

David Mallino is the legislative representative of the United Steelworkers of America, representing John Sheehan, legislative director of the Steelworkers. We welcome you, Mr. Mallino.

As you know, we are a bit pressed for time today. I would appreciate it if we could keep the statements brief. If you will summarize them for us, we will pose some questions for you. Your full prepared statements will appear in the record following your oral presentations.

Gentlemen, proceed in any order that you wish.

STATEMENT OF HOWARD MARLOWE, ASSOCIATE DIRECTOR, DEPARTMENT OF LEGISLATION, AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS, ACCOMPANIED BY LAURENCE GOLD, SPECIAL COUNSEL, AFL-CIO

Mr. MARLOWE. Thank you very much, Mr. Chairman.

The AFL–CIO appreciates this opportunity to present its views on S. 1080.

At the outset it is essential to state that the Federation believes that the Federal regulatory system has produced great and irreplaceable social benefits.

Our members and working people generally are better off than they were, not only as consumers and taxpayers but, most importantly, as workers.

Federal regulators have helped to promote worker health and safety, as well to insure employee rights.

Regulatory reform should be the means to providing better protection. It should not undermine the effectiveness of the system which has proved so valuable to so many Americans.

Consistent both with our view that the bill is a serious and responsible effort to address the issues concerning the regulatory system that were debated in the last Congress and that continue to command public attention and with your request, Mr. Chairman, we will focus our remarks on S. 1080's provisions.

We do wish to note, however, that in our view the bill is defective in failing to address the average citizen's basic complaint that rulemaking proceedings are too inconclusive, too technical, too slow, too complex procedurally, and too expensive for the participants.

The basic demand is to cut red tape, weed out useless or duplicative regulations, and improve the responsiveness of regulators to matters that affect workers' economic and social well-being, and that impact on the collective bargaining process.

S. 1080 moves in the direction of more complexity, more delay, and more expense to the Government and the participating parties. We question the wisdom of that approach.

Viewed from that perspective, we believe that S. 1080's provisions on the analysis to accompany major rules are over elaborate and ought to be cut back.

There can be no dispute that regulators, before they act, should isolate the benefit sought to be obtained, take the proper steps to select effective means for advancing the stated goal, ascertain possible adverse effects, minimize any such unnecessary effects, and articulate the reasons that led the rule to be adopted.

Provisions aimed at assuring that these obligations are met have our support.

In determining how elaborate such requirements should be, the beginning of wisdom is to recognize that, at least with regard to health, safety, and environmental regulations, there is no universal calculus for comparing benefits and adverse effects or for determining cost-effectiveness.

There is no consensus as to how to value continued good health, clean air and water, or maintenance of the ecological balance. Even if such a consensus existed, that would not mean that a general injunction, such as that in S. 1080, to compare costs and benefits or to take cost-effective alternatives, advances the course of rational decisionmaking.

Such determinations rest on projections about the consequences of proposed courses of action. Those projections, in turn, rest on limited data.

In our experience, particularly on the cost side, that data itself is often of questionable reliability.

At most then, at the end of the analysis, we know within certain confidence limits the probable range of benefits to be expected from certain regulatory strategies, normally expressed in terms of lives saved or illnesses avoided, and the costs of achieving those benefits, normally expressed in dollar terms.

Because there is no agreed-upon mediating principle and because our confidence in the accuracy of our projections is low, that limited knowledge does not dictate the decision to be made.

There is no escape from making an informed moral judgment that takes into account such factors as the seriousness and probability of the harm, the extent to which we are capable of obviating that danger, and the costs and other adverse effects of doing so.

In our society, the basic outline as to how such uncertain, sensitive, substantive judgments are to be arrived at should be made by the Congress—the representative branch of the Government—not by regulators or by the economists at the Office of Management and Budget or on the Council of Economic Advisers.

That has, in fact, been the method of proceeding thus far.

Recognizing that benefits, risks, and costs are not fungible and that there is an intuitive sense that we should be particularly sensitive to health or safety in certain situations and more sensitive to costs in others, Congress has set differing balances in differing statutes.

Once the limited utility of the system of analysis set out in S. 1080 is recognized, it follows that the nature of those analyses should be limited as well.

The analysis should not be an occasion for make-work or confounding needed action but should only be detailed enough to assure that the regulator has studied with care the benefits sought to be achieved and adverse effects of securing those benefits and

has articulated the basis, consistent with Congress judgment, for reconciling those competing considerations.

Mr. Chairman, in our statement, we have outlined very specific suggestions that we have made for the legislation in this regard.

The discussion thus far presages our view on the requirement for reviewing major rules already in effect and the added procedures suggested for informal rule making.

In time of fiscal austerity, new requirements can only crowd out the old. To divert limited resources to rehashing the past does not make the best use of scarce resources.

Certainly if analyses of rules already on the books are to be undertaken, that task ought to be circumscribed by setting a ceiling of no more than five such reviews by a given agency in any year.

There ought to be some balance between antiquarian diversions and attention to present concerns.

Moreover, the requirement for such review should not be in force for a period of more than five years.

If experience shows that these analyses do turn up a significant number of rules that are no longer sound, then the provision could be broadened and extended.

We have serious reservations as well about S. 1080's treatment of judicial review. We do not question such verities as that regulators should act within the scope of their statutory jurisdiction and in accord with congressional intent or that it is the province of the courts to decide questions of law. But there is no persuasive evidence that regulators regularly disregard the limits of their authority and that the courts are hamstrung in correcting such errors when they occur or that the courts show any hesitancy to exercise their proper authority in the overall law-making process.

The vice of S. 1080 is that it ignores the complementary roles of the regulator and the judge and impels the judiciary to assume much of the regulator's province.

We suggest that the difficulty in this instance, as in the others covered by the bill, is that they are the product of dissatisfaction with certain substantive decisions Congress has made and which it would be difficult and time consuming to attack directly, rather than with the quality of the work being done by the regulators and the courts.

This dissatisfaction leads to proposals for new procedures or new allocations of authority, supported mainly by vague arguments that such changes must be better than the present system, rather than by detailed demonstrations that the proposal is directed toward a structural deficiency and that it cures that deficiency.

Often then, critical analysis shows that the proposal is only of marginal benefit or that the supposed problem does not exist at all.

While there is a certain irony in our doing so, we suggest that in the wake of an election, generally viewed as a triumph for conservatism, the Congress should, on the issue of regulatory reform, exercise the cardinal conservative virtue—caution.

Senator LAXALT. I thank you very much, Mr. Marlowe.

Mr. GOLD?

Mr. Gold. I have no prepared statement, Mr. Chairman.

Senator LAXALT. Mr. Mallino?

[Mr. Marlowe's prepared statement follows:]

Prepared Statement of Howard Marlowe

The AFL-CIO appreciates this opportunity to present the Federation's views on S. 1080. Consistent both with our view that the bill is a serious and responsible effort to address the issues concerning the regulatory system that were debated in the last Congress and that continue to command public attention and with the Chairman's request, we will focus our remarks on S. 1080's provisions. We do wish to note, however, that in our view the bill is defective in failing to address the average citizen's basic complaint that rule making proceedings are too inconclusive, too technical, too slow, too complex procedurally and too expensive for the participants. The basic demand is to cut the red tape and stop useless activities. Yet, S. 1080 moves in the direction of more complexity, more delay and more expense to the government and the participating parties. We question the wisdom of that approach.

Earlier this month, AFL-CIO President Lane Kirkland, in a letter to Vice President Bush, stated the Federation's basic position on regulatory reform:

> " *** The nation needs a vigorous economy, a sound environment, equal employment opportunities, safe and healthy workplaces, decent labor-management relations, and fair and equitable treatment of consumers. Experience teaches that a system of laissez-faire does not achieve those ends. The government has an inescapable role in the economy and in promoting the health, safety and dignity of its citizens.
>
> "Experience teaches that in an industrial society manufacturers do not take care of the environment, employers do not take care of workers and sellers do not take care of consumers. The pursuit by the wealthy and powerful of their own advantage has not proved to be the means for advancing the general welfare; it is the government's obligation, acting in the interest of the society as a whole, to right the imbalances in our economic system. That is the function of the regulatory system mandated by the laws passed by Congress after extensive scrutiny and deliberation. It is an absolutely essential function.
>
> "We recognize, of course, that laws and regulations, like private markets, do not always work perfectly. Good intent is not a guarantee of a good effect. We, therefore, favor rigorous review of the regulatory system

and perfecting changes as well as vigorous enforcement of the regulatory laws on the books. We are anxious to cooperate in any such constructive endeavor. ***"

It is appropriate to add at this juncture that Congressional action on the Administration's budget proposals demonstrate an intent to strictly limit government spending. Unless there is a change in direction, it is fair to anticipate that the resources devoted to the regulatory system will remain constant or will be decreased. Yet the need to confront the novel problems constantly raised by a diverse and dynamic society and to do so in a considered and conscientious manner will continue unabated. Certainly then, proposals that make regulatory proceedings more cumbersome and more costly ought, at the very least, to be subjected to the closest and most skeptical scrutiny.

Viewed from that perspective, we believe that S. 1080's provisions on the analysis to accompany major rules are over-elaborate and ought to be cut back.

There can be no dispute that regulators, before they act, should: isolate the benefits sought to be obtained, take the proper steps to select effective means for advancing the stated goal, ascertain possible adverse effects, minimize any such unnecessary effects, and articulate the reasons that lead to the rule adopted. Provisions aimed at assuring these obligations are met have our support. But, in determining how elaborate such requirements should be, the beginning of wisdom is to recognize that, at least with regard to health, safety and environmental regulation, there is no universal calculus for comparing benefits and adverse effects or for determining "cost effectiveness." There is no consensus as to how to value continued good health, clear air and water, or maintenance of the ecological balance. And, even if such a consensus existed, that would not mean that a general injunction such as that in S. 1080 to compare costs and benefits or to take "cost effective" alternatives advances the course of rational decision-making.

Such determinations rest on projections about the consequences of proposed courses of action. Those projections, in turn, rest on limited data and, in our experience, (particularly on the cost side) that data itself is often of questionable reliability. At most then at the end of the analysis we "know" within certain confidence limits the probable range of benefits to be expected from certain regulatory strategies, normally expressed in terms of lives saved or illnesses avoided, and the costs of achieving those benefits, normally expressed in dollar terms. But because there is no agreed-upon mediating principle and because our confidence in the accuracy of our projections is low, that limited knowledge does not dictate the decision to be made. There is no escape from making an informed moral judgment that takes into account such factors as the seriousness and probability of the harm, the extent to which we are capable of obviating that danger, and the costs and other adverse effects of doing so. In our society, the basic outline as to how such uncertain, sensitive, substantive judgments are to be arrived at should be made by the Congress -- the representative branch of the government -- not by regulators or by the economists at the Office of Management and Budget or on the Council of Economic Advisors. That has, in fact, been the method of proceeding thus far. Recognizing that benefits, risks and costs are not fungible -- that there is an intuitive sense that we should be particularly sensitive to health or safety in certain situations and more sensitive to costs in others -- Congress has set differing balances in different statutes.

The belief that such judgments need no longer be made through the political process and that the task is better turned over to experts trained in scientific cost analysis under a mandate to justify the benefits and to follow cost effective methods is akin to an earlier belief in the miraculous powers of witch doctors. In the real world of health and safety regulation, the person making the decision does not have several choices all

of which have been assigned in the same terms certain definite benefits and costs. The actual situation is that the decision maker has a mass of information, most of which is conjectural and several possible approaches that are different in kind. One approach may promise great health benefits to workers with a high degree of certainty in a manner that is relatively easy to enforce and impose substantial capital costs on employers. Another may, relative to the first, subject workers to higher risks, be more difficult to enforce and provide cost savings to employers. A third may promise a range of benefits to workers, depending on the extent of voluntary compliance, while also imposing burdens on those workers, be still more difficult to enforce and provide greater savings to employers. With all deference, we suggest that to talk of cost effectiveness or benefit justification in such situations is to do nothing more than obscure the issues, and that S. 1080 does not provide material assistance in making difficult decisions.

Once the limited utility of the system of analysis set out in S. 1080 is recognized, it follows that the nature of those analyses should be limited as well. The analysis should not be an occasion for make-work or for confounding needed action but should only be detailed enough to assure that the regulator has studied with care the benefits sought to be achieved and adverse effects of securing those benefits and has articulated the basis consistent with Congress' judgment for reconciling those competing considerations. To that end we suggest:

First, that the definition of major rule be clarified with the end in view of limiting its scope. As the language stands, while clause (i) is relatively precise, clauses (ii) and (iii) are so vague and general as not to set any boundary at all.

Second, that the preliminary regulatory analysis be confined to the proposed rule and not to alternatives to the proposal. It makes better sense for those affected by the pro-

posal to suggest the alternatives. They are far more likely to do a competent job of stating and arguing for the alternative than the person who has made a tentative judgment that a particular approach makes sense.

Third, that the final regulatory analysis be limited to stating the costs and benefits of the rule, describing the major alternatives considered, and explaining why (taking into account the information available as to benefits and adverse effects) the regulator concluded that the rule is the soundest means consistent with the statute for obtaining the objective sought. That information is more than sufficient to assure that the regulator is doing his regulating job and for Congress to make the judgment as to whether the job should be changed. To go beyond those points either obscures the analysis or pushes the regulator toward a particular result which may or may not be consistent with the result Congress intended in the particular statute that empowers the regulator to act.

Fourth, precisely because regulatory analysis is a tool whose benefits and costs are both uncertain, a time limit of no longer than five years should be placed on the requirement that such analysis be made.

Finally, and particularly if the foregoing changes are made, there would be no reason to deny the benefits sought to be achieved by these portions of S. 1080 until January 1, 1983. If S. 1080 is worthy of Congress' consideration and passage now, as its sponsors evidently believe it is, than its provisions should go into effect promptly. Certainly, in light of Executive Order 12291, there is no argument that the executive needs time to "gear up" to meet the bill's requirements.

While all of the foregoing points are, in the interest of economy and efficiency, intended to place realistic limits on the burdens imposed by S. 1080, we feel an obligation to argue for the deletion of the provision excluding certain classes of

proceedings from the definition of "major rule." While we have done our best, we are unable to divine the neutral principle that explains, for example, the inclusion of rules under the Occupational Safety and Health Act having a certain effect and the exclusion of rules under the internal revenue laws having the same effect.

The discussion thus far presages our view on the requirement for reviewing major rules already in effect and the added procedures suggested for informal rulemaking. In time of fiscal austerity, new requirements can only crowd out the old. To divert limited resources to rehashing the past does not make the best use of scarce resources. Certainly, if analyses of rules already on the books are to be undertaken, that task ought to be circumscribed by setting a ceiling of no more than five such reviews by a given agency in any year. There ought to be some balance between antiquarian diversions and attention to present concerns. Moreover, the requirement for such reviews should not be in force for a period of more than five years. If experience shows that these analyses do turn up a significant number of rules that are no longer sound, then the provision could be broadened and extended.

Our concerns about the three major procedural changes for informal rulemaking are of the same tenor. S. 1080 in practical terms creates a normal comment period of ninety days. Such an extension is unwarranted. S. 1080 also inclines such rulemaking, which is intended to follow a quasi-legislative model, toward an adjudicative model. Many observers have noted our excessive passion for litigation. But that passion, like any other, ought to be kept under some control. Litigation is appropriate for dealing with some controversies and not all. We do not believe that Congressional committees should substitute trials for hearings or keep legislative files containing all "written material" "notice[d]" by the committee in its deliberations. Imposing such requirements on regulators makes no better

sense. And, while S. 1080's provisions for examination and cross-examination of witnesses is written with some circumspection, the bar on agency reliance of any sort on written materials not in the file is patently overbroad.

We have serious reservations as well about S. 1080's treatment of judicial review. We do not question such verities as that regulators should act within the scope of their statutory jurisdiction and in accord with Congressional intent or that it is the province of the courts to decide questions of law. But there is no persuasive evidence that regulators regularly disregard the limits on their authority and that the courts are hamstrung in correcting such errors when they occur or that the courts show any hesitancy to exercise their proper authority in the overall lawmaking process.

To be sure, there are a few decisions, almost invariably by lower courts, that are subject to criticism on the grounds of excessive timidity, and some words in a few opinions, again usually from the same source, that taken alone may suggest too much deference. The weight of authority, particularly Supreme Court authority, is, however, the other way -- the courts are active participants in the regulatory process. That being so, Congressional action based on the false premise of an inactive judiciary and for the stated purpose of increasing the judicial role can only press the courts to ignore wise restrains -- restraints that recognize that a generalist removed from the scene pays respectful attention on close questions particularly those of a technical nature to disinterested experts. In the regulatory system the regulators are selected to bring to bear substantial knowledge and experience in their area of competence and the judges are selected to complement those narrow skills with a general understanding of the legislative process, and a broad vision of the law and of the place of regulation.

The vice of S. 1080 is that it ignores the complementary roles of the regulator and the judge and impells the judiciary to assume much of the regulator's province. We suggest that the

difficulty in this instance as in the others covered by the bill is that they are the product of dissatisfaction with certain substantive decisions Congress has made and which it would be difficult and time-consuming to attack directly rather than with the quality of the work being done by the regulators and the courts. This dissatisfaction leads to proposals for new procedures or new allocations of authority supported mainly by vague arguments that such changes must be better than the present system rather than by detailed demonstrations that the proposal is directed toward a structural deficiency and that it cures that deficiency. Often then critical analysis shows that the proposal is only of marginal benefit or that the supposed problem does not exist at all. While there is a certain irony in our doing so, we suggest that in the wake of an election generally viewed as a triumph for conservatism, the Congress should, on the issue of regulatory reform, exercise the cardinal conservative virtue -- caution.

STATEMENT OF DAVID MALLINO, LEGISLATIVE REPRESENTATIVE, UNITED STEELWORKERS OF AMERICA

Mr. MALLINO. Mr. Chairman, my name is David Mallino, and I am the legislative representative of the United Steelworkers of America.

At the outset, let me say that our union believes that the Federal regulatory system and the laws which govern it are essentially sound. This is particularly true for that portion of the system which provides such necessary social protections as job safety and health, environmental and consumer protection, equal rights and opportunities.

These socially protective laws are an outgrowth of long and sometimes bitter experience. They are a public recognition that the free market system alone is largely incapable of satisfying many social needs and often fails to produce justice.

Any effort to weaken the social regulatory system by transferring government responsibility to the marketplace must be strongly resisted.

During the last decade, there has been a growing debate over whether the regulatory process has achieved its intended social benefits and whether those benefits have justified the economic costs of regulation.

This debate has produced an avalanche of statistics on both sides of the question.

Without engaging in a debate as to the accuracy of the data, suffice it to say that most of the numbers of both costs and benefits

have severe shortcomings. Perhaps the greatest problem is that many of the most important variables simply do not lend themselves to quantification or statistical measurement.

For our part, we believe that the social regulatory system has produced significant social benefits in the form of lives saved, injuries and diseases prevented, natural resources preserved, and human rights protected.

As for the economic costs of regulation, we believe that in addition to serious technical problems in accurately determining the regulatory costs, there are certain fundamental social responsibilities of government which must be exercised without regard to dollar considerations.

Foremost among these are the preservation of life, liberty, and justice.

In terms of regulatory reform legislation, we would first like to note something referred to by the chairman in his statement on the introduction of S. 1080.

According to Senator Laxalt, "regulatory reform, after all, is a broad and imprecise term which has been applied to a variety of Government efforts."

Indeed, regulatory reform means different things to different people.

If regulatory reform means making the existing regulatory system work better and more efficiently so as to improve the social protections of substantive law, then we favor reform efforts.

For example, we would very much like to see more occupational safety and health standards issued in a more timely manner and designed to more adequately protect workers. We support more effective environmental health standards to control toxic substances and clean up toxic wastes.

We favor stronger and more effective enforcement of civil rights laws, as well as laws governing the rights of workers.

If, on the other hand, regulatory reform means retarding or weakening the regulatory system so as to effectively deny essential social protections, then we are opposed to it.

If regulatory reform is viewed as a means toward less social regulation, then it should not be pursued.

Indeed, if regulatory reform is nothing more than a procedural smokescreen to dismantle or cripple the regulatory system, it is not reform at all but rather a political effort to reward certain special interests at the expense of society as a whole.

As we all know, the imposition of complicated procedural requirements on the regulatory system can destroy its effectiveness, just as surely as the repeal of substantive law.

As for the particular piece of regulatory reform legislation before this committee, we have a number of reservations.

In the first place, we question the advisability of acting on S. 1080 at the present time. As we are all aware, a substantial portion of the Federal regulatory system is presently governed by President Reagan's Executive Order 12291 which covers much of what is included in the bill.

Our union views the Executive order as shortsighted and dangerous to the welfare of workers, consumers, the environment, minorities, and others protected by the social regulatory system.

Thus, in considering legislation, we believe that this committee should take the time to fully explore the social, as well as the economic, impact of the President's regulatory program.

Second, as a general principle, we believe that the application of cost-benefit analysis to social regulations is a mistake and ought not to be used.

In addition to serious technical and analytical problems, cost-benefit analysis as a policymaking instrument raises fundamental moral, religious, and philosophical issues which should not be decided by economists or regulatory bureaucrats.

Regulatory tradeoffs between dollars on the one hand and human life and justice on the other ought not be the subject of theoretical economic abstractions or mechanical mathematic formulas.

While the cost-benefit provisions of S. 1080 are improvements over earlier proposals, great care must be exercised to insure that basic social rights and protections are not sacrificed in the name of abstract cost-benefit analysis.

Moreover, cost-benefit requirements should not be used as a procedural burden to overload the regulatory process and thus cripple its effectiveness.

Unfortunately, the cost-benefit provisions of S. 1080 could have such a crippling effect.

Third, we are concerned that S. 1080 is unclear as to whether the same procedures governing the promulgation of new regulations apply equally to the revision, modification, or revocation of existing regulations.

Furthermore, in the case of safety and health regulations, provisions should be made to insure that in cases where an existing regulation is being revised or modified, the resulting new regulation be better than, or at least equal to, the protections afforded by the original regulation.

In addition, provisions should be made to protect the integrity of existing regulations in those industries which are already largely in compliance.

Finally, Mr. Chairman, we must take exception to the dramatic expansion of judicial review proposed by S. 1080.

The courts already have sufficient authority to review regulations. Any further extension of that authority would not only overburden the judicial process with issues it is ill-equipped to handle but may also unduly intrude on the executive and legislative responsibilities.

Moreover, the Bumpers amendment would invite—indeed, encourage—what is already an excess of regulatory litigation.

In conclusion, I would like to briefly reiterate our union's position on a few other regulatory issues which, although not included in S. 1080, may very well be raised in the debate over the bill.

First, we are opposed to any form of legislative veto. Such provision would unduly politicize an already highly political and adversarial regulatory process.

Similarly, we are opposed to granting the President statutory authority to veto regulations. This would not only further politicize the process but would give the President unprecedented administrative powers to effectively override substantive law.

Finally, we are opposed to the so-called regulatory budget which would establish an arbitrary economic ceiling beyond which regulatory agencies could not regulate, no matter how necessary the regulations might be.

This meat ax approach would also have the net effect of administratively restraining substantive law.

Thank you, Mr. Chairman.

Senator LAXALT. Thank you, Mr. Mallino.

Senator Leahy?

Senator LEAHY. Thank you, Mr. Chairman.

Let me ask a couple of questions and then in the interest of time, I will submit further questions for the record if I might.

In statements here and material I have received from you, you have all expressed deep concerns that the regulatory analyses provisions of the bill don't provide adequate direction to the agencies in how to assess benefits or verify costs.

Let me see if I fully understand what you are saying.

Are you suggesting that we amend the bill to provide the agencies with more guidance in this area, or are you saying that we should set the standards in the enabling legislation to begin with?

Mr. GOLD. Our view is that regulation covers a very wide range. The problems associated with regulating clean air and worker safety are very different. The proper approach is for Congress to state in the enabling legislation what it expects of the regulators—that is, what Congress is doing presently.

If you look at legislation like the clean air and clean water legislation, there are very specific differing directions to the regulators, depending on the subject, the timeframe for action, and the degree of knowledge Congress believes is available. It seems to us that is a highly intelligent approach to this problem.

These questions in the final analysis are political questions. They are social and moral questions. They are not technician's questions. They are questions properly decided legislatively.

If the analysis provision of S. 1080 were to be an overlay on what the agencies had to do, then we would think that it would have to be a lot more specific than it is.

Senator LEAHY. There also seems to be a concern in your testimony that in our efforts to reform the regulatory process, we have developed a bill which could gum up the whole process.

I assure you that we really don't want to do that. If you look at the names of the cosponsors, we all may have slightly differing political philosophies about what is or isn't a good regulation, but we are all truly concerned that the regulatory process goes in fits and starts. Some of it goes very well and some of it goes very poorly.

We are trying to get this into line, so that it works best for the people the Government exists for in the first place—you, me, and everybody else here.

What provisions are you most concerned will add unnecessary delays to the regulatory process?

Mr. GOLD. There are three aspects of the proposed legislation that cause us concern. The first is the analysis provisions.

If the number of analyses are limited and if the analyses are restricted so that they get at essential information, that is one

thing. If the number of analyses is going to be substantial and if a wide range of information has to be considered, that is going to slow down the process even more.

We make specific suggestions in our testimony to place certain limits on the analyses required.

Second, the one aspect of the regulatory system that we really believe is very well thought through, in terms of the enabling legislation, is what is called informal rulemaking.

We are concerned that informal rulemaking, which is viewed as a quasi-legislative activity, is going to be over-judicialized and over-adjudicialized by the cross-examination provision and its kin.

Senator LEAHY. Do you think that could be used to tie up the process forever and ever, instead of to streamline regulations?

Mr. GOLD. Yes.

Normally, in the regulatory system, you have three groups who are interested. One is the Government; the second is the regulated entities; third are the people who may benefit from the regulation.

The Government has some resources to put into regulation. The regulated entities are normally well-fixed. The people who are going to benefit from the regulation normally have the least.

It is not in the interests of people who are going to be regulated to be regulated. Nothing is better for them. Nothing their lawyers can do is more appreciated than 2 or 3 years of delay.

If you create new systems for cross-examination, fact-finding, analysis, creating rulemaking files, and being able to file comments on rulemaking files, it is going to be a lawyers' full employment act. I haven't noticed any shortage of lawyers in Washington, except those who are willing to work for us at the fees we pay them.

Senator LEAHY. What if you set deadlines?

None of us wants to pass a lawyers' relief bill.

Mr. GOLD. I think that is the problem. That is why we are troubled by some of these processes.

Senator LEAHY. Could deadlines do that?

Mr. GOLD. I have never seen a situation in which deadlines are not viewed as hortatory.

From the regulator's standpoint, he is going to try to do his best to meet the deadline. From the regulated person's standpoint, he is going to try to slow down the process.

If slowing down the process means that the regulation can't go into effect at all, then those opposed to regulations gets a double bonus for slowing down the process. Not only does he slow it down, but it is invalid if and when the regulation comes out.

Deadlines have proved to be of little benefit.

We think the only sound answer is that the procedures themselves be simple. The theory of informal rulemaking is that the proceeding is quasi-legislative; the hearings are for the same purpose that these hearings are being conducted; they proceed in the same way so that the decider is given information that he can use in making his judgment; the record is the record of knowledge and intuition and experience that people bring to a task plus, in the regulatory system, the instructions from Congress.

We think it would be a shame in the one area where the system really is quite intelligently thought out, in our judgment, to add a new layer of complexity.

Finally, we think there are very limited benefits in increasing judicial review.

I litigate cases, and I haven't noticed any shy deference in the courts to administrators. Thus the purported justifying need does not exist.

The one thing you will accomplish, if you nonetheless pass a provision such as the judicial review provision, is uproot all the precedents in the area. You will do so in a situation where everybody is scratching their heads trying to figure out what it is that Congress is dissatisfied with.

That is going to lead to a good deal more litigation and a lot of milling around. We think it is unwise.

Those are the three areas that we are concerned with.

Senator LEAHY. Mr. Chairman, I would like to submit further questions for the record. I know that my time has expired.

I am also going to have to leave for about 15 minutes, and then I will be back.

Thank you, Mr. Gold.

Senator LAXALT. Gentlemen, I want to thank you for the quality of your statements. I think you have properly expressed the concerns that we are hearing all the time. I want to assure all of you that the purpose of this bill certainly is not to deny any necessary social protections or to dismantle the regulatory system. I think there has been value there. The bill, I think, deals with excess.

Let me give you one example, Mr. Mallino. We have a copper smelter in Eastern Nevada in a small town. I think some of your people are employed there. EPA came down with a regulation 3 or 4 years ago and made a finding that we had an unhealthy air situation and imposed on a mine there standards which required the installation of equipment, amounting to several million dollars, in the face of a community feeling that there actually wasn't any health problem there. They had lived with this alleged problem for years and years, and there were no demonstrable health effects—contradicting completely what the State authorities felt.

Eventually, we ended up in a head-on collision between the company making an economic judgment that they simply couldn't conform to the standard and EPA not moving away from their stated position. What happened? Closure. We had several hundred of your people out in the streets. I might say, having lived and worked with these people for a long time, that they are very unhappy about what they perceived, in their own interest, to be excessive governmental regulation of an area that affected their economic interest.

What do we do about situations of that kind, where you take proper views of the preservation of health through clean air standards, but apply them so excessively that the economic interest is almost totally ignored, eventually to the serious economic damage of your own people. What do we do about a case like that? That is what we are trying to do here—to inject into this ballgame, finally, what the economic impact is going to be.

Mr. MALLINO. Mr. Chairman, I am not familiar with that particular case; but what we have found in other cases similar to that, where a company has alleged either excessive environmental or excessive safety and health regulations as the reason for closing down a particular facility, upon investigation those facilities are economically marginal facilities. There are an awful lot of other economic——

Senator LAXALT. I think that was a factor here.

Mr. MALLINO. I am not familiar with that, but I know that in the steel industry in a number of cases there have been allegations that it is environmental regulations that are causing a problem, which is not the case.

Senator LAXALT. Getting away from the marginal case, let's assume that you can demonstrate that it was excessive regulation. What do you do about a situation like that?

Mr. MALLINO. The only thing I could suggest at this particular point—and we have done it on occasion in other instances with the EPA—is to set the EPA and the workers and the company down to try to resolve the problem.

I have to say that in terms of our membership, wherever they may be working, we are not prepared at this particular point in time, where there is a health problem, to submit our members or their communities to a health problem as a trade-off against economics.

We had a very serious situation—this was years ago—in Denor, Pa., where 23 people in that community died; 43 percent of that population was diseased because of air pollution from the steel mill.

Our position has been that we are not prepared to sacrifice the health of our members or their families in exchange for some kind of undefined economic benefit.

In the particular smelter you are talking about, I cannot address that issue. But I can say that on every allegation of a shut-down facility that we have investigated, where there has been an allegation of overregulation, particularly from EPA, what we have found is that there are an awful lot of other economic and business reasons why the plant was being shut down. EPA was being used as a convenient excuse.

That happened just a few years ago with respect to United States Steel's shutdown of 13 of their facilities.

Senator LAXALT. Is it your feeling—and anyone of you may answer—that Federal regulations have not imposed excessive compliance costs on the private sector? We hear all the time that they have.

That really has cost your people money, just as any consumer would have to pay, because those costs are eventually going to be passed down. We know that.

Mr. GOLD. When you talk about excessive costs, that is a subjective characterization.

We have followed and are reasonably well informed about the situation under OSHA, which has been a favorite subject of debate in this area.

Our feeling overall is that OSHA has not even scratched the surface of providing people with proper protection. The difficulty of

issuing standards, the procedural snarls, and the fact problems have slowed down that process.

In rulemaking cases we have been involved in, we have seen often claims of enormously high compliance costs when the proceeding is going on; once the litigation is over, the reality turns out to be very different.

One of the areas that OSHA moved on first was on exposure to vinyl chloride fumes. The industry said that the compliance costs would be $250 million, if my memory serves me correctly. A follow-up study showed that those costs were less than $20 million. The industry said it was technologically infeasible to do what OSHA said to do. They have done it.

There is no one formula—and we recognize this in our testimony—for determining the point at which regulation ought to stop.

The standard in the Clean Air Act that the measurement should be effects on children and the elderly isn't written in stone. It is a view that we support. But if there are people who believe that another standard is the correct one, we think the proper way to approach the issue is for what it is—a substantive issue as to how clean we want the air to be, given what we know about the costs of getting to that level.

It is a judgment that people on the Senator's side of the rostrum ought properly to make.

Mr. MALLINO. Mr. Chairman, on the cost issue, I would like to make a point.

When you are examining so-called compliance costs, there are a lot of times when you look at that cost and it may include increasing the productivity of that particular thing that you were also controlling, either environmentally, or to control an occupational hazard.

The vinyl chloride case that Larry alluded to was not only a compliance cost; but as a result of complying with the OSHA standards, the vinyl chloride industry substantially improved their production facilities.

When you look at the cost, you have to try to somehow break out what is an actual compliance cost and how much of that cost also adds to increased productivity.

Senator LAXALT. I think that will be part of the analysis. I would hope it would be.

Mr. MALLINO. Often when you see these cost figures floating around, they are not.

The other issue is this whole question of technological innovation. Very seldom do you see in a cost analysis the impact of what technological innovation can do to, again, not only improve the productivity of that particular facility but also protect the environment of the workers in the process.

Senator LAXALT. I think that ought to be factored in too.

I understand what you're saying, Mr. Gold. It will inspire a lot of litigation here, and it will make a lot of lawyers far more productive than they are now economically.

That is the situation here in Washington anyhow. Now they are on the other side of the fence, playing the other type of ballgame.

It seems to us, and I think we have a good deal of support here in the Senate, that without undermining what has gone before that

has been beneficial and without undermining basic social responsibilities, it is time that we address ourselves more than we have to the economic factors. That is all we want to achieve. We want to establish a mechanism.

We don't say that this bill has all the answers—that's for sure—procedurally. We want to establish a mechanism downtown and up here, whereby in major rules with major impacts that we look at the money for a change. I don't think that has been done.

Mr. GOLD. There are two responsive points I would like to make.

The first is that we think more of that is being done than is being acknowledged. We think the Congress has asked for a good deal of such analysis, and that it is being provided.

I think one valuable aspect of your considerations is that you are going to hear from people who are familiar with these individual statutes.

One of the questions you ought to satisfy yourself on, is what is being done now, because that's a question of fact. We ought not to be disagreeing about that.

We were here when Dr. Miller was testifying, and he said that prior to the *Benzine* case, OSHA wasn't looking into costs.

Dr. Miller and I have just been going to different rulemaking proceedings, because OSHA has commissioned cost and benefit studies with regard to every standard that I have been involved in.

The second point I would like to make is that in large part we agree with you. We stated that an analysis, that is not made under any illusion that the analysis can dictate the choice to be made rather than inform that choice, is sound. We are for that.

All we ask is that the scope of the analysis be in line with the scope of our knowledge and not be out of line. There can be excessive analysis, just as there can be excessive regulation. That's what we try to point out.

Mr. MALLINO. One final comment.

We just ought not to make too much of the analysis itself, because it is a very primitive technique. Even Dr. Weidenbaum in his testimony here a few minutes ago indicated that that is a highly underdeveloped science.

I think we are looking at the mechanism itself. The mechanism has some severe shortcomings.

Senator LAXALT. Senator Grassley?

Senator GRASSLEY. I don't have any questions, but I would like to just make a short statement.

I don't have a prepared statement on the bill, and let me tell you why I don't.

I did give lengthy testimony on the Danielson bill before the House Judiciary Committee. In that testimony, I told them, in essence, that I wished the House bill could be more like yours, Mr. Chairman.

Senator LAXALT. Did that go over very well? [Laughter.]

Senator GRASSLEY. As a cosponsor of your bill, I just wanted to drop in and tell you that I appreciate the long and hard work that your committee staff and you have done on this bill in the development of this bill. I'm sorry I can only be with you for a few minutes, but I have other conflicts.

Tomorrow in the Subcommittee on Agency Administration, which I chair, we will be holding hearings on section 5 of this bill, which is called the Bumpers legislation.

I hope that we can achieve speedy and careful consideration of the bill, leading to making this much-needed regulatory relief a matter of law before the end of this session.

I just wanted to thank you for holding these hearings and for your leadership in this area.

Senator LAXALT. I want to thank you for coming in. I want to thank you, in addition, for the marvelous work you are doing in the area of legislative veto. That is being handled on a double-track basis, and I imagine eventually we will have a convergence at some point.

Senator GRASSLEY. A successful convergence.

Senator LAXALT. Gentlemen, I thank you for some very helpful testimony. May we address some questions to you in writing, as I asked the last panel?

Mr. GOLD. Absolutely.

Senator LAXALT. If you could get them back to us perhaps by midweek next week. If that is not inconvenient, we would greatly appreciate it.

We thank you.

[The responses to questions submitted to the United Steelworkers of America and the AFL–CIO follow:]

QUESTIONS POSED BY SENATOR LEAHY

Question 1. In your view, does federal regulation impose excessive compliance costs on the private sector?

Answer. That federal regulation imposes costs on the private sector is an accepted fact. Whether the costs are "excessive" depends upon a whole host of factors, including the definition of "excessive." If the term "excessive" means the financial ability of business to comply with federal regulations, then we know of no major instance where business has been unable to comply because of financial reasons, particularly in the areas of occupational safety and health.

Question 2. In your view, do the compliance costs of federal regulation have any detrimental impact on the rate of employment?

Answer. To the best of our knowledge, there is little acceptable and objective evidence to suggest that federal regulation has a detrimental impact on the rate of employment. Indeed, in the areas of environmental and occupational safety and health, entire new industries have been created to develop, produce, market, and maintain control technology and equipment. Employment in these industries has grown substantially.

Question 3. In your view, do regulators weigh the trade-offs of a proposed regulation now?

Answer. Yes. At least for the past ten years, regulatory agencies have been required under various formal and informal presidential directives to analyze and consider the social, economic and public health implications of proposed regulations. The Nixon, Ford, Carter and Reagan Administrations have all required regulatory analyses of proposed regulations.

Question 4. Can you give an example of an area where a regulator should act, yet where the costs of a regulation are recognized as exceeding its benefits?

Answer. In the first place, we know of no situation in the areas of environmental or occupational safety and health where the costs of a regulation have been demonstrated to exceed the benefits. If the question is merely hypothetical, and assuming costs and benefits can be accurately determined (which is often not the case), then we believe that a regulator should act without regard to dollar considerations in cases where human life and health are endangered and where fundamental civil liberties are at stake.

Question 5. In your view, has Congress enacted a discrete policy judgment concerning the balance of regulatory benefits and costs in most regulatory statutes?

Answer. Except perhaps for the Delaney Clause, most of the regulatory statutes with which we are familiar appropriately provide a measure of discretion to the responsible agency as to the analytical details of rule making. However, there is no statute that we know of which gives a regulatory agency unbridled authority to issue regulations irrespective of other considerations.

Question 6. In your view, what existing statutes, excluding the Delaney amendment . . ., embody a judgment by Congress that the benefits of a regulation need not justify its costs?

Answer. The Occupational Safety and Health Act, as well as most environmental laws, embodies a congressional judgment that the protection of public and worker safety and health are primary policy considerations which need not justify the compliance costs of regulation. However, the Occupational Safety and Health Act includes a provision which states that an OSHA standard must be feasible, which has been interpreted by the courts to mean both economically and technologically feasible.

Question 7. Is it your view that S. 1080 requires the "quantification or statistical measurement" of all significant effects of a proposed regulation?

Answer. S. 1080, appropriately, qualified the need to quantify all the significant effects of costs and benefits and, by implication, assumes that some costs and benefits cannot be quantified. However, the clear intent of the bill is to require agencies to not quantify those costs and benefits which are quantifiable, but to use statistical measurements as a primary justification for proposed regulations. We believe that the bill would be much improved if it explicitly stated that an agency need not only quantify costs and benefits in order to regulate.

Question 8. In your statement, you observed that "there are certain fundamental social responsibilities of government which must be exercised without regard to dollar considerations. Foremost among these are the preservation of life, liberty and justice." By this do you mean that this nation has unlimited resources to preserve "life, liberty and justice?" With regard to what considerations should these "fundamental" social responsibilities be exercised?

Answer. The most important resource of this nation is the talent, genius and compassion of its people. This resource is not only unlimited, but is the primary factor responsible for making this nation what it is today. Our union is not prepared to qualify the preservation of life, liberty and justice by the availability of material resources. To do so would be a frank admission that the benefits of our democratic system cannot be extended to all sectors of society. Thus, we reject any suggestion that dollar considerations dictate the level and degree of government protection afforded its citizens.

Question 9. Specifically, what evidence do you have to support a belief that OSHA has been beneficial?

Answer. There are both quantifiable and nonquantifiable indications that OSHA has had a profound effect on the reduction of occupational injuries and accidental deaths. According to the Bureau of Labor Statistics, there has been a 20 percent reduction in job-related deaths since 1971. Moreover, according to the BLS, between 1973 and 1978 (the latest available data) there was a 13 percent improvement in the occupational injury rate, which means that there were some four million fewer workplace injuries during these years than would have occurred has the 1973 rate remained constant. The improvement rate was even more impressive in such industries as construction (19 percent decline), primary metals (18 percent decline), and machinery (19 percent decline).

In addition to these statistical measurements of OSHA's effectiveness, there is a body of literature which strongly suggests the OSHA has had a profound impact in resolving safety and health issues at the plant level. Very often these issues are resolved between workers and management without the active intervention of OSHA which, by its very presence in law, serves as the stimulus for resolution. Moreover, the OSHA statute has generated new and more effective approaches to safety and health research, professional and worker education and training, and an increased safety and health awareness on the part of both employers and employees.

For other statistical and nonstatistical measurements of OSHA benefits we refer the Committee to a study prepared for the Senate Governmental Affairs Committee by the Center for Policy Alternatives at the Massachusetts Institute of Technology, "Benefits of Environmental, Health and Safety Regulation."

Question 10. Do you have any data to challenge Albert Nichols' and Richard Zeckhauser's conclusion that OSHA "has had virtually no noticeable impact on work-related injuries and illnesses?"

Answer. See response to Question 9.

QUESTIONS POSED BY SENATOR LAXALT TO THE AFL-CIO

Question 1. Assuming that the President or his designee is given the authority to designate certain rules as "major," do you feel that the President or his designee should also have the power to waive regulatory analysis for certain major rules? If you support such waiver authority, please give specific examples (in addition to IRS rules) of rules for which such a waiver power would be needed. If you favor such waiver power, but with criteria set out in the statute, please elaborate on the details of such criteria. In addition, if you favor the addition of a waiver power, please explain why you do not feel that putting a such discretion in the Executive inserts a major loophole in the requirements of S. 1080. Should the exercise of such a power be subject to judicial review?

Answer. We do not favor granting the President or his designee authority to require regulatory analysis or the authority to waive regulatory analysis. We believe that if such analyses are required, Congress should specify uniform standards as to when that requirement applies.

Question 2. Should the determination of what is a major rule be subject to some form of judicial review? If you believe that there should be some limited judicial review, please explain how such review should be limited.

Answer. We believe that the material in, and the reasoning of, a regulatory analysis should be open to the judiciary in determining on review whether a particular rule meets the substantive standards specified in the governing statute or statutes. Otherwise, we do not believe that such analyses, or any issue relating to their preparation, should be subject to review.

Question 3. When considering the definition of a major rule, most witnesses addressed subparagraph (i), dealing with $100 million in compliance costs. Do you feel that subparagraphs (ii) and (iii) are too vague to be practically useful? Are these subparagraphs necessary?

Answer. As we stated in our testimony, we believe that subparagraphs (ii) and (iii) of the major rule definition are too vague to be practically useful. At the least, subparagraph (ii) should refer back to (i). We believe that subparagraph (iii) should not be included at all.

Question 4. In the past, some have suggested that all judicial review of rule making be vested in the Court of Appeals. Do you support such a change in jurisdiction? If so, please discuss the practical application of such a change. How would such a jurisdictional change affect *post-enforcement* review of rules? Don't the District Courts offer more opportunities for settlement than the more rigid procedures of the Courts of Appeals?

Answer. While the question is close, we believe that, in general, review of rulemaking should be in the Courts of Appeals. As a matter of principle, those courts are best suited for that function. Our only concern is the effect of such a step on their already strained dockets. In light of that concern, perhaps there should be certain exceptions for disputes that are deemed to be of too small dimension to warrant direct Court of Appeals consideration.

Question 5. Should a deregulatory rule making be subject to regulatory analysis?

Answer. Yes. Quite aside from the problem of defining deregulatory action, it is obvious that actions that come within the common use of that term may transfer substantial burdens from the previously regulated parties to the beneficiaries of the rule, any OSHA health standard is an example, or impose very substantial costs on the economy, the immediate price effects of oil deregulaton is a more than sufficient example. If regulatory analysis is a sound management tool in other instances, it is plainly every bit as sound in these.

Question 6. Many have said that regulatory analysis should not be the sole criterion of a rule making. What impact should regulatory analysis, as provided in S. 1080, have on a particular regulatory decision? What other criteria should be guiding a regulatory in addition to the regulatory analysis?

Answer. The sole criterion guiding a regulator should be the statute or statues which empower that regulator to act.

Question 7. Why not have a standard for rulemaking that a final rule should be the one that save the most lives and avoids the most injuries, unless the agency offers an explanation to the contrary?

Answer. We believe that the substantive standard for rulemaking ought to be set by Congress on a statute-by-statute basis and not through a generic statute such as S. 1080. Thus, while the standard suggested in the question is preferable, in our judgment, to those that incline the balance the other way, we believe that it is inferior to mandating a regulatory analysis that states in neutral terms that regulators are, in the manner provided for by the particular statute, to evaluate benefits

and adverse effects and to articulate the basis on which those consideratons have been reconciled.

In addition, we attach hereto: first, a response to the Nichols and Zeckhauser article in the appendix to volume 6 of the Study on Federal Regulation adverted to at the hearing; and, second, an appendix to the brief for the union respondents (the AFL-CIO, the IUD and Clothing and Textile Workers) in *ATMI. et al.* v. *Marshall, et al.*. (Supreme Court Nos. 79-1429 & 79-1583) which surveys statutory approaches to the consideration of costs and benefits in the promulgation of health and safety regulations.

Very truly yours,

HOWARD MARLOWE,
Associate Director. Department of Legislation.

LAURENCE GOLD,
Special Counsel.

AFL-CIO RESPONSE ON THE NICHOLS AND ZECKHAUSER OSHA CRITIQUE

Nichols and Zeckhauser's Article in the Appendix to volume 6 of the Study on Federal Regulation was largely researched and written in 1977 and represents a critique of the program prior to OSHA reforms under the leadership of Dr. Eula Bingham. The authors findings that OSHA had neglected the health area, that enforcement was an ineffective inducement for hazards abatement, and that agency programs for information dissimination and consultation were lacking, were accurate.

But from 1977 to January 1981, the agency made major improvements in all of these areas and other programs as well. Major health standards were issued for cotton dust, lead, acrylonitrile, DBCP. The federal governments first attempt at a generic regulatory policy for carcinogens was developed and issued by OSHA. And workers were provided the right of access to exposure and medical records on the job.

Agency enforcement efforts were targeted to high hazard industries, serious violations were stressed by the agency and larger penalties imposed on major violators of the law. In 1973, only 1 percent (1,973) of all citations issued were for "serious" violations. In 1980, serious violations accounted for over 35 percent (43,992) of all citations. More willful violation citations were issued in 1978 than in 1973 to 1978 combined.

In 1978, the agency instituted a major program for worker and employer training in occupational safety and health. Some $14 millon dollars is now budgeted for this important effort. Additionally, employer consultation services are available in every state supported by over $40 million dollars in federal funds.[1]

While there have been significant program improvements in recent years, data on the impact of these OSHA programs and the OSHA Act itself on workplace injuries and illnesses are unfortunately of limited use and questionable reliability. But limitations aside, available data do show that OSHA has had an impact on workplace injuries and illnesses, particularly for those injuries and hazards targeted by OSHA.

According to Bureau of Labor Statistics surveys, the overall injury rate in the private sector had declined from 10.6 per 100 workers in 1973 to 9.2 per 100 worker in 1978, and improvement of 13 percent. In other words some 4 million injuries have been averted.

For hazardous industrial sectors where OSHA targets its inspections the improvement during this time period has been even greater: injuries and illnesses have declined 19 percent on construction sites, 18 percent in primary metal maufacturing, 19 percent in the machinery industry and 26 percent in small business.

On the health side, it is estimated that OSHA's asbestos standard will prevent some 630 to 2,563 deaths annually, that some 2,000 lives will be saved by OSHA's vinyl chloride standard[2] and that 74,000 workers will be spared the agony of brown

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[1] Extensive Oversight Hearings on OSHA CONDUCTED IN Spring of 1980 by the Senate Labor and Human Resources Committee clearly document the positive effect these programs have had on worker health and safety.

[2] Committee on Governmental Affairs, U.S. Senate, Benefits of Environmental Health and Safety Regulation, 1980.

lung disease by the requirements of OSHA's cotton dust standard.[3] In addition, hundreds of thousands of workers exposed to lead, coke oven emissions, acrylonitrile, DBCP and other harzards regulated by OSHA are now protected from the damaging and lethal effects of the chemicals because of OSHA's efforts.

It is unfortunate and ironic that after years of criticism for being a nitpicking agency, now that OSHA has embarked upon a regulatory and enforcement track which addresses major hazards, Congressional, Administration and Business representatives propose to limit the agency's efforts and effectiveness.

Senator LAXALT. Our next panel consists of representatives of several business associations.

We have Robert Muth, representing the American Mining Congress and senior vice president of ASARCO, Inc.

F. Thomas Westcott is the president and treasurer of Westcott Construction Corp. and is representing today the Associate General Contractors of America.

John Post is executive director of the Business Roundtable.

Richard Leighton is managing partner of the firm of Leighton, Conklin, Lemov, Jacobs, and Buckley. He is representing the U.S. Chamber of Commerce and served as a consultant to the Administrative Practice Subcommittee during the last Congress.

Finally, Maurice Winger is here representing the National Association of Manufacturers and is vice chairman of Akzona, Inc.

Gentlemen, we welcome you here today.

I know that you have detailed prepared statements, and we will make them all a part of the record after your oral presentations. We would like summaries.

So that you get some idea of the time allocation, we would like to end up with this panel at around noon, if that is satisfactory. So time is of the essence.

I want to thank you, first of all, for coming here. I want to thank all of you, too, for the great help that your people have given our people in putting together this piece of legislation. This has been an ongoing process, as we all know. We came very close to the goal line last year. This year we hope to make it all the way.

As I indicated earlier, I think the bill we have here is a compromise, as it has to be, in legislation of this kind. I think the help that we have had, technically and otherwise, from your people has helped greatly in achieving this result.

You may proceed in any fashion that you wish.

STATEMENT OF ROBERT J. MUTH, VICE PRESIDENT, ASARCO INC., AND CHAIRMAN, AMERICAN MINING CONGRESS, COMMITTEE ON REGULATORY REFORM

Mr. MUTH. Thank you, Mr. Chairman.

I am appearing this morning on behalf of the American Mining Congress, which is a trade association of companies that together produce most of America's metals, coal, and industrial and agricultural minerals, together with the companies which supply that industry and the financial institutions that serve it.

The mining and mineral processing industry, I would suggest to you, has been as severely impacted as any by excessively costly regulations.

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[3] Amalgamated Clothing and Textile Workers Union, AFL-CIO, Statement before the Subcommittee on Labor Standards, House of Representatives, on the Impact of the Reagan Administration's Proposal to Reconsider the OSHA Cotton Dust Standard, April 9, 1981.

You referred to a copper smelter, sir. I think the impact on the copper industry, for example, of EPA and OSHA regulations is about as fully and extensively documented as any.

Senator LAXALT. If I may interrupt, Mr. Muth, the point was made here by Mr. Mallino, the representative from the Steelworkers, that many of these involve marginal operations; that EPA regulation and the cost of compliance is somewhat of a copout in closing a shop down; that they are looking for a way to do otherwise.

In your experience with some of these copper companies, that isn't always the case is it? It's applied to profitable operations.

If I understand it correctly, out in the West, they were fairly profitable; but the cost of these regulations simply rendered them unprofitable.

Mr. MUTH. I would have to say that overall, up until 1970, the U.S. copper industry was competitive in the world and was a profitable industry.

If you had to point to any one single factor that has been a debilitating force in our industry for the past 10 years, it has been the impact of OSHA and EPA regulations.

I might say in that regard that it is sometimes suggested that we enjoy delay in the regulatory process. That is not the case.

The uncertainty that has been created for this industry by regulations and regulatory change, the debilitating effect on investment decisions of regulatory uncertainty, has had as severe an impact as any other. We are not advocates of delay.

Because of the impact that regulation has had on our industry, we have followed the efforts of the Congress and successive administrations to control regulatory excesses. We have been an active participant in the debate. There is nothing more important to our industry.

We followed closely, Mr. Chairman, the progress of S. 2147, which you sponsored in the last Congress. We are very appreciative of your continuing concerns as evidenced by S. 1080.

The American Mining Congress has been especially concerned with two essential requirements for improving the regulatory process—that we have adequate hybrid rulemaking procedures and that there be an enforceable requirement that agencies choose the most cost effective regulatory approach.

S. 1080, we feel, accomplishes both of these objectives. The object of my brief statement this morning is to convey our support for the bill.

HYBRID RULEMAKING

Hybrid rulemaking procedures are essential, Mr. Chairman, because at the bottom of any regulatory effort, no matter how infused it may be with policy judgments, there is a perception of facts. If that perception is wrong, as we think it often has been in the past, the result is waste and confusion.

We need adequate procedures to test the factual bases of regulations. These procedures must include in proper cases a right of cross-examination. We believe proper procedures will speed, rather than delay, the rulemaking process.

S. 1080, we believe, provides the needed procedural tools.

One word about the concern sometimes expressed over formalizing the rulemaking process.

We agree that informal procedures can be most useful. Agencies should be encouraged to use informal procedures, both before and after publishing notices of proposed rulemaking.

Such procedures include preproposal workshops, mediation techniques, expert advisory panels, and other procedures aimed at producing cooperative regulations. There has been too little of this in the past.

Ideally, such informal procedures can identify and resolve most areas of disagreement and can produce far more rational results. But as to those issues on which agreement cannot be reached because of differing factual perceptions, more discipline over the regulatory process is needed.

COST EFFECTIVENESS

Very briefly, as to cost effectiveness, S. 1080 includes a cost-effectiveness requirement in both section 3 and section 4.

To be fully effective we feel that a requirement that agencies choose the alternative that places the least burden on the regulated must be judicially reviewable and subject to Executive oversight.

S. 1080 provides for judicial review. We would suggest oversight by the Executive Office of the President might also be provided for.

That completes my brief statement.

Again, I want to thank you for this opportunity to appear.

Senator LAXALT. Thank you, Mr. Muth.

Mr. Westcott, if the bells go off, I am going to have to leave. I am going to direct that counsel continue the hearing in my absence. So please understand, Mr. Westcott, if I leave it is not because of any lack of interest. I just don't want to miss a vote.

Please proceed.

[The prepared statement of Robert J. Muth and the responses to questions submitted to the American Mining Congress follow:]

Prepared Statement of Robert J. Muth

My name is Robert J. Muth. I am a Vice President of ASARCO Incorporated and Chairman of the American Mining Congress Committee on Regulatory Reform.

I am appearing here today on behalf of the American Mining Congress, an industry trade association whose membership includes producers of most of America's metals, coal, and industrial and agricultural minerals; manufacturers of mining and mineral processing machinery and supplies; and financial institutions that serve this industry.

AMC has been and continues to be a strong proponent of regulatory reform and appreciates the opportunity to present its views before this Subcommittee. I congratulate you, Mr. Chairman, and this Subcommittee on your diligent efforts continuing from past Congresses to the present to achieve meaningful reform of the process by which regulations are created.

My testimony today will focus on two essential requirements for improving the regulatory process: hybrid rulemaking procedures and a requirement that regulations be cost-effective. In terms of its legislative petitioning efforts, AMC considers these its highest priorities. Your bill, S. 1080, contains both of these requirements. Mr. Chairman, the object of my statement is to convey AMC support for your bill, especially as it relates to these two provisions.

Hybrid Rulemaking Procedures

I first wish to focus on the importance of the hybrid rulemaking procedures contained in Section 3 of S. 1080. As you know, hybrid rulemaking involves agency utilization of certain procedures in informal rulemaking, in addition to publishing notice and receiving public comments. The additional procedures provide opportunity for a careful probing and testing of the factual basis underlying an agency's action. The use of hybrid procedures helps agencies and rulemaking participants to recognize and resolve, if possible, conflicting claims early in the rulemaking process.

The term "hybrid" arises from the limited utilization of certain procedures common to formal rulemaking, such as the

questioning of witnesses, in what are otherwise informal rulemaking proceedings.

In order to appreciate why hybrid procedures are often necessary in informal rulemaking, it is important to recognize a fundamental reality: all agency rules rest on a factual basis of some sort. Although this proposition may seem obvious, it is often ignored, especially by agencies seeking to expand their discretionary powers by having their decisions characterized as "policy" choices. Policy decisions, nevertheless, are made always on the basis of some view or interpretation of "the facts."[1/] Admittedly, the importance of the factual basis for agency rules differs from proceeding to proceeding, but there must be a factual predicate of some dimension for an agency's action.[2/] Otherwise, the action can only be termed arbitrary.

This principle holds true in the environmental, and health and safety areas as in all others. While science may not provide a definitive factual answer to an agency inquiry in every case, there are in every case facts relating to the inquiry which the agency is obligated to consider before making a final decision.[3/] Hybrid rulemaking procedures are necessary in many instances to make clear the extent to which an agency is basing its decision on facts and what the agency's interpretation of these facts is.

Our highly industrialized society has forced Congress to enact laws which address complex scientific, engineering and health issues. Only a few of the statutes that call for the imposition of pollution and safety and health controls, however,

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1/ As Professor Davis has recently stated, "no policy can be sound unless in some way, directly or indirectly, it rests upon some sort of factual understanding." 1 K. Davis, Administrative Law Treatise 509 (2d. Ed. 1978).

2/ See 1 K. Davis, Administrative Law Treatise 507 (2d Ed. 1978); Action for Children's Television v. FCC, 564 F.2d 458 (D.C. Cir. 1977); Hooker Chemicals & Plastics Corp. v. Train, 537 F.2d 620 (2d Cir. 1976); National Welfare Rights Organization v. Mathews, 533 F.2d 637 (D.C. Cir. 1976).

Further, it has been noted that the "law has clearly moved away [from the proposition] that a court will presume the existence of facts justifying rules." K. Davis, supra, at 508.

3/ See Ethyl Corp. v. EPA, 541 F.2d 1, 29 (D.C. Cir.) (en banc), cert. denied, 426 U.S. 941 (1976).

provide federal agencies with modern procedural tools appropriate for the complexity of the issues that arise in implementing these statutes. Instead, the agencies are left with administrative procedures that were designed nearly four decades ago and that are simply inadequate in many cases today. It must be remembered that when the Administrative Procedure Act was enacted, the entire notion of rulemaking was not well developed. Certainly the importance of a factual base in informal rulemaking was not widely appreciated. Many of the complex scientific standards and regulations have arisen in more recent years with the creation of the Environmental Protection Agency, the Occupational Safety and Health Administration, the Mine Safety and Health Administration, and the Consumer Product Safety Commission.

Consequently, using inadequate procedures agencies frequently propose rules without adequate scientific or engineering justification, and find themselves in a position of being reversed by the courts (or reversing directions on their own) years later.[4/] Businesses which might in an earlier era have rejoiced in delay find no silver lining in this process: the changes ultimately required are much more expensive, and corporate capital planning is impossible in the interim period of uncertainty.

The answer is to open the decision-making process to greater technological input by those affected by a given regulation and to require the agencies to recognize and resolve conflicting claims themselves at the beginning of the decision-making process rather than before the courts at the end. Through its hybrid-rulemaking provisions, especially Section 3(d)(3) which allows a limited right of cross-examination, this Subcommittee has formulated a procedure whereby, under appropriate circumstances, the factual

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4/ There are numerous examples of hastily conceived and poorly documented agency decisions sent back by the courts for a second try because the agency failed properly to come to grips with the facts the first time around. See, e.g., United States v. Nova Scotia Food Products Corp., 568 F.2d 240 (2d Cir. 1977); National Ass'n of Food Chains, Inc. v. ICC, 535 F.2d 1308 (D.C. Cir. 1976); Portland Cement Ass'n v. Ruckelshaus, 486 F.2d 375, 393 (D.C. Cir. 1973), cert. denied, 417 U.S. 921 (1974) ("It is not consonant with the purpose of a rule-making proceeding to promulgate rules on the basis of inadequate data, or on data that, [in] critical degree, is known only to the agency.")

basis for an agency's action can be illuminated and probed and tested in such a way as to identify any flaws in the basic evidentiary foundation. There is simply no way an agency can reason its way to a sound regulatory policy if there are flaws in its basic factual premises.[5/]

The inclusion of a hybrid rulemaking provision in this Subcommittee's bill does not represent the introduction of a radically new idea. In fact, a similar provision was included in your bill, S.2147 (later S.262), reported by the Judiciary Committee last year. Congress has in recent years recognized that the bare notice and comment requirements of Section 4 of the Administrative Procedure Act (5 U.S.C. §553) are often insufficient to ventilate the issues raised by agency action. In at least seven major statutes since 1969,[6/] Congress has directed the use of hybrid rulemaking procedures which provide various techniques for the adversarial testing of disputed factual issues.

Similarly, in a line of decisions extending well over a decade,[7/] the courts in recognition of the factual complexities of modern

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5/ See, e.g., Mobil Oil Corp. v. FPC, 483 F.2d 1238, 1262-3 (D.C. Cir. 1973) ("There must . . . be some mechanism whereby adverse parties can test, criticize and illuminate the flaws in the evidentiary basis being advanced regarding a particular point. . . . [W]hatever procedure is followed, it must assure that the [agency] has a substantial evidentiary basis for its findings and it must provide the court with an adequate record on review.")

6/ See Federal Energy Department Organization Act of 1977, 42 U.S.C. §7191; Clean Air Act Amendments of 1977, 42 U.S.C. §7607(d); Toxic Substances Control Act of 1976, 15 U.S.C. §2605(c); Federal Trade Commission Improvement Act of 1974, 15 U.S.C. §57(a); Consumer Product Safety Act of 1972, 15 U.S.C. §§2056, 2058, 2059; Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C. §1317; Occupational Safety and Health Act of 1970, 29 U.S.C. §655.

7/ See, e.g., Mobil Oil Corp. v. FPC, 483 F.2d 1238 (D.C. Cir. 1973); International Harvester Co. v. Ruckelshaus, 478 F.2d 615 (D.C. Cir. 1973); Appalachian Power Co. v. EPA, 477 F.2d 495 (4th Cir. 1973); Walter Hohm & Co. v. Hardin, 449 F.2d 1009 (D.C. Cir. 1971); American Airlines, Inc. v. CAB, 359 F.2d 624 (D.C. Cir.) (en banc), cert. denied, 385 U.S. 843 (1966). Although the Supreme Court has limited the situations in which it is appropriate for the courts to impose additional procedures on the agencies, it has not foreclosed such judicial action altogether. See Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, 435.U.S 519 (1978); 1 K. Davis, Administrative Law Treatise, 605-616 (2d Ed. 1978). Indeed, courts have already exhibited an inclination to read the Vermont Yankee opinion narrowly, thus preserving their ability to specify additional or different procedural requirements than those specified by statute. See, e.g., United States Lines, Inc. v. FMC, 584 F.2d 519 (D.C. Cir. 1978); see also Cincinnati Gas & Elec. Co. v. EPA, 578 F.2d 660 (6th Cir. 1978).

rulemakings and the interplay of that complexity with notions of fundamental fairness, have expanded the procedural requirements of notice and comment rulemaking. The Supreme Court's widely criticized decision in Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519 (1978), may have temporarily set back the developing case law in this area, but that decision places squarely before Congress, and particularly this Subcommittee, the question of whether the mere notice and comment requirements of Section 4 are adequate to deal with complex informal rulemaking.

The inadequacy of mere notice and comment in every case has been realized even by some agencies, who in their own discretion have implemented hybrid procedures to resolve complex factual issues. 8/

AMC applauds this widespread recognition that hybrid procedures are valuable. We endorse the effort to make such procedures available to agencies and participants in major rulemaking proceedings.

At this time I wish to address briefly the major objections which might be raised to the inclusion in a regulatory reform bill of a hybrid rulemaking provision especially one such as Section 3(d)(3) which allows a limited right of cross-examination. First, some might be concerned that such a provision would overly formalize informal rulemaking. Such a result is not necessary or inevitable. The legislation should be drafted, as S.1080 is, so as not to require hybrid procedures in every case but only as needed. For example, in your bill proper limits are placed on the use of cross-examination. It is limited to use in proceedings involving major rules, used only for the resolution of material issues of fact, and employed only when other available procedures including oral and written rebuttal are determined to be inadequate. Also, the bill encourages agencies to establish reasonable controls on cross-examination to enhance its effectiveness. Such controls could include permitting the hearing officer discretion to exclude duplicative, irrelevant, or unnecessary lines of questioning, to consolidate parties with similar interests and to set time limits on the opportunity for

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8/ Although not mandated by statute, OSHA's rules of procedure require the presiding officer of a rulemaking proceeding to "provide an opportunity for cross-examination on crucial issues;" they specify at the same time that "the oral hearing shall be legislative in type." 29 C.F.R. §1911.15.

questioning. With such limitations, questioning from cross-examination can be an effective tool for resolving complex factual issues without turning the informal rulemaking proceeding into a full-blown trial.

Some might be concerned that hybrid procedures would significantly delay the rulemaking process. Experience in proceedings where hybrid procedures were utilized does not support this concern. As one regulator has noted, "the most complex and controversial hearings still consume no more than a very minor fraction of the total time normally needed to produce the decision."[9/]

Last year, an AMC witness testified before the House Education and Labor Subcommittee on Health and Safety that no hearing in which he participated during 1976 and 1977 under the Mine Safety and Health Administration's rules providing for cross-examination took longer than two weeks, and in each case some 20 to 25 standards and/or definitions were in issue at the beginning of the hearings. He testified that cross-examination was never a cause of delay in the issuance of such standards.[10/]

The same conclusion is supported by OSHA's rulemaking proceeding to develop a benzene standard. Although not mandated by statute, OSHA's rules of procedure for legislative-type rulemaking hearings "provide an opportunity for cross-examination on crucial issues."[11/] Use of these procedures in the "benzene rulemaking" did not result in a protracted proceeding. OSHA issued the proposed benzene standard on May 27, 1977, and promulgated the final standard on February 10, 1978, less than nine months later. The legislative hearings, which commenced on July 10, 1977, took less than three weeks. Attached to this testimony is a two-page account of how OSHA's provision for questioning in the "benzene rulemaking" not

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9/ See Pedersen, "The Decline of Separation of Functions in Regulatory Agencies," 64 Va. L. Rev. 991, 1010 (1978), citing as authority the Senate Comm. on Governmental Affairs Study on Federal Regulation: Delay in the Regulatory Process, S. Doc. No. 72, 95th Cong., 1st Sess. (1977).

10/ Oversight Hearings on the Federal Mine Safety and Health Act Amendments of 1977 before the Subcomm. on Health and Safety of the House Comm. on Education and Labor, 96th Cong., 2d Sess. 32 (1980) (statement of Anthony J. Thompson). Although the agency hearings were conducted as part of formal rulemaking proceedings, the point concerning absence of delay is equally applicable to informal rulemaking so long as the hearing officer places reasonable limits on cross-examination.

11/ See note 7 supra.

only was accomplished expeditiously but exposed an erroneous premise on which OSHA was basing its standard. The exposed error undoubtedly factored heavily in the Supreme Court's decision to overturn the standard, and should have led OSHA itself to reconsider the correctness of its own position at a much earlier stage.

Another concern might be that for fear of reversal in the courts an agency would over-utilize hybrid rulemaking procedures or that an agency decision not to use hybrid procedures in every case would lead to endless rounds of litigation. This concern is largely imaginary, especially in S.1080 due to the special judicial review provision that pertains to cross-examination. The effect of Section 3(f)(3) is to limit the instances when agency failure to afford cross-examination would constitute reversible error.

Additional protections are provided under existing law in that judicial review is available only from final agency action. The decision whether or not to permit cross-examination ordinarily is not final agency action. AMC does not favor interlocutory review of an agency's decision to grant or deny the use of hybrid procedures. Rather, the agency decision to deny cross-examination, for example, should be reviewable consistent with existing law, as part of the final agency decision under the familiar standards of Section 706. The judicial review provisions in Sections 3 and 5 of S.1080 are in harmony with this approach. Given these standards and the reasonable limitations that we have suggested for the use of hybrid procedures, an agency would be subject to no greater burden than it currently bears under existing law.

In summation, the objections which might be raised about hybrid procedures either have no basis in fact or can be avoided through the imposition of reasonable limitations such as those prescribed in your bill. Certainly the imagined drawbacks do not outweigh the proven benefits of such a provision. It has been our experience that cross-examination has forced industry witnesses to be more objective in their evaluation of agency proposals and in their development of positions on the issues, has forced all parties in a proceeding to prepare more thoroughly, to make their positions more reasonable and less doctrinaire, and to be more

amenable to compromise in the interest of producing clear, workable and judicially sustainable regulations.[12/]

Although I have emphasized the need for a limited right of cross-examination in informal rulemaking, I wish to underscore the proper context for the exercise of such a right. Cross-examination is not the only tool for the effective resolution of all rulemaking issues. As S.1080 recognizes, it properly should be reserved for use in resolution of material issues of fact that cannot be addressed adequately through other procedures. Agencies should be encouraged to use other less formal procedures, both prior to and after publishing the proposed rule in the Federal Register in order to promote cooperation among interested parties, define areas of widespread agreement, and help narrow and focus the key technical/factual, policy and legal issues in the rulemaking.[13/]

Examples of procedures which may be useful in particular situations are: advanced notices of proposed rulemaking; pre-proposal scoping workshops (analogous to pre-trial settlement conferences); creation of expert advisory councils, mediation techniques; written comment and rebuttal; written interrogatories; etc.

As a final note, AMC applauds several provisions of S.1080 which are enhanced by and consistent with hybrid rulemaking procedures. For example, Section 3(e)(4), prohibits agencies from relying on material not placed in the rulemaking file and subject to adequate notice and opportunity for comment. Also, Section 3(f) provides for a rulemaking file and prescribes its contents.[14/] Section 3(e)(i) importantly requires agencies to set forth the basis and purpose of final rules. Such provisions along with the use of hybrid procedures will clearly illuminate the factual basis underlying an agency's action.

12/ See note 10 at p. 31.

13/ With regard to S. 1080 perhaps this encouragement could best be given in the Committee Report as part of the explanation of Section 3(d).

14/ Section 3(f)(1)(B) is too restrictive in referring only to material "upon which the agency substantially relied in formulating the rule." The wording "substantially relied" should be replaced by the words "considered" or "relied." There is no good reason for requiring less than full disclosure of the material on which the rule is based, even though the basis may not be "substantial."

Cost-Effectiveness

I now wish to address AMC's other major priority for regulatory reform legislation -- cost-effectiveness. As you are well aware, a cost-effectiveness standard contemplates that where two or more alternative courses would substantially achieve a given regulatory objective, an agency should choose the least costly alternative.

It is difficult to find fault with such an efficiency-oriented and cost-conscious standard for agency action. AMC applauds the inclusion of a cost-effectiveness formulation in S.1080, both in the requirements of Section 3 respecting the publication of proposed and final rules, and in regulatory review provisions of Section 4.

Agencies must be told that they may not promulgate a final major rule unless that rule substantially achieves the regulatory objective in the least costly manner compared to alternative approaches. Such a requirement must be judicially reviewable and subject to executive oversight in order to effectively influence agency behavior.[15/] Under your bill's current formulation, the former need is satisfied. AMC hopes the bill will be strengthened to provide for centralized oversight by the Executive Office of the President of both independent and dependent agencies with respect to compliance with the cost-effectiveness requirements.

Mr. Chairman, this concludes my testimony. Once again, thank you for allowing AMC this opportunity to present its views on regulatory reform. I will now be happy to answer any questions you might have.

15/ The provision should also be drafted to protect industry from unreasonable agency data collection burdens and provide for proper protection of confidential information submitted by the companies.

THE SIGNIFICANCE OF DIRECT QUESTIONING OF WITNESSES IN THE OSHA BENZENE STANDARD RULEMAKING PROCEEDING

The Supreme Court's recent Benzene decision illustrates both the critical importance of cross-examination in legislative-type rulemaking and the falsity of charges that it will result in protracted proceedings.

The Benzene case affirmed the decision of the Fifth Circuit setting aside OSHA's Benzene Standard. The heart of the plurality opinion was the holding that OSHA had failed to make the necessary threshold finding that exposure to benzene at the existing permissible level of 10 ppm posed

> "a significant health risk in the workplace and that a new, lower standard is therefore 'reasonably necessary or appropriate to provide safe or healthful employment and places of employment.'" Plurality Opinion at 5.

In discussing the relevant evidence, the Court specifically noted OSHA's reliance on an epidemiological study of workers employed at two Pliofilm plants in Ohio during the 1940s (the so-called "Infante Study"). The Court observed that OSHA had erroneously interpreted that study as showing that benzene exposures between zero and 15 ppm caused leukemia. Id. at 11-13. If OSHA's interpretation of the study had not been shown to be erroneous, the required threshold determination of significant health risk at existing exposure levels might well have been deemed to have been established.

In fact, as the plurality opinion noted, evidence developed at the rulemaking hearing contradicted OSHA's interpretation of the Infante Study and indicated that benzene exposures at the two Pliofilm plants were often at levels of 100 ppm or above. Id. at 11-12 n.16. Thus, as the Court pointed out, NIOSH witnesses (who had authored the study) testified at the hearing that the Infante Study "should not be taken as proof of a five-fold increase in leukemia risks at 10-15 ppm." Id. The fact that the Infante Study could not fairly be interpreted to show an association between low-level benzene exposures and the development of leukemia was clearly of critical importance in OSHA's failure to establish the existence of a significant health risk at the 10 ppm exposure level permitted under the existing standard.

As the Supreme Court's citations to the rulemaking record indicate, a critical factor in discrediting OSHA's initial interpretation of the Infante Study was the testimony of various witnesses at the rulemaking hearing. Those witnesses (including the authors of the Infante Study and workers who had been employed at the two Pliofilm plants) were questioned closely by various participants in the administrative proceeding in an effort to reach a more soundly based and well-informed understanding of the benzene concentrations to which the workers involved in the Infante Study were exposed.

If there had been no opportunity to question these witnesses, it would not have been possible to mount as effective and persuasive a challenge to OSHA's erroneous interpretation of the Infante Study. Indeed, it is conceivable that in the absence of the clarifying evidence developed as a result of such questioning at the administrative hearing, the Court of Appeals and the Supreme Court might have been reluctant to conclude that OSHA had failed to establish the existence of a significant health risk at the 10 ppm level of the existing standard. In that event, the Courts would likely have reached a different result on the merits.

Although not mandated by statute, OSHA's rules of procedure require the presiding officer of a rulemaking proceeding to "provide an opportunity for cross-examination on crucial issues;" they specify at the same time that "the oral hearing shall be legislative in type." 29 C.F.R. § 1911.15. Use of these procedures did not result in a protracted proceeding. OSHA issued the proposed Benzene standard on May 27, 1977 and promulgated the final standard on February 10, 1978, less than nine months later; the legislative hearings, which commence on July 10, 1977, took less than three weeks.

Questions Posed by Senator Laxalt

Question 1. Assuming that the President or his designee is given the authority to designate certain rules as "major," do you feel that the President or his designee should also have the power to waive regulatory analysis for certain major rules? If you support such waiver authority, please give specific examples (in addition to IRS rules) of rules for which such a waiver power would be needed. If you favor such waiver power, but with criteria set our in the statute, please elaborate on the details of such criteria. In addition, if you favor the addition of a waiver power, please explain why you do not feel that putting such discretion in the Executive inserts a major loophole in the requirements of S. 1080. Should the exercise of such a power be subject to judicial review?

Answer. We believe any broad waiver authority vested in the President could serve to undermine the purposes of S. 1080. Therefore, we would be opposed to such a designation of authority. Nevetheless, there are legitimate exceptions (e. g. IRS rules) which should be made to the regulatory analysis requirements. Such exceptions, however, should be clearly expressed in the Act.

Question 2. Should the determination of what is a major rule be subject to some form of judicial review? If you believe that there should be some limited judicial review, please explain how such review should be limited.

Answer. Judicial review is the standard mechanism for assuring that agencies adhere to required procedures. We would not object to, indeed we would support, vesting concurrent oversight authority in the President. However, we believe it should be recognized that vesting sole oversight authority in the President is tantamount to granting waiver authority.

Question 3. When considering the definition of a major rule, most witnesses addressed subparagraph (i), dealing with $100 millionin compliance costs. Do you feel that subparagraphs (ii) and (iii) are too vague to be practically useful? Are these subparagraphs necessary?

Answer. They are necessary, both because subparagraph (i) will not provide a brightline test in all cases, and because much damage can be done to the U.S. economy by regulations having a severe impact on small business segments. Total sales in the U.S. of many vital materials are less than $100,000,000 per year. Examples include cadmium, arsenic, selenium, beryllium and any number of specialty drugs and chemicals. Since few industries have $1 in capital investment for $1 of annual sales, production of any of those materials could presumably be banned entirely without imposing a compliance cost of $100,000,000 per year. We need to pay attention to micro-economic impacts.

Question 4. In the past, some have suggested that all judicial review of rulemakings be vested in the court of appeals. Do you support such a change in jurisidiction? If so, please discuss the practical application of such a change. How would such a jurisdictional change affect post-enforcement review of rules? Don't the district courts offer more opportunities for settlement than the more rigid procedures of the courts of appeal?

Answer. We do not support such a change. The district courts do offer better opportunities for conflict resolution, and for this and other reasons district court jurisdiction should be preserved.

Question 5. Should a deregulatory rulemaking be subject to regulatory analysis?

Answer. There are convincing arguments to be made on both sides of this question. We are satisfied, however, with the way this issue is handled by the present version of S. 1080.

Question 6. Many have said that regulatory analysis should not be the sole criterion of a rulemaking. What impact should regulatory analysis, as provided in S. 1080, have on a particular regulatory decision? What other criteria should be guiding a regulator in addition to the regulatory analysis?

Answer. We believe that the "regulatory analysis" provisions of S. 1080 are very essential to effective rulemaking. Among other things, these requirements will assure that an agency carefully considers the economic consequences of its actions, as well as the merits of alternative approaches to achieve the stated regulatory objectives. "Regulatory analysis" should improve the quality of agency decision-making.

Of course, the "regulatory analysis" provisions of this generic rulemaking bill do not and cannot provide an exhaustive list of all factors which should be considered by an agency in any particular rulemaking. An agency would also have to look to the provisions of the statute authorizing the particular rulemaking (e.g. Clean Air Act, Clean Water Act, etc.) as well as other statutes, executive orders, regulations or case law that are substantively or procedurally relevant to the given rulemaking.

Question 7. One witness contended that the regulatory situation was getting "worse." Does this mean that E.O. 12291 is not working? Why is legislation needed?

Answer. There has been too little time to judge the effect of the Executive Order, but we see no indication that it will fail in its purpose. Legislation is needed, nevertheless, to reinforce the efforts of the Administration, to extend firm control over the independent agencies and to assure that common sense remains the guiding principle in this and subsequent administrations.

Question 8. Why not have a standard for rulemaking that a final rule should be the one that saves the most lives and avoids the most injuries, unless the agency offers an explanation to the contrary?

Answer. It would make as little sense to suggest that a final rule should be that which imposes the least cost, even if it is ineffective to achieve its purposes. Cost-effectiveness—which is the issue—simply embodies the common sense idea that given two or more effective choices, one should choose the least costly alternative. This, of course, is precisely what single-purpose agencies such as OSHA have been unwilling to do.

Questions Posed by Senator Leahy

Question 9. In preparing this legislation, we have heard from many business groups who complain that the federal regulatory agencies underestimate, or do not adequately consider, compliance costs for the regulated industries. On the other hand, there is a substantial body of opinion that, particularly in the environmental area, businesses, have, in fact, overestimated those costs. Please comment on the latter criticism and explain how you think we can avoid this problem.

Answer. A reason for over (and under) estimation of cost is that many regulations are of a technology-forcing nature. When Congress requires technology-forcing regulations, all parties to the rulemaking are forced to develop cost-estimates which can, at times, be only educated guesses.

Another reason for inaccurate cost estimates is ambiguity in proposed regulations. Cost estimates are always based on assumptions about what the regulations require and how they will be implemented. Better data should result from the reforms embodied in S. 1080.

Question 10. I believe all of you view the use of hybrid rulemaking procedures, particularly cross-examination, as essential to the development of an adequate factual record. Won't these procedures, in fact, result in unnecessary delays in the issuance of regulations? What can we do to avoid this result? Should we put time limits on agency regulation making? What would you suggest would be an appropriate time frame for the issuance of major rules as defined in this bill?

Answer. For the reasons set forth in our written statement submitted to the subcommittee at the hearing on May 14, 1981, we do not believe cross-examination will unnecessarily delay the issuance of regulations. Our written statement also provides specific suggestions for assuring that delay will not occur.

We doubt the efficacy of imposing time limits on agency rulemaking. It is better to allow sufficient time to produce a thoughtful and well-crafted regulation than one that is flawed because insufficient time was given to its creation. Experience has shown that great problems result when Congress writes into statutes unrealistic time deadlines for the promulgation of agency rules. Agencies have not been able to meet such deadlines and they cannot realistically be penalized for missing them.

Question 11. Mr. Muth, you are not worried that agencies will over-utilize hybrid rulemaking out of fear that if they don't, they face reversal on appeal. You rest your confidence on the limited standard for judicial review. I agree that the grounds for reversal are narrower where cross-examination is denied than other alleged errors, but still the courts may consider this issue on appeal. Are you satisified that the doors are not open wide enough to create a great deal of appellate litigation on this issue?

Answer. We are quite satisfied that the standard in S. 1080, which limits judicial review of an agency's decision to grant or deny cross-examination, will not impair the regulatory process. Moreover, as we stated in our testimony, agencies should be encouraged to use other, less formal, procedures than cross-examination, both prior to and after publication of the proposed rule in order to promote cooperation among interested parties, define areas of agreement and help narrow and focus the key technical/factual, policy and legal issues in the rulemaking. The intent of hybrid rulemaking is that an agency will implement whatever procedures are calculated under the circumstances to best provide for proper examination of the factual underpinnings of a rule. As this bill expresses, it is only when other procedures are found inadequate for the resolution of a particular factual issue that cross-examination is mandated. Presumably, in deciding whether an agency had properly responded to a request for cross-examination, a court would consider the extent to which the agency had used other procedures that in the circumstances may have been equally effective to resolve the factual issues in dispute.

Question 12. Mr. Muth, you have said in you direct testimony that the decision-making process should be open to greater technological input and that conflicting technical claims ought to be resolved at the beginning of the decision-making process, rather than before the courts, at the end. I share your enthusiasm for some form of hybrid procedure, but I am equally concerned that we may increase the time necessary to complete the rulemaking process and may end up with a more adversarial, trial-like process than the current rulemaking system. How can we reconcile an effective hybrid procedure with the need to minimize the complexities that have characterized rulemaking in the past, especially where the issues involve technology?

Answer. The American Mining Congress believes that as a general proposition it takes no more time to properly formulate a rule than to improperly formulate it and then correct its deficiencies. The purpose of hybrid rulemaking procedures is to improve the quality of public input to the agencies and agency consideration of such input at the rulemaking stage. Such procedures may require some time in addition to that which would normally be consumed under mere notice and comment procedures. However, we expect this short-time delay would be more than offset by long-term time savings in arriving at a reasonable and well-crafted final regulation.

Hybrid rulemaking procedures should help sharpen and define the issues in the rulemaking. They should assist the parties in resolving issues which can be resolved and in more narrowly defining the issues upon which the parties cannot agree. For the latter issues, hybrid procedures should produce a factual basis upon which the agency can confidently make its decision. Over the long run, hybrid rulemaking should take no more time and yet produce better rules than the existing informal rulemaking system.

One short example may be helpful. On August 31, 1976, the Environmental Protection Agency proposed regulations for state underground injection control programs pursuant to Section 1421 of the Safe Drinking Water Act. Written comments were submitted and public meetings held. Two and one half years later the agency decided it was necessary to repropose the regulations, accept written comments and hold further public hearings. The regulations were reproposed on April 20, 1979. Promulgation of the regulations occurred in two parts on May 19 and July 24, 1980. Because the final regulations ignored basic factual information submitted during the public comment period, the American Mining Congress filed a lawsuit challenging the regulations. Settlement negotiations are presently occurring.

It seems obvious to AMC that many problems and issues could and should have been resolved had government officials initially been required to address some basic questions related to the scientific and engineering material upon which the regulations were based. Many of the issues which are now being resolved through court settlement negotiations could have been resolved as easily through, for example, cooperative rulemaking techniques such as pre-proposal scoping workshops (analogous to pre-trial settlement conferences). Instead, adherence to the minimum informal rulemaking requirements has resulted in an effort that is now in its fifth year and still has not produced a reasonable, workable, factually supported, and legally sound rule.

STATEMENT OF F. THOMAS WESTCOTT, PRESIDENT, WESTCOTT CONSTRUCTION CORP., NORTH ATTLEBORO, MASS., REPRESENTING ASSOCIATED GENERAL CONTRACTORS OF AMERICA

Mr. WESTCOTT. Thank you, Mr. Chairman.

I am president of Westcott Construction Corp., of North Attleboro, Mass.

I appear here today representing the Associated General Contractors of America.

We are pleased to appear in strong support of S. 1080.

AGC had as its theme during 1980 the need for the Government to "return to reason" in its dealings with private industry and especially the construction industry.

We believe that Government can no longer afford to base its actions on social needs to the exclusion of practical considerations.

AGC fully supports and greatly appreciates the issuance of Executive Order 12291 by President Reagan on February 17, 1981. The fact that this Executive order was issued so early during the administration underscores both the emphasis President Reagan has placed on regulatory reform and the need for prompt action in the face of ever-mounting regulatory impositions.

The requirement that agencies undertake an analysis of the cost and benefits of proposed regulations is the touchstone of S. 1080.

We understand that this bill does not require a strict mathematical cost-benefit analysis. However, where discrete economic costs and benefits can reasonably be identified, S. 1080 does so require. Of course, where costs or benefits cannot be brought out in terms of dollars and cents, only a nonmathematical description of costs and benefits is required.

Equally important, this process includes a requirement to determine how costs and benefits are created by the proposed regulation and who in society will bear the cost and enjoy the benefits of each major rule considered.

We disagree with the exclusion of the Tennessee Valley Authority from this requirement. TVA has been the greatest offender against OMB's requirement that agencies contract out to the private sector. We believe tax dollars have been wasted for years by TVA doing its own construction. We urge that the agency be forced to justify its rules and regulations if it can.

Judicial review of the major rule determination sounds attractive but concerns us. Our concern is that this provision, and perhaps others like it that might be added during markup, would ultimately encourage endless litigation rather than provide realistic solutions to regulatory problems.

While regulatory excesses are bureaucratic phenomena, they have their origins in the legislative branch where the laws are born. The original problem is usually in the law. The Congress sometimes passes legislation that sets in motion a change of events without adequately weighing its own actions.

The Congress needs a handle to forecast what its actions will produce, a reasonably accurate estimate of the regulatory and paperwork burden any given statute will generate, and a means to correct the bureaucracy if it exceeds reasonable limits.

We suggest that a regulatory/paperwork impact assessment be required on every bill the Congress passes, just as the Congress already requires an economic assessment of legislation prior to passage. The impact assessment can be done by the agency that will be responsible for carrying out the statute.

Congress would then be able to make a considered judgment on whether the bill's objective is worth the estimated regulatory/paperwork costs. Congress could, with reasonable accuracy, weigh the alternatives—either scrap the bill, or rewrite it to reduce the inherent burdens, or pass it as proposed.

We support S. 1080 as an attempt to require the rational consideration of regulatory impositions which seek to attain the legitimate goals of the Federal Government.

I appreciate the opportunity to present the views of the Associated General Contractors on this subject. Thank you very much.

Mr. NASH. Thank you, Mr. Westcott.

[Mr. Westcott's prepared statement, with attachments and responses to questions posed by Senators Laxalt and Leahy follow:]

Prepared Statement of F. Thomas Westcott

My name is F. Thomas Westcott, and I am President of Westcott Construction Corporation, of North Attleboro, Massachusetts. I appear today representing the Associated General Contractors of America, and I am accompanied by John C. Ellis and Gary D. Simms of AGC's staff.

The Associated General Contractors of America and its 113 chapters nationwide is comprised of approximately 30,000 firms including 8,400 of the nation's leading general contracting companies that perform more than $100 billion of construction annually. The burden created by the regulatory system of the Federal Government falls heavily on AGC contractors as the management and employment leaders in the construction industry.

We are pleased to appear today in strong support of S.1080, the Regulatory Reform Act of 1981, which we believe will significantly improve the way in which the Federal Government's regulatory requirements are adopted and reviewed.

The Need for Regulatory Reform

AGC had as its theme during 1980 the need for the government to "Return to Reason" in its dealings with private industry and especially the construction industry. We believe that government can no longer afford to base its actions on social needs to the exclusion of practical considerations. For this reason, we can and do wholeheartedly support the objectives of the Regulatory Reform Act. By imposing a requirement of regulatory analysis, the costs and benefits of major rules which affect the private sector can be rationally considered and implemented. The practical consideration of compliance costs and benefits is an essential componant to the growth and expansion of our nation's economy.

A series of editorials from our monthly magazine on "Return to Reason" is attached to this statement, and is illustrative of our concerns. The editorials also clearly illustrate specific examples of the need for the Regulatory Reform Act of 1981.

Regulatory measures must bear a practical and justifiable relationship to the enabling legislation and to the realities of the people and businesses being regulated. We have brought this message directly to the attention of government regulators. We have specifically called for realistic and workable affirmative action and compliance structures for our industry from the OFCCP. We have asked OSHA to consider carefully compliance costs for many of its regulations. We have told EPA that it has lost sight of fundamental objectives in administering its Construction Grants Program by issuing minority business enterprise regulations which severely conflict with the competitive bidding process. AGC has endorsed the Administration's regulatory reform program, and we have submitted regulatory action recommendations to the Presidential Task Force on Regulatory Relief, and to executive agencies as well. We believe that the Administration's efforts will be substantially enhanced by enactment of S.1080, by providing an effective and enforceable framework for the revision of major rules.

AGC fully supports and greatly appreciates the issuance of Executive Order 12291 by President Reagan on February 17, 1981. The fact that this Executive Order was issued so early during the Administration underscores both the emphasis President Reagan has placed on

regulatory reform, and the need for prompt action in the face of ever-mounting regulatory impositions.

Senator Laxalt stated when introducing this legislation on April 30 that "by enacting this legislation into statute, we insure agency compliance to an extent not achieved by executive fiat." This statement is corroborated by our own experience. As we reported to the Congress in oversight hearings on Executive Order 12044 on October 9, 1980, many difficulties arise when agency compliance to regulatory reform is based on executive fiat, rather than statute. In that testimony (copy attached) we pointed to several instances of agency non-compliance with E.O. 12044, which had among its provisions requirements that needs and purposes of regulations be clearly established, and that compliance costs and paperwork burdens be analyzed. Clearly, we would not be discussing legislation on these issues if executive fiat was a sufficient vehicle for reform.

On the other hand, we urge that nothing be imposed, through S.1080, that would dilute or delay the current Administration's regulatory reform initiatives.

The Regulatory Reform Act of 1981

S.1080 is a necessary first step for total reform of the regulatory process. Several features of the Bill are particularly noteworthy, and form the basis for our support.

* The Regulatory Analysis Requirement: The requirement that agencies undertake an analysis of costs and benefits of proposed regulation is the touchtone of S.1080. We understand that this bill does not require a strict mathematical cost/benefit analysis. However, where discrete economic costs and benefits can be reasonably identified, S. 1080 does so require. Of course, where costs or benefits can not be brought out in terms of dollars and cents, only a non-mathematical description of costs and benefits is required. The bill requires reasonableness, with full delineation and consideration of all factors. Equally important, this process includes a requirement of how costs and benefits are created by the proposed regulation, and who in society will bear the costs and enjoy the benefits of each major rule considered. We view the regulatory analysis requirement as a standard for rational agency deliberation and action. While this analysis may fall short of perfection, it is a major step forward in enlightened regulation making.

We disagree with the exclusion of the Tennessee Valley Authority from this requirement. TVA has been the greatest offender against OMB's requirement that agencies "contract out" to the private sector. We believe tax dollars have been wasted for years by TVA doing its own construction--and we urge that the agency be forced to justify its rules and regulations, if it can. In addition, we suggest that language be inserted to indicate that a provision be inserted in this Act to make clear that any major rule as herein defined is subject to the requirements of this Act, even if the agency issuing the rule has language in its enabling legislation providing for rule-making without regard to the provisions of the Administrative Procedures Act.

* Notice of Proposed Rule-Making: The provisions of S.1080 requiring a statement of agency objectives, a description of the substantive material upon which the rule is based, and a solicitation for alternative proposals in the notice of proposed rule-making are key factors in our opinion. Explicit statements of regulatory goals will enable the private sector to creatively identify alternative, less costly means to attain stated goals. The private sector will have the opportunity to inform agencies of how the agency's estimates of costs and benefits square with the private sector's own views. This, we believe, will be a major opportunity to enhance the practicality of regulatory proposals with minimum societal costs.

* Judicial Review Provisions: AGC also endorses the provisions of S.1080 relating to judicial review of regulations. Under the Bill, courts would be prohited from assuming that agency interpretations of law are valid; however, agency factual determinaations would be upheld if substantial factual support of such determinations appears in the administrative record.

Judicial review of the "major rule" determination sounds attractive but concerns us. Our concern is that this provision, and perhaps others like it that might be added during mark-up, would ultimately encourage endless litigation rather than provide realistic solutions to regulatory problems.

The Oversight Function

It is the position of AGC that the regulatory management program within the Executive Branch is properly a function of the Office of Management and Budget. President Reagan has made that determination in E.O. 12291 and we do not believe that any change should be recommended by Congress as part of this legislation. OMB's role in the Executive Branch budget process renders it uniquely qualified to fulfill this role.

Legislative Action: A Necessary First Step

While regulatory excesses are bureaucratic phenomena, they have their origins in the Legislative Branch where the laws are born. The original problem is usually in the law. The Congress sometimes passes legislation that sets in motion a chain of events, without adequately weighing its own actions.

For example, the Employee Retirement Income Security Act of 1974 (ERISA) is a rather recent statute, clearly well-intentioned, but so detailed that we could hope the law itself embodies the bulk of any needed regulations. Despite the great detail in the statute, ERISA has spawned rapidly growing regulations, a bureaucracy that cannot do its assigned job, and a staggering paperwork burden.

Congress undoubtedly did not intend the results that followed passage of ERISA. One must presume the Congress simply did not anticipate how the bureaucracy would interpret its mandate. This is a basic problem, which must be addressed. The Congress needs a "handle" to forecast what its actions will produce, a reasonably accurate estimate of the regulatory/paperwork burden any given statute will generate, and a means to correct the bureaucracy if it exceeds reasonable limits.

We suggest that a regulatory/paperwork impact assessment be required on every bill the Congress passes, just as the Congress

already requires an economic assessment of legislation prior to passage. The assessment can be done by the agency that will be responsible for carrying out the statute. It should not unreasonably burden the agencies to do this, because they will have to do it anyway when the law is enacted. A review of the agency assessment by the General Accounting Office might be useful.

For example, if ERISA was being considered today and the regulatory/paperwork impact assessment was in place, the bill would be referred to the Department of Labor as proposed legislation. DOL would be required to take a preliminary, but careful, look at it and estimate the regulatory/paperwork impact necessary to execute such a statute. Congress might want the General Accounting Office to review DOL's estimate - GAO is already in the business of auditing agency actions for the Congress.

Congress would then be able to make a considered judgement on whether the bill's objective is worth the estimated regulatory/paperwork costs. Congress would, with reasonable accuracy, weigh the alternatives: scrap the bill, re-write it to reduce the inherent burdens, or pass it as proposed.

One additional control is needed to guard against gross errors in the regulatory/paperwork estimate. The agency estimate should be made a benchmark trigger for congressional review. By including the agency estimate in the statute's legislative history, and mandating in the statute prompt oversight hearing if that estimate is exceeded by, say, 10 percent, Congress would obtain an "emergency brake" to slow down the runaway bureaucracy.

Regulatory Analysis: Can It Be Done?

Critics of S.1080 may argue that regulatory analysis cannot be accomplished because it is too theoretical, impractical, or because it is impossible to assign dollar values to human life or to environmental quality or like matters. As noted above, S.1080 does not require the mathematical assignment of dollar values to costs or benefits not reasonably susceptible to such a process. But we agree that rational regulatory policy must be based on a careful, accurate weighing of costs and benefits which can be quantified, together with the weighing of societal costs and benefits which are inherently non-mathematical.

We support S.1080 as an attempt to requires the rational consideration of regulatory impositions which seek to attain the legitimate goals of the Federal Government. Thank you for providing us with the opportunity to present our views on this subject.

Attachments: 2

STATEMENT

SUBMITTED BY

THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INC.

TO THE

SUBCOMMITTEE ON OVERSIGHT OF GOVERNMENT MANAGEMENT

COMMITTEE ON GOVERNMENTAL AFFAIRS

OCTOBER 9, 1979

OVERSIGHT ON IMPLEMENTATION

OF

EXECUTIVE ORDER 12044

The Associated General Contractors of America welcomes this opportunity to comment on the effectiveness of President Carter's Executive Order 12044.

We commented, late in 1977 when E.O. 12044 was a proposed order, that we commended the spirit and substance of the proposal. We called it a "genuinely fresh breath of air." That view has not changed--it is still clear today that the White House supports a more open and participatory system of federal regulation. Without that kind of impetus from the top, regulatory reform in the bureaucracy cannot be expected.

Unfortunately, that impetus from the top is just the first step of many that are needed to reach the goal. OMB's September, 1979, progress report on E.O. 12044 indicates that appropriate and intelligent follow-up can be expected. Just as regulatory activities did not get out of hand overnight, effective regulatory reform cannot be expected overnight.

AGC responded to OMB's request for assessments of agency performance under E.O. 12044. For the record, that response is part of our testimony today. We found the Executive Order still holds great promise but agency compliance is far from adequate so far.

As a case in point, we will update those comments as they relate to the Office of Federal Contract Compliance Programs in the Department of Labor. On September 7, 1979, OFCCP published its proposed new paragraph 7q, an addition to 41 CRF 60-4.3(a), with

the stated intent of "clarifying" contractors' requirements for the employment of women and minorities. Paragraph 7q says that construction contractors who are subject to OFCCP's regulations on the employment of minorities and women, are subject to those requirements on all their construction projects. This means that any contractor who has one federal or federal-aid construction job anywhere is subject to the OFCCP regulations on all other work, everywhere in the country, regardless of whether the other jobs are public or private.

Failure to comply with OFCCP's rules leads, ultimately, to debarment from bidding on federal and federal-aid projects. In effect, construction firms are now faced with the possibility of being debarred from bidding on federal work if they should fail to meet OFCCP's requirements on any single private or public job anywhere.

Executive Order 12044 directs each agency to "achieve legislative goals effectively and efficiently" and the agencies "shall not impose unnecessary burdens on the economy, on individuals, on public or private organizations...". To achieve the objectives, regulations are to be developed through a process which ensures that the need for and purposes of the regulation are clearly established. Meaningful alternatives are to be considered and analyzed before the regulation is issued. Compliance costs, paperwork and other burdens on the public are to be minimized, and the public is to be given an opportunity to participate in the development of the rule.

The Department of Labor was given a "good progress" grade in OMB's September report. Let's look at how DOL treated the 7q regulation.

DOL announced that it would publish its first Semi-annual Agenda of Regulations Selected for Development and Review on October 31, 1978. It was actually published on January 26, 1979. DOL's second Semi-annual Agenda was to be out on August 31, 1979, but we have not seen it yet.

In the January 26 Agenda, DOL listed nine anticipated regulatory proposals in 41 CFR 60. The one that, presumably, covers 7q and offers little evidence of what to expect. It says, also,

"New policies and procedures are being developed." It says, also, "A regulatory analysis is not required."

Implementation of the proposed 7q regulation would constitute a very significant restructuring of the federal compliance system for construction. The rule would extend OFCCP into areas where its authority is highly questionable. Untold costs would be imposed on the contractor to comply with the reams of reports and forms that would have to be developed and maintained to comply with the extended OFCCP jurisdiction. The rule would impose a major increase in costs and prices for the construction industry, and a corresponding cost increase for all of government construction procurement. The regulation would also result in legal uncertainties which will require resolution through litigation.

It is such regulatory excesses that E.O. 12044 was designed to avoid.

However, OFCCP decided a regulatory analysis was not needed on 7q, nor was it necessary to develop "a careful examination of alternative approaches." According to the Executive Order, OFCCP is required to provide "a succinct statement of the problem; a description of the major alternative ways of dealing with the problems that were considered by the agency, an analysis of the economic consequences of each of these alternatives and a detailed explanation of the reasons for choosing one alternative over the others." OFCCP even failed to articulate the problem which it is attempting to clarify. OFCCP, directly contravening E.O. 12044, failed to analyze alternative approaches and ultimately failed to develop a rule that solves the (undefined) problem with a minimal detrimental impact on the industry.

As OMB stated in its September, 1979, report, "agencies are not doing an adequate job of determining when a regulatory analysis is required." We are most gratified to find that OMB recognizes this problem, and plans to see that it is remedied. At the same time, it is galling to note the specific failures of OFCCP and the inability of the government to take specific corrective action.

It is apparent that these regulatory excesses require corrective legislation.

It is our belief, however, that S. 262 and S. 755 do not go far enough to accomplish the purpose of regulatory reform.

You are well aware of the staggering increase in federal regulation. Your own studies, the reports of the Commission on Federal Paperwork, previous witnesses before these hearings - all have demonstrated the size of the monster we are fighting. It can not be brought to heel with mild measures.

This 96th Congress was being proclaimed "the oversight Congress" almost before it convened. Virtually all who were elected or reelected to this Congress during 1978 proclaimed "regulatory reform" and "control the bureaucrats" and "cut out the paperwork" as cardinal ambitions. S. 262 or S. 755 would be feeble fulfillment of such great ambitions. The AGC cannot believe that passage, and full implementation, would adequately deter the regulation explosion, and we believe you would find the electorate completely unsatisfied by such a cosmetic remedy.

Not that these bills are useless; we are happy to support statutory establishment of the initiatives taken by Presidents Ford and Carter. Certainly coverage of the independent agencies is a significant and very needed addition to those initiatives. Improvements in the administrative law judge system are well taken, too.

We must observe, however, that the process seems to promise a new bureaucracy by rocketing the Administration Conference from obscurity to very substantial authority. That authority, in our view, belongs where it now resides--in the Office of Management and Budget. OMB has the clout, and now apparently also has the motivation, to make reforms happen.

We are most impressed, however, by what the proposed legislation does not do, and the most glaring gap is the lack of attention to the Congress itself.

While regulatory excesses are bureaucratic phenomena, they have their origins in the Legislative Branch where the laws are born. The original problem is usually in the law. The Congress passes legislation that sets in motion the awful chain of events, without adequately weighing its own actions.

For example, take the Davis-Bacon Act of 1931. From a few paragraphs of rather innocuous sounding, and certainly well intentioned, legislation, there has emerged a sizeable bureaucracy generating great controversy to this day. Even the Secretary of Labor concedes that the law is not being administered as well as he would like. The General Accounting Office is convinced that the statute is simply not capable of good administration.

We know this is not the forum to bring up arguments for repeal of Davis-Bacon. We intend only to point to an example of a statute, of merciful brevity, of obvious good intent, that nonetheless has produced:

a) a body of regulations which continues to grow after 48 years,

b) a bureaucracy still unable, by its own admission, to adequately fulfill its stated mission, and

c) a paperwork burden which is among the greatest in existence - to the point where the agencies receiving the paper admit it is beyond their means to make any use of it.

For another example, consider the Employee Retirement Income Security Act of 1974 (ERISA). Here is a rather recent statute, also clearly well-intentioned, but so detailed that we could hope the law itself embodies the bulk of any needed regulations. Not so. Despite the great detail in the statute, ERISA has spawned exactly the same kind of problems as Davis-Bacon--growing regulations, a bureaucracy that cannot do its assigned job, and a staggering paperwork burden.

In both cases, and obviously many more could be cited, Congress undoubtedly did not intend the awesome results that followed. One must presume the Congress simply did not anticipate the full dimensions of its mandate. This is a basic problem, which must be addressed in any serious attempt to deal with regulatory excesses. The Congress needs a "handle" on what its actions will produce, a reasonably accurate estimate of the regulatory/paperwork burden any given statute will generate, and a means to correct the bureaucracy if it exceeds reasonable limits.

This will not come any more easily than the bureaucracies' own house-cleaning, but it can be done.

We suggest that a regulatory/paperwork impact assessment be required on every bill the Congress passes, just as the Congress already requires an economic assessment of legislation prior to passage. The assessment can be done by the agency that will be responsible for carrying out the statute. It should not unduly burden the agencies to do this, because they will have to do it anyway when the law is enacted. A review of the agency assessment by the General Accounting Office might be useful.

For example, if the Davis-Bacon Act, or ERISA, were being considered today and the regulatory/paperwork impact assessment was in place - these bills would be referred to the Department of Labor as <u>proposed</u> legislation. DOL would be required to take a preliminary, but careful, look at the bills and estimate the regulatory/paperwork impact necessary to execute such a statute. Congress might want the General Accounting Office to review DOL's estimate - GAO is already in the business of auditing agency actions for the Congress.

Congress would then be able to make a considered judgement on whether the bill's objective is worth the estimated regulatory/paperwork cots. Congress could then, with reasonable accuracy, weigh the alternatives - scrap the bill, re-write it to reduce the inherent burdens, or pass it as proposed.

One additional control is needed to guard against gross errors in the regulatory/paperwork estimate. This can be done by making the agency estimate a benchmark trigger for congressional review. By including the agency estimate in the statute's legislative history, and mandating in the statute a prompt oversight hearing if that estimate is exceeded by, say 10 percent, Congress would obtain an "emergency brake" to slow down the runaway bureaucracy.

Obviously, there are ways to tie this sort of control into "sunset" provisions - such as mandating a shortened "sunset" schedule when regulatory/paperwork excesses occur.

Mr. Chairman, we believe additions of this nature to S. 262 or S. 755 would provide the ammunition for <u>both</u> the legislative and the executive branches to finally deal with the problems of over-regulation.

July 30, 1979

Mr. Stanley E. Morris
Deputy Associate Director
Regulatory Policy and Reports
  Management
Office of Management
  and Budget
Washington, D.C. 20503

Dear Mr. Morris:

As a trade association representing the construction business management interests of over 8,000 general contracting firms and over 20,000 construction industry affiliate firms, we have frequent occasion to become involved in the federal regulatory process.

In preparing our response to your July 13 letter requesting an evaluation of improvements in the regulatory practices of agencies as a result of implementation of Executive Order 12044, we have reviewed our regulatory involvement with sixteen agencies.

Our review has determined that Executive Order 12044 held more promise than is actually being realized.

I offer the following observations from our review panel:

- "Many of the regulations currently being proposed and promulgated by the Department of Energy (DOE) are of an emergency nature which, therefore, permit shorter comment periods. This is understandable; however, there should be more flexibility on the part of DOE to consider comments which come in after the shortened deadline period.

  When comments received by DOE are analyzed as part of the printed text in the Federal Register, it appears to be more of a pro forma analysis than a true consideration of the comments' merits."
- "Opportunities to participate in the Office of Federal Contract Compliance Programs' (OFCCP) rulemaking have been reasonable; however, comment periods have been too short. Thirty days is not an adequate comment period.

  The rules for Women in Construction were published by OFCCP on April 7, 1978. To my knowledge, the OFCCP did not assess the economic impact of the regulation, nor did it consider alternative approaches to the issue of getting women into construction - more importantly, the OFCCP did not consult with other agencies and offices within the Department of Labor (DOL) to determine whether the DOL could successfully implement the OFCCP regulation without creating a conflict with other DOL regulations. OFCCP also did not determine whether the construction industry could comply with all DOL regulatory obligations within the timeframe established for compliance."

- "The Council on Wage and Price Stability (CWPS) has not published a semi-annual agenda. Very little has been done by CWPS in publishing its actions in periodicals or relevant journals.

  CWPS has done very little by way of assessing the negative impact of existing regulations."

- "Cost-benefit rations are almost non-existant or completely ignored in the Occupational Safety and Health Administration and Mine Safety and Health Administration proposed regulations. They are generally discounted with a flippant 'How do you place a value on human life?'"

- "The General Services Administration (GSA) reviewed its regulation requiring the listing of subcontractors with bids, and instead of making the final decision based on economics, decided to keep the listing requirement based on the number of comments received supporting the continuation versus the number of requests that it be dropped.

- In another case, the Department of Housing and Urban Development, to the best of our knowledge, did not assess our comments on an important regulation dealing with payments for material stored off site."

- "We find both the Environmental Protection Agency (EPA) and the Farmers Home Administration (FMHA) openly providing drafts of proposed regulations early in the development process. Both agencies are receptive to formal and informal discussions of the proposed rules and a frank exchange of views usually prevails. EPA, however, does not provide realistic comment periods during the final stages of the process; sufficient and reasonable comment periods are provided during the drafting stage, but a short comment period is used on the final regulation even when the final regulation differs substantially from the draft.

  EPA does not appear to be concerned with assessing alternative approaches to major economic regulations. It claims that its regulations, pursuant to law, are health oriented and economic impact is not a major consideration."

The above observations are, admittedly, general in nature. A specific evaluation, however, of a recent proposed rule and its cavalier implementation of Executive Order 12044 should lend credence to the general observations and our determination that Executive Order 12044 is not being seriously pursued.

The Department of Transportation (DOT) issued proposed rules concerning "Participation by Minority Business Enterprises in Contracts and Programs Funded by the Department of Transportation" in May 17, 1979 Federal Register. The substance of the regulation has been a publicly controversial one within the construction industry, the procurement community, the Congress, and the courts for approximately two years. Controversy has kayed around the cost of implementation of set-aside and other special procurement preference programs, the effect on competition of such programs, and the constitutionality of such programs. Such publicly acclaimed and acknowledged controversy can leave no doubt that any regulation dealing with the subject is a "significant regulation" within the criteria for definition of that term contained in Executive Order 12044.

Executive Order 12044 provides, in part, that:

> "Meaningful alternatives are considered and analyzed before the regulation is issued;" (Section 1[d])
>
> "Before an agency proceeds to develop significant new regulations, the agency head shall have reviewed ....the alternative approaches to be explored..." (Section 2[b])
>
> "The head of each agency...shall approve significant regulations before they are published for public comment in the Federal Register. At a minimum, this offical should determine that:
>
> > ...(2) the direct and indirect effects of the regulation have been adequately considered; (3) alternative approaches have been considered and the least burdensome of the acceptable alternatives has been chosen; ....(6) an estimate has been made of the new reporting burdens or recordkeeping requirements necessary for compliance with the regulation; ...(8) a plan for evaluating the regulation after issuance has been developed." (Section 2[d])
>
> "(2) agencies shall include in their public notice of proposed rules an explanation of the regulatory approach that has been selected or is favored and a short description of the other alternatives considered." (Section 3[f][2])

The seventeen page proposed DOT regulation required, among other things:

1) nine new contract clauses

2) three new forms

3) nine reports

4) two separate programs to be created by grantees - one a four component program, one an eight component program

5) two separate "documentation of reasonable effort" requirements - one with ten components - one with eleven components

6) a "maintenance of records" requirement with ten components

7) the following all inclusive requirement: "bidder/offeror will submit such periodic reports and cooperate in any studies or surveys as may be required by the Department..."

8) the employment or designation by Grantees of MBE liaison officers and "adequate staffs" to administer the program

9) summarily waving competitive bidding principles in contract solicitation and contractor selection procedures.

Despite the patently obvious questions concerning compliance costs, paperwork and reporting burdens, and the effect on competition, the sum total of DOT's "compliance" with the above cited requirements of Executive Order 12044 was the following:

> "The necessity for monitoring the performance of contractors and recepients and for insuring that only eligible MBE's benefit from the program means that some recordkeeping and reporting requirements will be created. In the Department's view, the

requirements contained in this proposed rule are the least burdensome ones consistant with the goals of the regulations, including MBE participation. Neverthaless, we welcome the comments of the public regarding alternative approaches which will result in significantly increased MBE involvement in DOT activities while creating lesser administrative requirements."

We believe that Executive Order 12044 holds great promise. Unfortunately, based on our review of agency implementation - particularly the cited DOT example - that may be all it holds at this point. It is certainly not holding the attention of the Department of Transportation.

Unless and until agencies treat Executive Order 12044 as more than a pro forma requirement, we will see no improvement in regulatory practices.

Sincerely,

HUBERT HEATTY
Executive Director

HH:jma

QUESTIONS FOR THE DEPARTMENT OF LABOR WITNESS

1. The Department of Labor was late with its first Semi-Annual Agenda of Regulations. The Department of Labor is late with its second Semi-Annual Agenda of Regulations.

   WHY?

2. Is there a way for industry to get relief from agency actions that run counter to Executive Order 12044?

Return to Reason — The Message of the '80s

In March 1980, Ival R. Cianchette, chairman of the board and chief executive officer of Cianbro Corporation of Pittsfield, Maine, was installed as AGC's president. In his inaugural address, he set the theme for his year as president. He said:

"I view the 80's as the time for a return to reason. We have just left a decade in which our industry and all industry has been harrassed by a mindless barrage of laws, regulations, and proposals that are overburdening — and frequently — crushing the very spirit and the reality of free enterprise. . .

"We must have a return to reason instead of the unrealistic, unworkable and ill-conceived programs that have been thrust upon us in overreaction by all branches of our government. . .

"The return to reason will not happen overnight, and certainly not within my one short year as your president. But we must begin now. We must begin to set the tone for the 80's."

AGC, working together through its political action committee, through its lobbying apparatus, and through its involvement in the regulatory process, and all under President Cianchette's leadership, has achieved notable success in setting the tone for the 80's.

President Cianchette's CONSTRUCTOR editorials reprinted here present an overview of how that success was achieved.

CONSTRUCTOR

RETURN TO REASON

Many of you commented that the need for a return to reason, the theme of my address at AGC's 61st Annual Convention and my goal as President of the Associated General Contractors of America, is timely and imperative. All who read this know that we have had an excess of unrealistic, unworkable and ill-conceived problems thrust upon us in overreaction by all branches of our government.

Construction is not the only industry resisting the burden of overregulation and counterproductive laws. There is now an acute awareness in every thinking household that overregulation and excessive social engineering continues to erode the economic health of all who want to be productive in our society.

We understand the problems. We have a theme that addresses them. We still have the problems, and the theme too, unless we:

1) Support and elect people who share our views and who will be diligent in advancing our views.

The AGC of America PAC has already done this to the tune of more than $150,000 from a very limited number of people.

2) Let the regulators and our legislators know when a proposed regulation, an existing regulation, a proposed law or an existing law is unfair, unjust or unreasonable.

AGC of America and its chapters will keep you informed on the issues. While they can act for you and protest on your behalf, their protests will never replace the effectiveness of your individual actions.

The key to achieving a return to reason is not located in Washington, D.C. It has been demonstrated in legislative successes during the past few years that the real key to change is located in grass roots activity by you. You must make it clear to regulators and legislators that the nation demands realistic change and will no longer tolerate the "government as usual" attitude of the last two decades.

There is a lesson to be learned from Gulliver's travels to the land of Lilliput. Tired from his travels, he rested. Later, he found himself tied to the ground with tiny threads and surrounded and swarmed over by the thimble-high people of Lilliput. Mr. Gulliver was asleep when he should have been awake! A lot of people are waking up now. AGC has helped that process. We can and must do more.

May 1980

CONSTRUCTOR

RETURN TO REASON II

The U.S. Department of Transportation has instituted new subcontracting requirements, the intended benefits of which "are the provision of contract dollars under DOT financial assistance programs to minority contractors," according to the department's so-called "Regulatory Evaluation." Is the use of general public tax dollars specifically for minority contractors or any other special group a reasonable objective of the Department of Transportation?

The regulation employs a quota system that has been vigorously challenged by AGC, its members and chapters. That challenge, on grounds that such a quota system violates the Federal Constitution, is now before the U.S. Supreme Court, which will deliver its decision sometime this month. Is it reasonable for the Department of Transportation to implement a quota system that may be found illegal pending a Supreme Court decision on a similar quota?

The U.S. Congress has developed a law that governs minority subcontracting in all 100 percent federally funded construction programs. That law, while it requires contractors to take steps to ensure the highest practical level of MBE subcontracting, does not authorize quota systems in competitively bid construction projects. Is it reasonable that the DOT should institute a system that runs counter to the will of Congress?

AGC's answer to all these questions is, "No. It is certainly not reasonable." Nonetheless, DOT has done it by providing the construction industry with yet another blatant example of the unreasonable, unworkable, ill-conceived regulations that have multiplied to stifle business in general and the construction industry in particular over the past ten years.

AGC, in no uncertain terms, is opposing this regulation with all its strength. We will fight it in the courts. We have brought our concerns directly, forcefully and personally to the attention of the Secretary of Transportation and we have informed every member of Congress that this flagrant attempt to legislate by bureaucratic demand must be rescinded.

Last month, in my first message to you in these pages, I said the key to achieving a return to reason is not located in Washington, D.C. All of us together in what is known as the "grass roots" of this country hold the key to the return to reason.

We must all work to achieve change through the electoral process. We must do it now and we must do it in a big way. At the same time, we have got to work with what we have in Washington. Write your elected representatives and tell them about this regulation promulgated by DOT. Tell them the practical problems the regulation poses for your operations. Tell them the effect it will have on competitive bidding. Tell them now and don't pull any punches.

If you need more information, see the AGC National Newsletter (May 28, May 21, May 7, April 30 and April 23 issues), or contact either your chapter or the AGC national office.

June 1980

CONSTRUCTOR

RETURN TO REASON THROUGH POLITICAL ACTION

This issue of CONSTRUCTOR — featuring the directory of our membership and an informative section on AGC's Political Action Committee — should help focus our attention on what needs to be done in the next few months.

Many observers see the upcoming election as one of the most important in American history. With the involvement of you, the members of this association, and our PAC, we can help turn the tide toward a true return to reason in the legislation and regulation that is now harming the construction industry and the entire economy.

While the Presidential election is of obvious importance, it seems to me that the congressional elections may ultimately be of even more importance. No one man can change the course of government, but a strong, active, **reasonable** Congress — using the power of the purse strings — can have a tremendous positive effect on the course of government.

We do not have to change every seat in Congress but we must do all in our power to elect a majority that will act to tame the out-of-control bureaucracy. This job cannot be done by wishful thinking and it cannot be accomplished by our PAC apparatus alone. We need the involvement of every member of this association and, indeed, every member of the business community. It will take vigorous, powerful grass roots activity.

If you have not already done so, I urge you to give AGC PAC permission to solicit financial support from you and your key management employees. At the very minimum, you must work to be well-informed on all the issues and cast your ballot in November. You should also encourage your friends and associates to do the same.

The opportunity exists to elect a Congress that will change the course of government and work toward a return to reason. Let's not fail to make use of this opportunity. Otherwise our future as American businessmen is bleak.

July 1980

"For six months we have hammered persistently at a single, concise theme: Government at all levels has burdened the construction industry with a mass of counter-productive, inflationary rules, and a return to reason in the regulation of the private sector is long-overdue."

CONSTRUCTOR

SUPREME COURT MAKES CONGRESSIONAL RETURN TO REASON IMPERATIVE

In the wake of the Supreme Court's *Fullilove* decision, which said it is legal for Congress to discriminate in favor of some citizens solely on the basis of race, some have counseled the construction industry to accept so-called benign racism as a fact of life with which we must live.

While AGC will continue to inform its members of their legal obligations, we refuse to resign ourselves to accepting what is wrong. Our Constitution is and should be color-blind. There is no argument by reasonable people that the country has not been color-blind, and, in fact, did discriminate against minorities. Because we were wrong once, some say we should now accept reverse discrimination. We don't think so!

There is no law, no section of the Constitution, that guarantees a citizen the right to succeed in business because of race or any other characteristic. For the government to do so is wrong and we must not resign ourselves to living with what is wrong ... again.

AGC is opposing quotas for female hiring on construction projects, we are suing to stop the Department of Transportation's MBE quota, we are working to halt the Environmental Protection Agency's MBE program and will sue EPA if necessary to accomplish this, and, despite the Supreme Court's decision in the *Fullilove* case, we will continue to seek a definitive ruling outlawing racial quotas.

While we continue to pursue justice in the courts we are intensifying our congressional activity so that the United States Congress will focus on the issue when it is again asked to vote in favor of quotas.

AGC members are disappointed that our views did not initially prevail at the Supreme Court in the *Fullilove* case. However, we have some hope for more realistic congressional action in the future. The public is beginning to understand the issue through supportive editorials in newspapers as diverse as *The Washington Star* and *The Washington Post*. Other media, including *The New York Times*, are less enlightened. We still believe that we are right and that we will succeed in getting the public, the Congress and, yes, the courts to agree.

August 1980

CONSTRUCTOR

RETURN TO REASON

The following letter was sent to all members of the Senate and House of Representatives:

Subjects: A – EPA, DOT & other Bureaucratic MBE proposals
B – A Private Enterprise proposal

I urge that you personally take an interest in the enclosed letter to Environmental Protection Agency Administrator Douglas Costle. It documents a complete lack of understanding by EPA of construction industry economics in its attempts to increase minority business enterprise participation in construction.

EPA's inept performance parallels that of the Department of Transportation. The tactic of coercing contractors to find unavailable or non-existing minority firms is now spreading to the Corps of Engineers and other agencies from which the Small Business Administration is demanding that construction projects be set aside for socially and economically disadvantaged firms. SBA's dismal track record in the construction industry should disqualify it from any opportunity to continue wasting tax dollars.

Assisting minority owned firms to gain experience, become more competitive, and move into the mainstream is a desirable goal, but one that will never be achieved by the bureaucratic MBE programs mentioned above.

There is a practical and readily achievable private enterprise solution available. It is one, however, that cannot be implemented without your action.

Small construction projects have proved to be the ideal training grounds for emerging small and minority business enterprises. Yet, we are presented with an extraordinary contradiction: as a social policy the nation has attempted to encourage the growth and development of minority owned firms; but many cities, counties and other public agencies refuse to put small construction projects out for bid to the private sector, instead keeping them to be performed by taxpayer financed public construction operations.

This system, commonly referred to as public force account or day labor construction, wastes millions of tax dollars yearly since public entities must maintain expensive construction equipment inventories and a construction workforce on their payrolls.

Assuming that Congress is genuinely interested in advancing entry by all, including minorities, into construction contracting, I urge you to sponsor or support legislation to prohibit the use of any federal construction funds for force account or day labor construction. By denying federal funds to entities that practice force account or day labor construction, you will not only save tax dollars but you will open up hundreds of thousands of business opportunities for emerging small and minority owned firms.

September 1980

"The growing public work force construction problem is yet another example of the unreasonableness of government's involvement in our industry. Hundreds of thousands of opportunities ideally suited to the capabilities of emerging companies, such as the minority business enterprises the government is seeking to encourage through quotas, are lost each year."

CONSTRUCTOR

RETURN TO REASON: PRELIMINARY RESULTS

For six months we have hammered persistently at a single concise theme: Government at all levels has burdened the construction industry with a mass of counter-productive, inflationary rules, and a return to reason in the regulation of the private sector is long overdue. There now exists some evidence that we are beginning to achieve the results we have sought.

On the "Commentary" page at the back of this magazine, you will see a newspaper column written by Paul Harvey, the nationally syndicated newspaper columnist and radio commentator. Printed in over 300 newspapers and delivered over 900 radio stations to an audience of approximately 17 million Americans, the commentary makes the point, "All General Contractors ask is a return to reason."

In addition to the Paul Harvey commentary, many newspapers around the country have editorialized on AGC's "Return to Reason" theme. In the months to come, as we continue to provide the press with information and sample editorials based on facts and figures such as those developed from the AGC Cost of Government Regulation Survey, we expect that many more editorial writers will focus on the issue.

The AGC PAC is taking an active role in the congressional elections this year and, with significant increases in the numbers of people who have contributed and the amount of money contributed, we hope we will help elect a Congress that is reasonable when it comes to regulation of the nation's economy.

We have continued to work with the current Congress and some significant results are becoming obvious. The House has approved a DOL appropriations bill that would accomplish — at least for one fiscal year — two of AGC's major objectives: the prohibition of funding for DOL enforcement of goals, quotas or timetables in its affirmative action programs; and the elimination of dual Mine Safety and Health Administration [MSHA] and Occupational Safety and Health Administration [OSHA] jurisdiction over the construction industry. Encouraging as this development may be, the Senate is not expected to act on the measure until the lame duck session following the elections, if at all.

AGC also staged its second annual Construction Orientation Conference for Federal Government Personnel, bringing together a panel of expert construction industry spokesmen to explain the nation's construction industry to the executive branch officials who actually write the regulations that have had such a harmful effect.

It's obvious to all of us — as we follow news of the industry and as we guide the day-to-day operations of our companies — that a return to reason is becoming more and more necessary. Even as we begin to make inroads in the sphere of public opinion, more and more regulations that have been in the development and implementation stages are becoming effective and further burdening our operations. This trend cannot be changed overnight but the preliminary evidence indicates that we may have made a significant start.

How significant that start has been will be shown, most clearly, by the election returns.

October 1980

CONSTRUCTOR

RETURN TO REASON — MAKE AMERICA PROGRESS THROUGH CONSTRUCTION

Government agencies using their own personnel and equipment are undertaking billions of dollars worth of construction work in this country every year. This practice — which is sometimes known as "force account" or "day labor" construction — costs thousands of private sector jobs, millions of dollars in lost tax revenue and the loss of hundreds of thousands of contracting opportunities for small and emerging businesses.

As far back as 1809, the federal government affirmed its preference for constructing government projects by means of contracts with private constructors. Yet, 171 years later the practice of public "force account" not only persists but continues to grow. The problem is also acute in the Municipal-Utilities field which is the focus of this issue of CONSTRUCTOR.

As a result of the forum on "force account" held at the recent AGC Board Meeting in Phoenix and other information gathered by the national AGC office, it has become apparent that the force account problem is not confined to any particular category of work or area of the country.

AGC of California President Dave McCosker reported on his state's experience with the issue. In California, "force account" amounts to $1 billion in work and 46.2 percent of that amount is in building construction and repair. Others taking part in the forum told us that it is a problem from Virginia to Alaska.

We must marshall vigorous opposition on the local level, where problems are most acute, but national opposition is essential and will continue. As Warren Diederich of North Dakota, former AGC Highway Division chairman, told us: "While it's true that the laws governing the Federal-Aid Highway Program and the Airport Development Aid Program allow only construction by contract and, therefore, those funds may not be used to fund 'force account' projects, the existence of this federal-aid money makes it possible for state and local governments, by using their own funds, to enter the construction business." As Warren said, "Even though 'force account' work has grown in steps, it must be confronted totally."

The growing public work force construction problem is yet another example of the unreasonableness of government's involvement in our industry. Hundreds of thousands of opportunities ideally suited to the capabilities of emerging companies, such as the minority business enterprises the government is seeking to encourage through quotas, are lost each year.

We must make government at all levels understand that its actions do not occur in a vacuum. "Force account" costs more and deprives governments of tax revenues, making budget problems worse. "Force account" removes workers from the mainstream of the economy, making unemployment eventually worse. "Force account" removes opportunities, making it more difficult for small and emerging businesses to grow and prosper in our industry.

I encourage all who care about construction, and who have the vision to see the abundant opportunities of which it is capable, to help make this subject the issue it should be. I am convinced that this positive approach, combined with genuine efforts to correct inequities that result from past history, can rekindle the spirit that America does indeed progress through construction and within the free enterprise system.

November 1980

CONSTRUCTOR

RETURN TO REASON — ON THE RIGHT TRACK

Last month's elections produced sweeping changes, changes that AGC worked for and welcomes, because those changes signal a return to reason. We should expect that the new government that takes office next month will be more reasonable, that it should be a government which realizes that the legitimate interests of the business community and the construction industry — the nation's largest industry — are vital to the economic and personal well-being of all Americans.

The elections proved that the American voters agree that change in this direction is long overdue, a change in the logic and values that influence government's intervention in the private and economic affairs of its citizens. Such change is absolutely essential for our industry, an industry burdened by ill-conceived, counterproductive, and frequently punitive regulations.

It is in the field of regulatory reform where we must immediately direct our energies and talents. We have the opportunity to effect some worthwhile changes and we will take advantage of that opportunity.

We recognize that some of the regulations imposed on our industry were promoted by legitimate concerns and a desire to promote the general welfare of the nation.

The promotion of safety and health in the workplace, sound environmental conservation, equitable labor laws and just measures protecting the equal opportunity of all citizens are worthwhile goals of government. We must work with all elements of government and the public to make it clear that we agree with reasonable objectives in these areas.

As we close out an eventful year, it is obvious that the American public wants a return to reason. Let's get on with it.

December 1980

"If we, the people, and we, the industry, are to turn government around we must commit ourselves to a long, difficult task. That task requires our constant attention."

CONSTRUCTOR

**RETURN TO REASON —
IN THE PUBLIC INTEREST**

We can look to the year ahead with some optimism. Economically, our markets will still be soft in many areas and in many categories of construction. However, we can expect that the federal government will begin to address the issue of unreasonable regulation and thus begin to take the steps necessary to slow government-induced inflation. We can expect that the relationship between business and government will begin to be characterized more by cooperation and less by confrontation.

One cooperative effort that will be and needs to be stressed is the drive to eliminate construction by public forces at all government levels. The "force account" problem is a complicated, interwoven series of missed opportunities and unintended effects. Contractors are burdened with a myriad of obscure, specialized taxes on vehicles, equipment and operations. These taxes may very well be used to pay for the very "force account" projects that take hundreds of thousands of opportunities away from private contractors, especially small and emerging firms. Thus, governments lose the taxes that would be paid on income, profit, equipment and materials purchases, and make it more difficult for tax paying businesses to operate at a profit.

We must and we will redouble our efforts to convince government that the way to address equal opportunity in construction is through the open market, not through coercive, unworkable quota systems. These efforts on our part will also be positive and cooperative.

One of the major challenges facing AGC and the entire construction industry is to convince Congress, the federal bureaucracy and the public that the actions we have taken and will undertake are squarely in the public interest. We must do a much better job of convincing all that our industry is a major ingredient in our economy, that we share reasonable and practical concerns about our environment, that, as is true of all decent Americans, we will not accept, tolerate or practice discrimination in any form against any citizen.

We welcome the opportunity provided by the electorate on November 4 to replace confrontation with cooperation, to work diligently with the Reagan transition teams and Administration and to explain problems and propose solutions in a spirit of cooperation and in the public interest.

January 1981

CONSTRUCTOR

**RETURN TO REASON —
COMMITMENT TO A NEW BEGINNING**

In the last days before the inauguration of Ronald Reagan as President, the exiting bureaucrats in the Carter Administration added thousands of pages of fine print to the volumes and volumes of federal regulations that already burden the nation's economy. On the last two business days of the Carter Administration, the *Federal Register* totalled six volumes and over 2,000 pages. In the final week, nearly 5,000 pages were published.

In 1980, the *Federal Register* published 87,012 pages. In 1977 the total was 65,603. In 1970, the total was 20,036 pages. In the last two days of the Carter Administration, the *Federal Register* totalled 10 percent of the entire output for the year 1970. In the final week, the *Federal Register* total amounted to 30 percent of the entire 1970 figure.

Printed in three separate books, the January 19 issue alone of the *Federal Register* includes eight executive orders, new regulations on education, Medicaid, rural housing programs, historical preservation, archaeological resources, minority business enterprise programs for the Department of Energy and the Environmental Protection Agency, new endangered plants in New Mexico, land use regulations, motor vehicle pollution control policies, regulations on the use of pesticides and citizen participation in local transportation planning among a host of other regulations and procedures.

Of course, the public is told, most of these regulations are simply "clarifications," or the "culmination of programs which have been in the planning process for a long period of time." What a coincidence that all this planning should "culminate" just before the inauguration of a new president who believes "government is not the solution to our problem; government is the problem."

In his inaugural address President Reagan noted that the trend toward more and more government cannot be turned around quickly. The pre-inaugural issues of the *Federal Register* underscore that point and the urgent need for an immediate start to a return to reason by a bloated bureaucracy.

If we, the people, and we, the industry, are to turn government around we must commit ourselves to a long, difficult task. That task requires our constant attention. Now, more than ever, we must be willing to give of our time, experience and knowledge to develop and promote government policies that will help achieve a return to reason in the way government affects private businesses and private citizens. Now, more than ever, we must support political action that is consistent with our views of government's proper role.

February 1980

QUESTIONS POSED TO MR. WESTCOTT BY SENATOR LAXALT

Question 1. Assuming that the President or his designee in given the authority to designate certain rules as "major," do you feel that the President or his designee should also have the power to waive regulatory analysis for certain major rules? If you support such waiver authority, please give specific examples (in addition to IRS rules) of rules for which such a waiver power would be needed. If you favor such waiver power, but with criteria set out in the statute, please elaborate on the details of such criteria. In addition, if you favor the addition of a waiver power, please explain why you do not feel that putting such discretion in the Executive inserts a major loophole in the requirements of S. 1080. Should the exercise of such a power be subject to judicial review?

Answer. AGC does not support a statutory waiver authority. In recognition of the potential delay inherent in the analysis process, we could support an amendment which provides the President with authority to approve some major rules, on an interim basis, until such time as the regulatory analysis and the other prescribed requirements of S. 1080 are completed. The exercise of such a limited, temporary waiver should not be subject to judicial review.

Question 2. Should the determinations of what is a major rule be subject to some form of Judicial Review? If you believe that there should be some limited Judicial Review, please explain how such review should be limited.

Answer. AGC feels that the determination of what is a "major rule" within the meaning of S. 1080 should not be subject to judicial review. Such review could substantially delay the implementation of urgently required reforms due to lengthy and complex litigation. Courts do not enjoy any special expertise in this area which makes them particularly well-suited to such determinations.

Question 3. When considering the definition of a major rule, most witnesses addressed subparagraph (i), dealing with $100,000 million in compliance costs. Do you feel that subparagraph (ii) and (iii) are too vague to be practically useful? Are these subparagraphs necessary?

Answer. While subparagraph (ii) and (iii) are rather vague, they are helpful in descriptively alluding to non-mathematical bases for the evaluation of whether a proposal is a "major rule" within the meaning of S. 1080. Their inclusion reinforces our understanding that S. 1080 contains more than a strictly mathematical requirement for assessing costs and benefits.

Question 4. In the past, some have suggested that all judicial review of rule making be vested in the Court of Appeals. Do you support such a change in jurisdiction? If so, please discuss the practical application of such a change. How would such jurisdictional change affect post-enforcement review of rules? Don't the District Courts offer more opportunities for settlement than the more rigid procedures of the Courts of Appeals.

Answer. We have no opinion on this issue.

Question 5. Should a deregulatory rule making be subject to regulatory analysis?

Answer. No.

Question 6. Many have said that regulatory analysis should not be the sole criterion of rule making. What impact should regulatory analysis, as provided in S. 1080, have on a particular regulatory decision? What other criteria should be guiding a regulator in addition to the regulatory analysis?

Answer. The regulatory anlysis provisions of S. 1080 form the basis for rational decision making, and therefore should have a significant impact on any regulatory decision. In addition to this process, adherance to clear statements of Congressional intent is another essential criterion for regulatory guidance. Other factors for consideration include existing law and regulation (the problem of overlap), the need for consistency in regulation, and adherence to the philosophy of the elected executive (policy implementation).

Question 7. One witness contended that the regulatory situation was getting "worse." Does this mean that E.O. 12291 is not working? Why is legislation needed?

Answer. As we remarked in our written submission, Senator Laxalt stated when introducing this legislation on April 30 that "by enacting this legislation into statute, we insure agency compliance to an extent not achieved by executive fiat." This statement is corroborated by our own experience. As we reported to the Congress in oversight hearings on Executive Order 12044 on October 9, 1979, many difficulties arise when agency compliance to regulatory reform is based on executive fiat, rather than statute. In that testimony (copy attached to our written statement) we pointed to several instances of agency non-compliance with E.O. 12044, which had among its provisions requirements that needs and purposes of regulations be clearly established, and that compliance costs and paperwork burdens be analyzed.

Clearly, we would not be discussing legislation on these issues if executive fiat was a sufficient vehicle for reform.

While we do not believe that the regulatory situation is getting worse, this should not be interpreted as an attitude of complacency. AGC fully supports Executive Order 12291 issued by President Reagan. The fact that this Executive Order was issued so early during the Administration underscores both the emphasis President Reagan has placed on regulatory reform, and the need for prompt action to reverse the ever mounting regulatory imposition of recent years. We believe that his actions and the actions taken to date by the Regulatory Reform Task Force have already resulted in the abatement of some regulatory excesses. Further relief is clearly high on the President's agenda, but much more must be done, and soon. S. 1080 will help him reach the goal.

Question 8. Why not have a standard for rule making that a final rule should be the one that saves the most lives and avoids the most injuries, unless the agency offers an explanation to the contrary?

Answer. As we stated in our presentation to the Committee, we believe that government can no longer afford to base its actions on social needs to the exclusion of practical considerations.

Such a standard as proposed by this question would be antiethical to all practical considerations, and could effectively shut down virtually all construction work. Some danger to health or life is inherent in almost all pursuits. The elimination of all potential hazards could result in absurd limitations. Because people sometimes are injured in automobile accidents, should automobiles be banned? S. 1080 presents a rational framework for regulatory decision-making which takes into account the realities of the workplace, and the realities of economic resources as well as non-economic concerns.

QUESTIONS POSED TO MR. WESTCOTT BY SENATOR LEAHY

Question 9. In preparing this legislation, we have heard from many business groups who complain that the federal regulatory agencies underestimate, or do not adequately consider, compliance costs for the regulated industries. On the other hand, there is a substantial body of opinion that, particularly in the environmental area, businesses, have, in fact, overestimated those costs.

Please comment on the latter criticism and explain how you think we can avoid this problem.

Answer. The provisions of S. 1080 calling for the creation of a public record of industry comments, with the opportunity for open hearings, is an appropriate vehicle for testing estimates of costs and benefits. By permitting full debate among all affected parties, regulators can weigh evidence instead of rhetoric, and make a factual determination on issues presented.

Question 10. I believe all of you view the use of hybrid rulemaking procedures, particularly cross-examination, as essential to the development of an adequate factual record.

Won't these procedures, in fact, result in unnecessary delays in the issuance of regulations?

What can we do to avoid this result?

Should we put time limits on agency regulation making?

What would you suggest would be an appropriate time frame for the issuance of major rules as defined in this bill?

Answer. The hybrid procedures may, perhaps, result in delays. Such delays are, however, not "unnecessary" insofar as they provide regulatory decision makers with needed public input and debate. This is not a bad result in any sense. The delays are the prices paid for informed decision making. A time limit on regulation making is not an urgent need. Due to the different sets and scopes of regulatory agenda, any such limitation should be attached to enabling legislation of each affected agency.

Question 11. Mr. Westcott, you have stated in your testimony that you are concerned about judicial review of major rule determinations. I, too, am concerned about excessive litigation. Have you any sugestions for ensuring that agencies will not avoid the requirements of the bill by finding rules not be be "major?"

Answer. We are at present comfortable in relying upon the Administration to assure compliance. We assume that any serious breach of the requirements of S. 1080 will rapidly come to the attention of Congressional oversight Committees and receive close scrutiny.

Mr. NASH. Now we will hear from Mr. Post from the Business Roundtable.

STATEMENT OF JOHN POST, EXECUTIVE DIRECTOR, THE BUSINESS ROUNDTABLE

Mr. POST. Thank you, sir.

My name is John Post. I am the executive director of the Business Roundtable.

The Business Roundtable favors across-the-board regulatory reform legislation in order to, first of all, codify the principles embodied in Executive Order 12291.

Second, to apply those principles to the independent regulatory agencies, as well as to those within the executive branch.

Third, to make certain changes in rulemaking procedures and standards of judicial review which we feel cannot be put into effect by Executive order.

Our primary legislative objectives and concerns in the Business Roundtable are addressed in my written statement, which I request be included in the record.

Most of our objectives are effectively met in your bill, S. 1080. We think it's an excellent bill, and the Roundtable can support it.

However, in the few minutes available to me, I will limit my remarks to just a few issues.

EXECUTIVE OVERSIGHT

First, we recommend that S. 1080 include a provision that explicitly states that the President of the United States or his designee has authority to oversee and insure compliance by all agencies with the regulatory requirements imposed by this legislation or by Executive order.

The President should be free to make his own institutional arrangements for this function within the Executive Office of the President.

REGULATORY ANALYSIS

Second, we favor the provisions of S. 1080 which require agencies to describe the projected benefits and costs of proposed major rules.

In addition, we support the provisions which require all agencies, unless specifically otherwise precluded by law, first, to adopt major rules only when the potential benefits justify the potential costs.

Second, to select the most cost-effective alternative that substantially achieves the regulatory goals.

As we explain in our written statement, we recognize that regulatory analysis is an estimating process, but there shouldn't be any undue uneasiness on this account. Congress makes constant use of estimates, as does the executive branch and the business community.

Information and estimates, qualitative as well as quantitative, are an aid to judgment and are not intended to be a substitute for judgment.

Third, we believe that compliance with the regulatory analysis requirements should be subject to some limited judicial review. The courts should be able to set aside a rule when the agency's failure to comply with the regulatory analysis requirement makes the rule itself arbitrary and capricious, as is now provided in S. 1080, and

also when it leaves the rule without substantial support in the record, viewed as a whole.

HYBRID RULEMAKING

Fourth, we favor changes in the Administrative Procedure Act to expand the use of legislative-type hearings in all major rulemakings. The current barebones notice and comment procedure does not afford adequate opportunity to develop and test material issues of fact in major rulemaking proceedings.

JUDICIAL REVIEW

Fifth, our views on standards of judicial review are detailed in our written statement and are consistent with the provisions of S. 1080. Essentially, we believe that agencies should be required to show that their rulemaking actions are within the authority delegated by Congress and that there is substantial support in the rulemaking record, viewed as a whole, for the factual basis of their rules.

In addition to deciding questions of law, the courts should entertain no presumption either for or against the validity of agency actions.

As indicated in our prepared statement, the Business Roundtable believes that some changes are required in enabling regulatory statutes themselves. We also think that across-the-board reform is necessary to insure greater cost consciousness on the part of all the regulatory agencies.

In taking this position, we also want to restate the Roundtable's continuing commitment to such national objectives as achievement of a healthy environment and a safe workplace.

We believe these objectives can continue to be met, however, within a resource-conscious framework that is consistent with other important national objectives, such as encouragement of American economic growth and productivity.

Thank you, sir.

Mr. NASH. Thank you, Mr. Post.

[The prepared statement of John Post and responses to questions posed by Senators Laxalt and Leahy follow:]

PREPARED STATEMENT OF JOHN POST

Mr. Chairman and Members of the Subcommittee:

Thank you for this opportunity to present the views of The Business Roundtable on regulatory reform issues, including S. 1080, the Regulatory Reform Act of 1981. The Roundtable is an association of some 200 chief executive officers of companies in all fields, founded in 1972 to examine public issues affecting the economy and develop positions reflecting sound economic and social principles.

The Roundtable's involvement in regulatory reform efforts dates back to 1974, and, as you know, The Roundtable worked very closely with members of the Senate Judiciary Committee and their staffs in last year's drive to pass a satisfactory regulatory reform bill.

Throughout this time, we have made it clear that members of The Roundtable, as responsible leaders of the business community and as citizens, remain fully committed to such national objectives as achievement of a healthy environment and a safe workplace. We certainly understand that some regulation is required to ensure that these objectives are achieved. At the same time, it is also quite clear to us, as it has become to others, that the explosion of regulatory activity which occurred during the last 15 years has had certain unintended and undesirable results.

Costs have turned out to be far higher than anticipated -- both direct costs and such indirect costs as those resulting from losses in productivity, delays in construction of new plants and equipment, sacrifice of profitable opportunities, and so forth. Moreover, as regulatory targets become tougher, costs tend to rise enormously.

The direct costs of regulation were examined in a major study which The Roundtable commissioned, and which was performed for us by the well-known accounting firm, Arthur Andersen & Co. As you may recall, that study, published in March 1979, measured the direct incremental costs of regulation -- that is, costs over and above expenditures that would have been incurred in the absence of regulation.

It covered just 48 companies, six regulatory agencies or programs, and only the costs incurred in a single year, 1977. No attempt was made to measure indirect costs or costs reflected in the price of goods or materials purchased from outside vendors. No attempt was made to project the results for the 48 companies to the economy as a whole. Thus, as was explained at the time, the study revealed only the tip of the iceberg.

Nonetheless, the costs included in the study amounted to $2.6 billion or more than 10 percent of the total capital expenditures of the 48 companies in 1977, 15.5 percent of their net income after taxes, and 43 percent of their total research and development expenditures. Copies of the study are available to you if you desire them.

As the mounting costs of regulation became an increasing cause of concern, the Nixon, Ford and Carter Administrations each made attempts to introduce economic considerations into the regulatory process. President Reagan, in Executive Order 12291, has continued and significantly strengthened these efforts. The establishment of the Cabinet-level Task Force on Regulatory Relief, under Vice President Bush, and the consolidation of oversight responsibility in the Executive Office of the President likewise strengthened prior structures designed to ensure high-level attention to major regulatory issues.

We also welcome the specific deregulatory steps which the Reagan Administration has taken, including the suspension of certain proposed regulations and the withdrawal of those rules which were not justified on a cost-benefit basis; the postponement of certain other pending regulations to allow incoming administrators to get up to speed on their responsibilities; and the initiation of detailed reviews of certain major existing regulations. Without attempting to voice a judgment on each of the rules which has been or will be scrutinized in this fashion, the process is certainly consistent with the reform effort we believe is required.

The Business Roundtable also supports efforts to reexamine the standards and the procedures embodied in the enabling statutes of specific regulatory programs. Such attention is clearly necessary.

Nonetheless, we continue to believe that across-the-board regulatory reform legislation, such as that before the Subcommittee, must be enacted (1) to codify the principles embodied in President Reagan's Executive Order, (2) to apply them to the independent regulatory agencies as well as those directly under the aegis of the Executive Branch and (3) to put into effect certain other reforms in the process of rulemaking and judicial review, which cannot be put into effect by Executive Order. Because we believe that these changes should be mandatory, not discretionary, we think they should be embodied in statute to ensure that the present determination to maintain a system of checks and balances in the regulatory area does not come and go with the political tides.

Congress has been attempting for some time to enact an across-the-board reform package, and we have participated, along with this Subcommittee, in those efforts. In general, we believe

that S. 1080 represents a significant improvement on previous legislation designed to deal with these issues. It would send a clear and permanent signal to the regulatory community that Congress intends regulatory actions to be taken only after full and fair consideration of the costs as well as the benefits -- that it intends, in other words, for the overall impact of regulation on our society to be taken into account.

In general, The Roundtable believes that the legislation should embrace three basic areas of reform. First, some measure of central oversight of actions by all regulatory agencies should be established to ensure that the procedures mandated by Congress and by the President are followed, and to minimize conflicting or duplicative regulation from agency to agency. Second, major rules should be required to meet cost-benefit and cost-effectiveness standards, and the procedures employed by agencies in rulemaking activities should be modified in certain respects. Finally, the standards of judicial review of agency actions must be strengthened to prevent abuse through rulemaking of powers delegated by the Congress. I will amplify each of these points.

First, on the subject of Executive Branch management:

A measure of centralized oversight and enforcement of major rulemaking procedures is necessary to ensure that individual agency actions are consistent with requirements imposed by this legislation and by Executive Order, and to make certain also that they do not conflict with other rules and with other national priorities. Without such a mechanism, the so-called "runaway fourth branch of government" is a constant possibility.

President Carter acknowledged this need when he established two organizations -- the Regulatory Analysis Review Group, which provided independent cost assessments of a limited number of major regulations pending at the agencies, and the Regulatory

Council, which assumed responsibility for coordinating regulatory activities to help minimize unnecessary costs and burdens on the non-Federal sector.

President Reagan has vested somewhat broader authority in the Task Force on Regulatory Relief and the Office of Management and Budget. His Executive Order charges them with key oversight and enforcement responsibilities over Executive Branch agencies.

As indicated earlier, we are strongly of the opinion that this kind of central management is necessary. We believe that the structure developed by the Reagan Administration to manage the regulatory apparatus is an excellent one as far as the Executive Branch agencies are concerned. We feel that every President should be free to use whatever managerial system he considers most appropriate. Accordingly, we suggest that S. 1080 be modified to explicitly establish oversight and managerial authority over independent and dependent agencies in the Executive Office of the President. The President or his designee should be clearly empowered to ensure compliance by the agencies with the provisions of this legislation, particularly those relating to the designation of a major rule and performance of regulatory analyses.

Second, Regulatory Analysis and Agency Rulemaking Procedures: The Roundtable believes that certain rulemaking procedures should apply equally to both the independent agencies and those within the Executive Branch. The most important reform is the regulatory analysis requirement for major rules. We support provisions of S. 1080 which would require agencies to describe the costs and benefits of proposed major rules, as well as the cost effectiveness of reasonable alternative approaches to achieve the same regulatory objectives.

The cost of regulation must be weighed in determining both the stringency of regulation and the means of implementation.

We concur with the provisions of S. 1080 that require a regulatory impact analysis for all rules imposing compliance costs having an annual impact on the economy of $100 million or more. We also support the requirement for a regulatory analysis for rules that impose less than a $100 million annual impact, but which have a disproportionate impact on individual industries, specific geographic areas or different layers of government, or that have a significant adverse impact on competition, productivity or employment.

This is an entirely practical requirement. While it employs measurement techniques where feasible and useful, regulatory analysis is not an exact measurement process, and it need not be so in order to be a valuable decisionmaking tool. Rather, it is an estimating process designed to provide comparative information about expected outcomes on both costs and benefits. The analysis needs to be done as carefully as possible, of course, but precise, exact numbers are not essential to the usefulness of the assessment.

As we envision it, regulatory analysis is simply a technique for providing decisionmakers with information they must have as a basis for intelligent judgment. That information includes economic data and estimates; scientific facts, estimates and hypotheses; risk estimates, and various other kinds of knowledge, theory and educated guesswork. Congress requires such information and makes use of it every day, recognizing the imperfections of estimates. The Executive Branch requires and uses such information. Business requires and uses such information. We simply do not see how requiring such analyses, as part of the judgmental process involved in developing major rules, can possibly be questioned on any logical basis.

S. 1080 acknowledges appropriately that all costs and benefits cannot be reduced to numbers. Agencies will remain free to

exercise their judgment; but they should be required to do so on the most informed basis possible.

We also strongly support the provisions of S. 1080 that require all agencies, unless precluded by law, to determine formally (1) that the potential benefits of any major rule they adopt justify the potential costs, and (2) that the most cost-effective alternative has been selected.

In summary, the approach embodied in S. 1080 has the following advantages:

- First, it imposes a needed economic discipline on the regulatory process by requiring cost-benefit and cost-effectiveness analyses for all major rules.

- Second, it allows Congress to continue to determine whether or not cost-benefit and cost-effectiveness considerations are appropriate decision criteria in connection with each enabling statute. Where they are considered not to be appropriate, their consideration can be precluded by law as was done in the Delaney Clause of the Food, Drug and Cosmetic Act and in the ambient air standard provisions of the Clean Air Act. At the same time, the fact that regulatory analyses are performed gives Congress the informational basis on which to determine whether cost-benefit and cost-effectiveness considerations should be utilized as decision criteria.

- Third, it reflects a realistic recognition of the state-of-the-art in cost-benefit analysis. Both cost-benefit and cost-effectiveness analysis are valuable analytical tools which should be

used to ensure rational decisions on the best ways to allocate the nation's scarce resources. However, both analyses should be viewed as a part of, not a substitute for, rational public policy decisionmaking.

We favor limited judicial review of compliance with the regulatory analysis requirements. We agree that the regulatory analysis itself should not separately be the subject of judicial review. But it is important to provide some mechanism to guard against the possibility that an agency will avoid fulfilling the regulatory analysis requirement in a way that infects the result of rulemaking as a whole.

This objective can be accomplished (a) by requiring that the regulatory analysis be part of the record for judicial review and (b) by directing the reviewing court to set aside a rule where the agency's failure to comply with the regulatory analysis requirements makes the rule itself arbitrary and capricious, or leaves the rule without substantial support in the record, viewed as a whole.

S. 1080 goes most of the way toward achieving this goal. As drafted, the bill would permit a reviewing court to set aside an agency rule because of a failure to comply with the regulatory analysis requirements if that failure results in a rule which is arbitrary and capricious, unconstitutional or beyond the agency's statutory authority. We believe that the bill should be amended, however, to provide that a court may also set aside a rule where the failure to comply with regulatory analysis requirements leaves the rule without substantial support in the record, viewed as a whole. In this respect, our proposed modification parallels the changes in judicial review standards that would be made by the Bumpers amendment.

Overall, the approach reflected in S. 1080 is consistent with the principle that the regulatory analysis -- while not separately subject to judicial review -- is a part of the rulemaking record. This is similar to the compromise worked out by this Subcommittee and the Government Affairs Committee last year.

For regulatory actions predicated on scientific findings, we believe the President or his designee, in consultation with the Office of Science and Technology Policy, should determine how to improve the quality and objectivity of the science base for regulatory action.

We support the requirement of S. 1080 that major rules be reviewed periodically, and be repealed or modified if it is found that they are no longer cost-effective or that their benefits fail to justify costs.

We also agree with the provisions of this legislation requiring the publication of semiannual agendas of all regulatory actions under consideration. This process seemed to work reasonably well during the Carter Administration. It imposes discipline on the agencies to examine their entire rulemaking activity periodically and to indicate areas of possible regulatory excess, conflict or duplication.

Also at the agency level, we feel that current requirements under the Administrative Procedure Act do not satisfactorily reflect the extent to which informal rulemaking has become a principal vehicle for complex and far-reaching government regulation. Accordingly, our view is that the bare-bones notice and comment requirements are insufficient for major rules. We therefore support the requirement of S. 1080 that the use of oral, legislative-type hearings be expanded in the case of major rules, with reasonable opportunity for cross-examination of witnesses to resolve material issues of fact.

We also support the concept of requiring the agency to place in the rulemaking file material that is relied upon in promulgating a final rule, whether or not the rule is a major rule. However, as S. 1080 is currently drafted, it is possible that an agency would rely substantially on material that was placed in the rulemaking file after the comment period had ended. The Roundtable believes that this problem can be avoided without opening the proceeding to endless rounds of comments. All that need be done is to require agencies to provide interested persons an adequate opportunity to comment on all material placed in the file before the close of the comment period and on any factual or methodological material of central relevance to the proceeding that is received by the agency after the normal comment period has expired. Under this approach, the agency would be free to place materials in the rulemaking file after the comment period had closed. It could rely on such material in adopting the final rule even without affording interested persons an opportunity to comment, unless the material is of central relevance to the proceeding. If the material is of central relevance, the agency should not be able to rely on it unless it gives interested persons an opportunity to comment on the material. This approach to the handling of material received after the close of the normal comment period recently was approved by the United States Court of Appeals for the District of Columbia Circuit in Sierra Club v. Costle, Nos. 79-1719, et al.

I would also like to address a question that has been asked about this bill and its predecessors, in both the House and Senate -- the question of whether these new management and procedural reforms will overburden or delay the rulemaking process.

First, the majority of these new procedures apply only to major rules which have a substantial impact on our economy. According to the current Administration, we probably can

anticipate fewer than 150 major rules per year in the Executive Branch regulatory agencies. Thus, these new procedures will not apply to the bulk of agency rulemaking.

Second, we should recognize that the current rulemaking process for most "major rules" takes extended periods of time due to the significance of the public policy issues involved.

Third, under the Ford, Carter and Reagan Administrations, agencies and the Executive Office of the President have gained experience with economic analysis in the regulatory process for major rules.

Fourth, a minor additional delay in rulemaking seems a small price to pay for the benefits of applying economic discipline to the regulatory process for the adoption of major rules. These benefits include improved public policy decisions and a significant reduction in the regulatory burdens on both the public and private sectors.

Fifth, relative to the new rulemaking procedures (Hybrid procedures), we must bear in mind that the reforms at issue are fairly limited in nature. Based on agency experience to date, we do not think that these additional procedures will create any significant delay. We would point out that legislative-type oral hearings, both with and without cross-examination, are commonplace in many agencies today. These non-adjudicatory oral hearings do not appreciably lengthen the rulemaking process; in fact, many such hearings consume less than one day. Even those that are more protracted rarely add more than one to three weeks to the rulemaking proceeding. This was true, for example, in the case of OSHA's benzene standard. Given the fact that a major rulemaking proceeding often consumes more than a year from start to finish, an additional few weeks do not constitute a significant delay. Moreover, the formulation of positions and the testing of evidence that occurs in an oral hearing enhance the agency's understanding of the issues, and often expedite rather than lengthen the decision-making process.

Finally, on the subject of Improved Standards of Judicial Review:

Some of the problems of the current regulatory system derive from ill-defined congressional mandates, abuse by the agencies of delegated authority, and undue deference accorded to agency determinations by some courts.

Part of this problem can be remedied by clearer and more specific delineations of agency authority in the underlying organic statutes. But the standards of judicial review also need to be refined in order to help prevent potential agency abuse of the rulemaking process.

S. 1080 accomplishes this objective by amending the judicial review provisions of the Administrative Procedure Act in three principal respects. First, and most importantly, it directs a reviewing court to set aside an agency rule when the factual basis for that rule lacks substantial support in the rulemaking record. Second, it requires agencies to show that their rulemaking actions are within the scope of the authority delegated to them by Congress. Third, it makes clear that, when deciding questions of law, courts should not entertain any presumption for or against the validity of agency action.

Taken together, these revised standards of judicial review will guard against the types of abuse that can arise when an agency is left free to determine the scope of its delegated authority. The result should be a more careful and conscientious approach to rulemaking by all agencies.

Mr. Chairman, that completes our statement on the key issues. Before inviting your questions, I want to make it clear that The Roundtable does not favor the imposition of impractical procedures on Federal regulatory agencies. We do not want

to tie knots in the regulatory process. We only want to restore appropriate checks and balances in the process.

I want also to reiterate that The Business Roundtable considers regulatory reform to be a key element in the drive to restore American economic growth and productivity. We urge you to enact a comprehensive regulatory reform bill like S. 1080, and we stand ready to assist you and your staff in any way we can.

QUESTIONS POSED BY SENATOR PAUL LAXALT TO MR. JOHN POST

Question 1. Assuming that the President or his designee is given the authority to designate certain rules as "major", do you feel that the President or his designee should also have the power to waive regulatory analysis for certain major rules? If you support such waiver authority, please give specific examples (in addition to IRS rules) of rules for which such a waiver power would be needed. If you favor such waiver power, but with criteria set out in the statute, please elaborate on the details of such criteria. In addition, if you favor the addition of a waiver power, please explain why you do not feel that putting such discretion in the Executive inserts a major loophole in the requirements of S. 1080. Should the exercise of such a power be subject to judicial review?

Answer. We would be opposed to any broad waiver authority in S. 1080 that would undermine the effectiveness of the bill. We do believe that there should be an exemption for IRS rules contained in the bill, and there may be other categories of rules where regulatory analysis requirements are inappropriate. While we have not identified any specific ones, we are open to review any proposals on the subject. It is important that whatever exemptions are included should be carefully drafted so as not to render the regulatory analysis requirements meaningless.

Question 2. Should the determination of what is a major rule be subject to some form of judicial review? If you believe that there should be some limited judicial review, please explain how such review should be limited?

Answer. Since agency determination of what is a major rule is key to the whole process, the Roundtable strongly believes that some form of oversight over this determination is necessary. There are three alternative sources for providing oversight: the President or his designee, the courts, or Congress. The option chosen in S. 1080 is the courts. The Roundtable is receptive to any workable oversight mechanism that ensures that agencies cannot avoid the reform procedures embodied in this bill.

Question 3. When considering the definition of a major rule, most witnesses addressed subparagraph (i), dealing with $100 million in compliance costs. Do you feel that subparagraphs (ii) and (iii) are too vague to be practically useful? Are these subparagraphs necessary?

Answer. These paragraphs are valuable in that they provide guidance to the agencies, the Executive Office of the President, and the courts on additional criteria that should be considered in designating major rules, even if the compliance costs associated with those rules is less than $100 million. We can envision situations where individual geographic sectors or industries coud be adversely affected by a rule which does not have a $100 million impact; in those cases a regulatory analysis would be justified on the basis of impacts described by subparagraphs (ii) and (iii).

Question 4. In the past, some have suggested that all judicial review of rulemaking be vested in the Court of Appeals. Do you support such a change in jurisdiction? If so, please discuss the practical application of such a change. How would such a jurisdictional change affect post-enforcement review of rules? Don't the District Courts offer more opportunities for settlement than the more rigid procedures of the Courts of Appeals?

Answer. While the Roundtable is interested in finding ways to expedite the judicial review of regulatory decisions, it is questionable whether this proposal would achieve that end. We do not support such a change. In many cases, it would deprive litigants of a more convenient forum, and it would place substantial new burdens on already over-burdened and backlogged Courts of Appeals. We agree that District Court procedures are more flexible and provide greater opportunities for settlement. The effect of proposals of this kind on challenges to rulemaking in enforcement actions is unclear. For example, it would depend to a large extent on whether a preenforcement action was established as the only forum for challenging the rule.

Question 5. Should a deregulatory rulemaking be subject to regulatory analysis?

Answer. The Roundtable supports the use of cost-benefit and cost-effectiveness analysis for any rule defined as a major rule under the major rule provisions currently incorporated in S. 1080.

Question 6. Many have said that regulatory analysis should not be the sole criterion of a rulemaking. What impact should regulatory analysis, as provided in S. 1080, have on a particular regulatory decision? What other criteria should be guiding a regulator in addition to the regulatory analysis?

Answer. Regulatory analysis is an analytical tool which should be used to ensure rational decisions on the best ways to allocate the nation's scarce resources. It will impose a needed economic discipline on the regulatory process, and make the choices between alternative regulatory approaches explicit. We believe the analysis should be an important factor in any given regulatory decision, although obviously it is not the only factor to be considered. Regulators should be guided by all factors made relevant to the rulemaking by the enabling statute, as well as by any other provisions of law which come to bear on the rulemaking (e.g., the Regulatory Flexibility Act, the National Environmental Policy Act, executive orders, etc.).

Question 7. One witness contended that the regulatory situation was getting "worse." Does this mean that E.O. 12291 is not working? Why is legislation needed?

Answer. Our impression during the brief period that Executive Order No. 12291 has been in effect is that it is working quite well. Legislation is necessary, however, for three reasons: (1) to codify the Executive Order to ensure that the reforms implemented by the order are not withdrawn at the whim of a different Administration; (2) to extend the provisions of the Executive Order to independent agencies; and (3) to implement additional reforms that cannot be achieved through executive action.

Question 8. Why not have a standard for rulemaking that a final rule should be the one that saves the most lives and avoids the most injuries, unless the agency offers an explanation to the contrary?

Answer. Narrowly limiting the decision criteria for rulemaking to only one or two factors, no matter what they may be, will not yield optimal decisions. The suggested standard would not be useful or applicable to all regulatory rulemaking. Not all rules can be judged on a basis of lives saved or injuries avoided since many rules have nothing to do with these factors.

In light of the substantial impact of regulation on our economy, other national priorities, and scarce resources, we cannot afford to use a standard which considers only selected benefits. Current rulemaking lacks the discipline required for optimal decisions. Given our national need for economic stimulation and growth, we cannot misdirect funds, man-hours, or any other finite resource. In pursuing regulatory objectives, we must make every effort to choose methods that are in consonance with our overall national interests—not methods that thwart those interests. To do so, all benefits must be measured with reference to all related costs.

Questions Posed by Senator Leahy to John Post

Question 1. In preparing this legislation, we have heard from many business groups who complain that the Federal regulatory agencies underestimate, or do not adequately consider, compliance costs for the regulated industries. On the other hand, there is a substantial body of opinion that, particularly in the environmental area, businesses, have, in fact, overestimated those costs.

Please comment on the latter criticism and explain how you think we can avoid this problem.

Answer. We can all point to cases where there has been an exaggeration of costs and benefits at both extremes. The Roundtable believes, however, that the regulatory analysis requirements will help remedy the problem caused by disparities in these estimates. One of the purposes of the analysis is to fairly weigh different estimates and sort them out. Extreme over—or underestimates should be weeded out in the process.

As we mentioned in our written testimony, we do not see regulatory analysis as an exact mathematical quantification but as an attempt to reasonably measure the costs and benefits of a given regulatory program. Properly done, the analysis can assist regulatory policymakers by giving them knowledge of all the potential ramifications of a proposed rule.

Question 2. I believe all of you view the use of hybrid rulemaking procedures, particularly cross-examination, as essential to the development of an adequate factual record. Won't these procedures, in fact, result in unnecessary delays in the issuance of regulations? What can we do to avoid this result? Should we put time limits on agency regulation making? What would you suggest would be an appropriate time frame for the issuance of major rules as defined in this bill?

Answer. First, the additional procedures that we are discussing would apply to major rules and thus would not come into play for the bulk of agency rulemaking.

Second, the additional procedures at issue are actually fairly limited in nature. The principal additional procedure is the opportunity for interested persons to conduct limited cross-examination on certain selected factual issues that are disputed in a proceeding for the adoption of a major rule. Moreover, agencies would be able to limit and control the nature and extent of cross-examination to ensure that the proceeding goes forward in an expeditious fashion. In these circumstances, we think that the additional procedures involved will not create any significant delay.

Lest the problem be blown out of proportion, we should recognize that legislative-type oral hearings, both with and without cross-examination, are commonplace in many agencies today. These oral hearings do not stretch out the rulemaking process in any significant way. Many such hearings consume less than a single day. And even those that are more protracted rarely add more than two or three weeks to the rulemaking proceeding. That was true, for example, in the case of OSHA's benzene standard. An additional week or two or three in a rulemaking proceeding for a major rule that may consume more than a year from start to finish is not a significant element of delay. Indeed, the shaping of issues and positions and the testing of evidence that occur in the context of such an oral hearing give the agency a better appreciation of the issues involved, and often permit the agency to reach a decision sooner rather than later.

We do not support time limits for agency rulemaking. The time required to promulgate a rule is proportional to the complexity of the issue and the amount of relevant data to be considered. Some rulemaking procedures may take a matter of months, while others require several years. Any given procedure should take as much time as required to arrive at a well-reasoned and supportable regulatory decision. Moreover, as the experience of EPA under the Clean Air Act indicates, if Congress sets unreasonable deadlines for rulemaking, they simply will not be met.

Question 3. Mr. Post, in your testimony you suggest that the central management functions President Reagan has initiated already through his Task Force on Regulatory Relief and the Office of Management and Budget be formalized and included with S. 1080. I have a few questions. First, I wonder why managerial initiatives, which really have very little to do with the administrative process issues dealt with in S. 1080, should be melded into this bill? Do you feel that the President requires additional authority to direct the management of executive agencies? Lastly, I wonder if you have any comment on whether granting the executive branch explicit managerial authority over independent agencies is either wise or necessary?

Answer. The President or his designee should have the power to ensure that all agencies (both executive and independent) comply with the procedural requirements embodied in S. 1080. In this regard, managerial and administrative procedure concerns are inextricably tied together in the reforms in this bill; thus we believe it is appropriate that managerial authority be included in it. In our opinion, the President does not need additional authority to direct the management of executive agencies; he already has that authority. We believe, however, that it would be useful to clarify the authority vis a vis the specific provisions of this bill, and to make clear that such authority to ensure compliance with the requirements of S. 1080 extends to the independent agencies as well. Furthermore, we believe that S. 1080 should contain a provision enabling the President to delegate this authority within the Executive Office of the President.

The whole question of regulatory agency structure and oversight should be the subject of extensive study and public debate. However, such an undertaking is outside the content of this legislation. Pending such a study, we believe that the President has the authority to direct the exercise of substantive policy discretion by Executive Branch agencies within the factual context of the rulemaking record. Experts disagree on whether the President has the authority to direct the substantive policy decisionmaking of the independent agencies. There are major pros and

cons on whether he should have the authority and since it is not embodied in any current legislative proposals we have not taken a position on it.

Question 4. Mr. Post, I share with you a concern that the public have an adequate opportunity to comment on all materials placed in the rulemaking file. You have testified that if any material is placed in the file after the close of the comment period and that material is "of central relevance to the proceeding" that the agency not be able to rely on material of central relevance unless interested persons were afforded an opportunity to comment. Why can't the courts deal with this problem on a case-by-case basis as was done in the Portland Cement litigation?

Answer. The Business Roundtable believes that interested persons should have an opportunity to comment on any material that is placed in the rulemaking file before the comment period closes, as well as on any material of central relevance to the proceeding that is placed in the file even after the comment period has closed. We believe that this principle should be formally embodied in the Administrative Procedure Act, so that there will be no question of its applicability to individual agency proceedings.

If this were done, courts might still have to decide on a case-by-case basis whether interested persons have been afforded an adequate opportunity to comment on material upon which the agency relied. For example, an agency might rely on material that was placed in the rulemaking file after the close of the comment period without affording interested persons an opportunity to comment thereon, because, in the agency's view, the material was not "of central relevance to the proceeding." In such a case, a court might be asked to decide whether the agency was reasonable in concluding that the material at issue was not "of central relevance." Why should we defer to the courts on issues that can be resolved by Congress? Particularly in light of court backlog and workload, it seems advisable to reduce that load where possible by clarifying procedural issues in legislation.

In that respect, the courts would still be dealing with this problem on a case-by-case basis, as was done in Portland Cement Association v. Ruckelshaus, 486 F.2d 375 (D.C. Cir. 1973), cert. denied, 417 U.S. 921 (1974). However, we believe that the principle of administrative law requiring that interested persons be given an adequate opportunity to comment on any material of central relevance to the proceeding should be made explicit in the Administrative Procedure Act. In that way, Congress can ensure that this sound administrative principle will be followed universally be agencies and courts. It will guard against the possibility that some courts might limit the principle to cases where an explicit predicate for invoking it is contained in the enabling statute pursuant to which the agency is acting. Cf. Sierra Club v. Costle, No. 79-1565 (D.C. Cir. April 29, 1981).

In sum, recognition of the principle that interested persons should be afforded an adequate opportunity to comment on material of central relevance to the proceeding, regardless of when that material is received, should be decided by Congress. However, application of this principle in particular cases can be entrusted to judicial oversight.

Question 5. Mr. Post, in your testimony you suggest that a reviewing court would be able to set aside an agency rule where the regulatory analysis requirement leaves the rule without substantial support in the record viewed as a whole. As you point out, this proposed change parallels the changes that would be made by the Bumpers Amendment. I am sure you are well aware that the Bumpers Amendment language has been the focus of much discussion and debate in this committee and elsewhere in the Congress. Aren't you concerned that all of the care that we are lavishing on the adoption process will end up being ineffective if a reviewing court substitutes its judgment in the end for that of the agency?

Answer. We do not read the Bumpers Amendment as investing the judicial branch with policy judgment responsibility that traditionally has been in the hands of the executive or legislative branches. Nothing in the version of the Bumpers Amendment which is embodied in S. 1080 purports to deprive agencies of their policymaking responsibilities or to empower the courts to second-guess agencies on questions of law that the Bumpers provision would have any impact on presumptions that some courts presently affort to agency action. We believe that the "substantial support" and "substantial evidence" test in S. 1080 give the courts a sufficient standard for reviewing the factual basis of agency rules without undermining agency policymaking responsibility.

Mr. NASH. Now we will hear from Mr. Winger from the National Association of Manufacturers.

STATEMENT OF MAURICE H. WINGER, JR., VICE CHAIRMAN, AKZONA, INC., ASHEVILLE, N.C., REPRESENTING THE NATIONAL ASSOCIATION OF MANUFACTURERS

Mr. WINGER. Thank you.

My name is Maurice Winger, and I am appearing here today on behalf of the NAM, of which organization I am a member of the board of directors, the policy group on regulatory reform, and serve as chairman of the Regulatory Reform and Government Organization Committee.

Regulatory reform has been, and continues to be, an NAM priority. As the third point of NAM's six-point program to revitalize American industry, we are committed to the reform process as one essential element in the restoration of America's prominence as a world industrial leader, which stature has been compromised by the unprecedented flood of Federal rules and regulations in recent years.

Over the past 20 years, this country has shifted its focus away from the maintenance and development of a strong and productive capital base and toward the furtherance of social goals.

The method by which this focus has been furthered is particularly regulatory rulemaking. The reason why the regulatory process has been so convenient for regulatory activists is directly linked to the absence of procedural guarantees of due process in this connection.

The bulk of Federal rules and regulations are promulgated through the notice and comment provisions of title 5, United States Code, subsection 553.

These informal procedures have been used to facilitate the personal agendas of regulatory activists—in some cases, without regard to the costs, the effectiveness, the benefit or, indeed, the intent of Congress. This is plainly wrong.

Therefore, the NAM is delighted that this subcommittee has begun work on this important legislation which establishes enhanced procedural due procedures to process guarantees across all Federal agencies.

We believe in the viability of the regulatory analysis as a decisionmaking tool of judgmental value, coupled with the requirement that the agency implement the least costly regulatory or nonregulatory alternative which reasonably accomplishes the objective of the proposed rule. The regulatory analysis stands to promote reasoned Federal decisionmaking.

However, the NAM has suggested seven amendments which are designed to insure the accrual to society of the full benefits contemplated by this legislation. Briefly, they are as follows:

First, the NAM has suggested that the regulatory analysis provision be codified in section 600 of the Administrative Procedure Act, rather than in section 500, as currently drafted.

Second, rules temporarily excluded from the enhanced procedural guarantees of this legislation through the emergency rule provisions of section 3 should, in our opinion, have a time limit of 1 year.

Absent compelling public policy reasons, they should not be the subject of future emergency rule.

Third, regulatory duplication and overlap have created a network of Federal enforcement programs which are often incomprehensible. Therefore, agencies should review the need for their proposed rule in the light of existing enforcement programs as well.

Fourth, sensitive business information should be treated confidentially.

Fifth, the use of Federal funds for public intervention purposes should be proscribed.

Sixth, the bill needs to provide for meaningful executive oversight, and in this we agree with the Roundtable comments, by the President or his designee.

In addition to executive oversight, the NAM encourages the institution of meaningful congressional oversight through the legislative veto mechanism. In this regard, I would ask this subcommittee to admit for the record the comments filed on April 23 by the NAM before the Senate Committee on the Judiciary Subcommittee on Agency Administration on the legislative veto.

Seventh, the provisions of this law should be implemented with deliberate speed. The need for this legislation we believe is too great to squander any more of our precious time.

In our view, these are strengthening amendments which insure both procedural and oversight reforms. A strong omnibus bill will do much to complement NAM's program on regulatory reform which includes the revision of underlying agency organic statutes and the review of existing rules and regulations.

Together, these three modules will promote consistency across Government, the effective use of society's necessarily finite resources, the restoration of pride through prominence as a world industrial leader, and the maintenance of a high standard of life.

The NAM appreciates this opportunity to provide our comments. We will continue to devote whatever time and resources and skills are necessary to meet the challenge before us.

Mr. NASH. Thank you.

The materials you requested will be put in the record, along with your prepared statement.

[Mr. Winger's prepared statement and the prepared statement of the National Association of Manufacturers and questions posed by Senators Laxalt and Leahy follow:]

Prepared Statement of Maurice H. Winger, Jr.

The National Association of Manufacturers is a voluntary organization of industrial and business firms both large and small, located in every state. The NAM's 12,000 member companies and 158,000 affiliates, through the National Industrial Council and Associations Department, represent nearly 75% of our national industrial output and a similiar percentage of industrial employment. Together, we vigorously support principles which encourage individual freedom through sound programs designed to enhance the economic well-being and social progress of the American people.

The National Association of Manufacturers is pleased to have this opportunity to present its views on S. 1080, the Regulatory Reform Act of 1981. For ease in reference, these comments have been divided into five sections concerning (I) the need for regulatory reform, (II) NAM's views on regulatory reform objectives, (III) our support for S. 1080, (IV) recommended improvements, and (V) summation.

I. The Need for Regulatory Reform

For many years now the need for reform has been documented. Consequently, the American people have become sensitized to the pervasive influence of the Federal bureaucracy in the private sector and have spoken clearly regarding the need to eliminate the deleterious effects of Federal overregulation.

American manufacturing is no exception. For years we have directed massive sums of money into compliance with Federal programs and away from productive purposes. Concurrently, the Federal government has been borrowing ever increasing sums from society to finance its unprecedented growth. Consequently, the capital necessary to maintain America's prominence as a world industrial leader has become prohibitively expensive.

Significant capital at manageable rates can be made available by reducing society's compliance costs through the prudent exercise of both legislative and quasi-legislative powers and a concommitment reduction in the size and cost of government generally. These objectives do not require the compromising of the quality of American life. Clearly, there is a role for rules and regulations. Equally clear is that we no longer can afford to squander society's necessarily finite resources on counter-productive, outmoded, inefficient and non-cost effective programs.

II. Objectives

The NAM believes that a four-point omnibus regulatory reform program which concentrates on the establishment of procedural safeguards in all branches of the Federal regulatory network is needed. Procedural and managerial improvements are desired in (1) the legislative, (2) executive, (3) judicial branches, and (4) in the agencies themselves. The scheme of this comprehensive program is better understood by a review of how the regulatory system has run amok.

Overregulation is the result of overbroad delegation of congressional legislative powers to unelected regulators who have interpreted the scope of their authority in expansive terms. As a result, in 1980, Federal agencies promulgated more than 7,500 final rules and regulations, which is twelve times the number of laws enacted by the Congress.

The size of the regulatory network is one matter. Another real problem, however, is the lack of procedural fairness. The essential legislative nature of substantive administrative rule-making is well established in law. The issue has arisen in cases in which courts have been faced with the question of the applicability of procedural due process requirements to rule-making proceedings of administrative agencies. The uniform

answer of the courts has been to treat the administrative exercise of legislative powers similarly to the direct exercise of power by the legislature. The agency was found to be no more bound by constitutional procedural requirements than the legislature itself when it enacts a statute. Since procedural due process does not limit the legislature, the same principle has been consistently applied where rulemaking powers are exercised under legislative delegation. Bi-Metallic Co. v. Colorado, 239 U.S. 411 (1915).

This inequity was perceived by Congress when it enacted the Administrative Procedure Act (APA). Were it not for the APA, agencies would be free to administratively legislate in the same manner that Congress makes law. Moreover, from time to time, the Congress has enacted more specific procedural requirements with regard to certain regulatory programs. Generally, these procedural directives are more substantive than pure notice and comment proceedings under 5 U.S.C. § 553, and less procedurally cumbersome than formal adjudication 5 U.S.C. §§ 556, 557. See 15 U.S.C. 57(a) 1976; (F.T.C. trade regulation rulemaking proceedings).

The lack of procedural checks and balances on administrative decision making has permitted regulatory activists to further their personal agendas regardless of congressional intent, domestic policy, or other competing considerations. Coupled with the absence of effective oversight, the Federal regulatory network has become unwieldy.

Oversight, in our view, is properly a matter jointly committed to the Congress and to the Executive. By this we mean that the work of Federal agencies must be closely scrutinized by the Executive for strict adherence to the procedures by which they work and by the Congress for the policies which they implement.

III. NAM's Position on S. 1080

The National Association of Manufacturers congratulates Senators Laxalt, Leahy, Thurmond, Roth and the other sponsors on the introduction of S. 1080, the Regulatory Reform Act of 1981. We believe that this legislation does much to address the problems outlined herein. In particular, we note this legislation requires agencies to clearly articulate the need for and objectives of any proposed rule, as well as the specific statutory authority under which the agency is acting. If the rule is determined, to be a major rule, then the promulgating agency is required to perform a cost benefit analysis and may only promulgate as final rules those which are determined to be both cost-effective and justifiable in relation to the benefits incurred by the cost.

In our view, these requirements are the foundations to any meaningful regulatory reform legislation. The cost benefit analysis technique, though still unrefined, is a judgmental tool of significant value to any conscientious agency administrator who is committed to the promulgation of rational, well-reasoned rules and regulations. We note that the analysis established in S. 1080 is flexible enough to allow further developments in the science of cost and benefit assessment.

In the final analysis, NAM's support for S. 1080 is predicated on our belief that significant procedural due process guarantees will be provided to all interested parties. In this regard, the NAM would like to offer some salient suggestions designed to further strengthen this legislative proposal and to expedite any refinements you may wish to make.

IV. NAM's Recommendations

The primary objective should be to secure procedural and management reforms which give all interested persons fair access to the decision-making system, and thereby ensure reasoned

Federal decision making. In this regard, we suggest that the following areas be reviewed and amended.

(1) Title 5 U.S.C.

The NAM understands that it is the intent of Congress as reflected by this legislation to secure enhanced procedural rulemaking reforms applicable to all Federal agencies. To accomplish this objective, the drafters of S. 1080 elected to rewrite the notice and comment provisions of title 5 U.S.C. § 553. As rewritten, whenever an agency determines a proposed rule (or series of closely related rules) to be major as defined in the bill, then an agency would be required to conduct a regulatory analysis to determine which regulatory or non-regulatory alternative reasonably achieves the proposed rule's objective in the most cost-effective manner.

In our view, this is an entirely reasonable procedure which will promote better reasoned Federal decision making. The NAM, however, is concerned that a revision of title 5 U.S.C. § 553 may unwittingly construct a loophole for agencies which are exempted by their enabling statutes from the provisions of 5 U.S.C. § 553. We are concerned that an agency may avoid the enhanced procedural requirements of major rulemaking. This we do not believe to be consistent with meaningful procedural reform.

Therefore, the NAM suggests that this concern can be accommodated by placing the procedural requirements for major rules in a new chapter six and stating that "without regard, and in addition to other provisions of law, whenever a rule is determined to be major, an agency shall conduct a regulatory analysis, examine all regulatory and non-regulatory alternatives, determine that the benefits bear a reasonable relationship to the cost, and select the least costly alternative which reasonably achieves the objective of the rule at the least cost."

(2) Emergency Rule

Section 3(b)(3)(C) establishes the limitation on the term of an emergency rule to "no longer" than a reasonable period necessary to complete agency compliance with subsections (c) through (g) of this section. This language is flexible enough to allow either swift or attenuated compliance. The NAM recommends that there be added at the end of section 3(b)(3)(C) language which provides that "in no event may an agency delay compliance with the provisions of subsection (c) through (g) of this section beyond one year from the date of publication of the emergency rule." Moreover, absent compelling public policy reasons, no agency should be permitted to repromulgate as an emergency rule one which has lapsed.

(3) Duplication and Overlap

Regulatory duplication and overlap has created a conflicting and confusing regulatory network which frustrates the efforts of honest businessman to understand the parameters of the law. We suggest that there be added in section 3 a requirement that upon establishing the need for and objectives of a proposed rule that agencies review existing Federal enforcement programs to determine if the intent of Congress is already being met by existing programs. If so, then there is no need for an additional layer of regulatory structure and cost. In addition to major rules, we believe that this review would be a meaningful requirement for rulemaking.

(4) Business Communication Protection

The credibility of the regulatory analysis provision of S. 1080 depends on the integrity of the cost and benefit information mandated by the bill. Unfortunately, this bill fails to provide adequate disclosure safeguards for business documents. The NAM believes that this lack of disclosure protection will have a chilling effect on the willingness of business entities to document their cost and benefit data.

Therefore, the NAM strongly urges this subcommittee to institute disclosure protections to ensure both the sufficiency of the underlying data and the credibility of a final rule.

(5) Prohibition for Paid Public Intervention

The NAM has consistently opposed the use of taxpayer funds to finance the participation of single interest groups in Federal decision making. In this regard, the NAM notes language in section 3(d)(5) which states that "[N]othing in this section authorizes the use of appropriated funds available to any agency to pay the attorney's fees or other expenses of persons participating or intervening in agency proceedings."

In our view, this language is intended to address the paid public intervenor issue. Unfortunately, it may compromise the provisions of the Equal Access to Justice Act.

Therefore, the NAM suggests language which specifically prohibits the use of public funds for the purpose of participation unless specifically authorized by law.

(6) Oversight

In addition to procedure, the NAM notes the need for effective executive and congressional oversight. The NAM endorses Executive Oversight both generally and specifically. We advocate the adoption of general oversight language granting to the President, or his designee within the executive office of the President the authority to monitor, review and ensure compliance with procedural rulemaking requirements and to establish such procedures as may be necessary to exercise such authority. We also believe it critical to the ultimate success of these endeavors to vest in the President, or his designee within the executive office of the President, the authority to require the use of enhanced procedural guarantees where in his judgment, he believes them to be necessary.

In addition to Executive Oversight, the NAM advocates the establishment of effective Congressional Oversight. Noting this subcommittee's request that our comments be confined to matters within its jurisdiction. The NAM requests the inclusion for the record comments filed on April 23, 1981, by the NAM before the Senate Committee on the Judiciary's subcomittee on Agency Administration concerning the legislative veto oversight mechanism.

(7) Effective Dates

The NAM suggests that the need for this legislation vitiates any justification for delaying the effective date. In our view, six months will permit the development of adequate compliance procedures.

V. Summation

The NAM commends this subcommittee for moving ahead with this urgent business. NAM has a long standing commitment to regulatory reforms as seen by our active leadership in the passage of airline, trucking and paperwork reduction legislation. Moreover, the NAM has formulated a six-point program designed to revitalize American industry. Regulatory reform as the third point of this program focuses on procedural and management reform initiates, such as S. 1080, as well as the systematic review of existing rules and regulations and the revision of generic agency enabling statutes. Our recommendations herein, are designed to promote the greatest benefit to society by this legislation. We appreciate this opportunity to comment and stand prepared to respond to your questions. A summary of our comments is attached.

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COMMENTS OF

THE NATIONAL ASSOCIATION OF MANUFACTURERS

ON

S. 890

THE REGULATORY REDUCTION AND CONTROL ACT OF 1981

AND

S. 684

THE RULES REVIEW ACT OF 1981

BEFORE THE

SENATE COMMITTEE ON THE JUDICIARY

SUBCOMMITTEE ON AGENCY ADMINISTRATION

APRIL 23, 1981

The National Association of Manufacturers is pleased to have this opportunity to present its views on S. 890, the Regulatory Reduction and Congressional Control Act of 1981, and S. 684, the Rules Review Act of 1961.

Legislative veto is an important element for inclusion in any meaningful procedural and management reform effort. The need for this type of omnibus regulatory reform tool is clearly demonstrated by the burgeoning growth of the Federal regulatory network. Unelected administrators promulgated 7,765 final rules and regulations in 1980, all of which have the full force and effect of law. The authority for their activities emanates directly from the Congress via delegated legislative powers. Acting under both their quasi-legislative authority, and the provisions of the Administrative Procedures Act (APA), today's regulators enact rules and regulations with only a modicum of procedural fairness. For example, the bulk of Federal rules and regulations are promulgated pursuant to the "notice and comment" provisions of 5 U.S.C. § 553 which do not mandate the substantive analysis of the costs of compliance with Federal rulemaking

initiatives. Moreover, because the delegated authority is granted by the Congress, the courts have, in large part, refused to mandate enhanced procedural guarantees, Vermont Yankee Nuclear Power Corp. v. NRDC 435 U.S. 519 (1978), and inquire into the scope of legislative power granted broadly to Federal agencies. Bi-Metallic Co. v. Colorado 239 U.S. 441 (1915). This unsupervised "carte blanche" has become an exceedingly easy way to enact laws with little fear of oversight from either the Congress or a generally passive public.

The public, as of November 4, 1980, is no longer generally passive. Regardless of the interpretation given by pollsters, widespread public discontent exists over the pervasive nature of Federal rules and regulations which are compromising the quality of life in this country. Inflation is directly and inexorably linked to rampaging Federal regulation. Moreover, the amount of capital available to increase productivity and provide jobs is compromised by mandated costs imposed on business by a plethora of rules and regulations which divert capital to non-productive and unnecessary purposes. In short, there is both a public mandate and a demonstrated need to scrutinize with all deliberate care the manner in which laws are administratively enacted.

Toward this goal, the NAM actively has advocated a broad range of procedural and management reforms across all three branches of the Federal government. These reforms are a major NAM priority. We have, in the past, advocated the adoption of a legislative veto mechanism. We continue to support this concept. We believe that this tool will permit the Congress to measure the effectiveness of its programs and the costs caused thereby. Moreover, it promises to afford a check and balance on the "carte blanche" authority exercised in the name of Congress by the unelected regulator.

NAM recognizes the existence of a school of thought which views the legislative veto mechanism as (1) unconstitutional, or

(2) procedurally cumbersome. We note that the question of constitutionality has been neither affirmed nor denied. Further, there is a school of thought which recognizes and permits the careful construction of a legislative veto mechanism that avoids the recognized problem areas of Bicameralism, Separation of Powers and the Presentation clause. The NAM is not prepared to abandon a viable reform mechanism simply because it is arguably unconstitutional. Rather, we advocate the careful structuring of the mechanism to avoid clear intrusions into recognized constitutional principles. When necessary, interpretations of the law of the land will be made by those to whom such decisions are entrusted.

The NAM believes that congressional oversight is a responsibility not now met by existing budgetary review procedures of regulatory agencies. There is a need for additional congressional oversight which can be achieved if given a fair chance to work. If the legislative veto mechanism, as a form of congressional oversight, is too procedurally cumbersome, then so too is substantive congressional oversight. The only alternative is more regulation, irrespective of both cost and goal. This alternative is not in our national interest.

The NAM believes in the legislative veto mechanism. We view it as both constitutional and procedurally workable. However, we do not support watered-down programs which masquerade as a legislative veto. To be effective, the mechanism must promote swift actions so as to avoid undue delay, and it must not involve the President. In our view, the very nature of the legislative veto is congressionally based. It is the Congress measuring and evaluating the effectiveness of the use of powers delegated by it to the agency in question. The President's involvement in this "housekeeping" exercise is not warranted, and may in fact violate the separation of powers doctrine of article I, section 6.

In this regard, the NAM suggests that S. 890, the Regulatory Reduction and Control Act of 1981, be modified to require an agency to transmit to the Congress pursuant to § 802 (b)(3)(B) a clear finding regarding the need for and objectives of any proposed final rule. Moreover, in that same section, the agency should make a finding, supportable at law that (1) there is specific statutory authority for its proposed rule as measured by the legislative grant of authority under which the agency operates; (2) the agency should be required to establish that its final rule does not conflict, overlap, or duplicate similar rules already in existence. In the event that there is conflict, overlap, or duplication, the agency should make a finding that their statutory authority is either (i) legally justified and superior to the existing program, or (ii) that the existing program fails to meet the intent of Congress.

What is more, the NAM suggests that the congressional review section, § 802 (c)(1)(F), be rewritten to accommodate the finding of need and objective. As revised, that section would read "(F) is inconsistent with congressional intent as measured by the finding of need and objectives in § 802 (b)(3)(B)," or is otherwise inconsistent with the intent of Congress.

Finally, NAM suggests that the provisions of section 4 of S. 890, which postpone the effective date for two years, should be reconsidered. In our view, the legislative veto mechanism is good law. If it is good now, there is little justification for postponing its benefit while government grows ever larger. The NAM recognizes the need to reorganize to accommodate the review process. We believe that this can be accomplished in less than two years time.

In our view, these changes ensure that the need and the objective of proper rules are within the scope of Congress' delegated powers; the final rule does not overlap, duplicate, or work at cross purposes to existing delegations of authority; and

the benefits of this mechanism begin to accrue at the earliest feasible date.

With respect to S. 684, the Rules Review Act of 1981, the NAM suggests that the bill could benefit from several strengthening amendments. S. 890 contains a series of substantive tests designed to focus the scope of congresional review on the more consequential issues, which the legislative veto mechanism is designed to address. For example, S. 890 in § 802 (c)(1)(A)-(F) sets out six tests examining the agency's compliance with the law, congressional intent and program. Notable are tests which examine regulatory inconsistency and redundancy which we favor. Elsewhere in this text, the NAM has proposed amendments which will further strengthen the review criteria in the areas of need for, and objective of, a proposed rule.

The NAM notes in S. 684 the threshold requirement of 20 senatorial and/or 87 congressional signators to a resolution of disapproval. This threshold requirement, in our view, tends to add procedural requirements of doubtful merit relative to the need to increase and facilitate congressional review and oversight of rules and regulatory programs.

Finally, the NAM believes that the two house versions of the legislative veto mechanism, as embodied in S. 684, may add only additional procedural problems without ensuring a corresponding increase in the integrity of the final product.

In closing, these bills in conjunction with the entire package of procedural and management reforms, tend to promote good congressional housekeeping. The NAM commends Senators Schmitt and Grassley, Senator Harry Byrd, and the other co-sponsors of each bill for proposing and supporting legislation which can provide meaningful substantive congressional oversight. It complements NAM's focus on enacting omnibus regulatory reform legislation without which any legislative veto mechanism would be of only incremental benefit.

QUESTIONS POSED BY SENATOR LAXALT TO MR. WINGER

Question 1. Assuming that the President or his designee is given the authority to designate certain rules as "major", do you feel that the President or his designee should also have the power to waive regulatory analysis for certain major rules? If you support such waiver authority, please give specific examples (in addition to IRS rules) of rules for which such a waiver power would be needed. If you favor such waiver power, but with criteria set out in the statute, please elaborate on the details of such criteria. In addition, if you favor the addition of a waiver power, please explain why you do not feel that putting such discretion in the Executive inserts a major loophole in the requirements of S. 1080. Should the exercise of such a power be subject to judicial review?

Answer. The NAM supports enhanced oversight authority in all three branches of government. We have testified to S. 1080's need for express executive oversight authority. That authority, in our view, should be in two parts; first, the ability to make major rule designations; and second, the ability to ensure procedural compliance. The expansion of this authority to include absolute waiver authority is not supported by the NAM.

Our opposition is predicated on our belief that such authority crosses the fine line between procedural oversight and policy oversight. We recognize an existing power in the executive to supervise regulatory procedures in both executive and independent agencies. Policy however, is an existing power only as it relates to executive branch agencies. Independents, due to their unique Congressional ties are not clearly within the scope of exising policy oversight powers, and such power if granted statutorily skirts a constitutional issue.

Consequently, it is our view that specific statutory language of this nature would serve only to codify existing powers and may well run afoul of unclear constitutional principles.

Question 2. Should the determination of what is a major rule be subject to some form of judicial review? If you believe that there should be some limited judicial review, please explain how such review should be limited.

Answer. The major rule determination is the pivot point around which the enhanced major rulemaking provisions in S. 1080 revolve. Consequently, its central importance to the meaning of S.1080 can not be disputed. The NAM recognizes that most agencies will comply in good faith with the requirements of S.1080. We also recognize that agencies are not infallible. Therefore, to ensure the fairest possible consideration of the major rule elements, the NAM strongly supports the judicial reviewability of major rule determination. We believe that the check and balance of potential judicial intervention, coupled with effective executive oversight mechanisms will provide sureness in the major rule determination.

Question 3. When considering the definition of a major rule most witnesses addressed subparagraph (i), dealing with $100 million in compliance costs. Do you feel that subparagraphs (ii) and (iii) are too vague to be practically useful? Are these subparagraphs necessary?

Answer. These subparagraphs are necessary to ensure a complete definition of major rule.

Question 4. In the past, some have suggested that all judicial review of rulemaking be vested in the Court of Appeals. Do you support such a change in jurisdiction? If so, please discuss the practical applications of such a change. How would such a jurisdictional change affect post-enforcement review of rules? Don't the District Courts offer more opportunities for settlement than the more rigid procedures of the Courts of Appeals?

Answer. The NAM does not support a change in jurisdiction to the U.S. Courts of Appeals. We believe that the District Court, as a court of first impression promotes a fuller review of factual issues than is currently afforded in the Courts of Appeals which are better suited to the review of issues of law. Therefore, we believe it better to leave unchanged the jurisdiction of final agency determinations.

Question 5. Should deregulatory rulemaking be subject to regulatory analysis?

Answer. Yes. The NAM advocates the adoption of enhanced procedural and management reform legislation because it establishes what we believes to be sound rulemaking procedures across all Federal agencies. As such, it stands to reason that deregulatory initiatives will benefit from these reforms in equal measure to all other rulemaking. At the same time, the NAM is keenly aware of the Reagan Administration's desire to effect a number of critical reforms as soon as practicable. In this regard, the NAM supports the provisions of S.1080 which exclude from application those initiatives which are the subject of an advanced notice of proposed rulemaking prior to the effective date of this act.

Question 6. Many have said that regulatory analysis should not be the sole criterion of a rulemaking. What impact should regulatory analysis, as provided in S.1080, have on a particular regulatory decision? What other criteria should be guiding a regulation in addition to the regulatory analysis.

Answer. The regulatory analysis, in our view, is a tool of judgmental value which promotes well reasoned Federal decisionmaking. As a judgmental tool it cannot exist in a vacuum. Rather, in conjunction with subjective judgments regarding benefits, and other factors, the resulting rule should accomplish its objective in the most cost effective manner possible.

Question 7. One witness contended that the regulatory situation was getting "worse." Does this mean that E.O. 12291 is not working? Why is legislation needed?

Answer. Clearly, the regulatory situation continues to deteriorate. The NAM suggests that regulatory compliance costs are 25 percent greater than last year. However, it is premature to fault E.O. 12291. Rather, there are problems in agencies at both the staff and policy level which have yet to be fully addressed. Moreover, there still exists a strong bias favoring regulatory solutions to societal problems. On our view, regulation will always be a problem until this problem of institutional bias is addressed.

Question 8. Why not have a standard for rulemaking that a final rule should be the one that saves the most lives and avoids the most injuries, unless the agency offers an explanation to the contrary?

Answer. Advocates of the most beneficial approach to regulatory policy tend to think that modern American society can and should be free from risk. These glassy eyed visionaries fail to recognize the realities of a technological society, first, risk is a fact of life, and second, that the resources available to reduce risk are necessarily finite. This does not mean that the NAM advocates the abandonment of health, safety and environmental concerns. However, we do advocate the careful balancing of social programs against resource development. By ensuring a prosperous economy, we ensure the generation of the wealth necessary for a high quality of life in this country.

QUESTIONS POSED BY SENATOR LEAHY TO MR. WINGER

Question 9. I believe all of you view the use of hybrid rulemaking procedures, particularly cross-examination, as essential to the development of an adequate factual record. Won't these procedures, in fact, result in unnecessary delays in the issuance of regulations? What can we do to avoid this result? Should we put time limits on agency regulation making? What would you suggest would be an appropriate time frame for the issuance of major rules as defined by this bill?

Answer. Hybrid rulemaking procedures in S. 1080 pertain only to the estimated 150 major rule initiatives expected each year. Moreover, the opportunities for cross-examination are narrowly defined. Consequently, the NAM believes that any delay will be minimal in relation to the annual volume of all regulations. The NAM also notes that the problem with regulations is that they are not fully thought out. Hybrid techniques tend to reiterate that problem thereby ensuring rational, well reasoned responses to the need at issue. In our view, if this benefit is the product of delay, then some delay is to be encouraged.

Question 10. In preparing this legislation, we have heard from many business groups who complain that the federal regulatory agencies underestimate, or do not adequately consider, compliance costs for the regulated industries. On the other hand, there is a substantial body of opinion that, particularly in the environmental area, businesses, have, in fact, overestimated those costs.

Please comment on the latter criticism and explain how you think we can avoid this problem.

Answer. Costs have both a direct component and an indirect component. Direct costs are fairly certain; labor, paperwork, overhead, transportation, employee benefits, and the like. Indirect costs, such as far gone business opportunities, can only be projected based on past growth and anticipated expansions. Other indirect factors include the value of market shares, investor confidence, equity return and so on. Where regulation compromises these stability factors, the foundation of a business or an industry is compromised which represents a very significant indirect costs. Hence, side effects such as these should be fully considered by any regulator before proceeding with a regulatory initiative.

Mr. NASH. And next we have Mr. Dick Leighton representing the chamber of commerce.

STATEMENT OF RICHARD J. LEIGHTON, LAW FIRM OF LEIGHTON, CONKLIN, LEMOV, JACOBS & BUCKLEY, AND CHAIRMAN, U.S. CHAMBER OF COMMERCE, COUNCIL ON ADMINISTRATIVE LAW

Mr. LEIGHTON. Thank you, Mr. Nash.

THE CHAMBER SUPPORTS S. 1080

The Chamber of Commerce is here to enthusiastically support this bill. We are here to cheer you on. I think it's the best bill around that has been written on the subject. In fact, we think it's the best bill that has ever been written on the subject.

We want to congratulate the sponsors and the staff for the hard work they have put in.

We have made some specific recommendations, but they should not take away from the fact that almost without qualification we support this bill, and we are very enthusiastic about it.

I would just like, rather than get into the details which are in our prepared statement, to share an observation with you about the prior witnesses here.

LABOR'S POSITION SURPRISING

I think we had a unique moment in history. That was perhaps some of the most conservative testimony I have ever heard in my life.

We are facing a situation where organized labor is saying that basically, if I understood them right, everything is fine in the Federal Government. Little or nothing needs to be changed.

That defies the scientific method. That defies everybody's own eyes.

I predict that within a few months they are not going to find everything being very fine at OSHA and places like that.

OSHA REGULATION CAUSES PROBLEMS

I don't have to predict to tell you that things are terrible in OSHA. That agency just recently declared, through a mistake, that all foods are toxic and hazardous substances. They didn't do it in a proposal; they did it in a final rule as a result of an unannounced policy change in the middle of a proceeding. No one in food industry saw it, and now it's on the books and no one knows what to do with it.

If this bill had been in place and the proper discipline had been exercised by that agency, you wouldn't have had that absurdity promulgated.

Everything is not fine. Everything is getting worse.

MORE DISCIPLINE AND EFFICIENCY NEEDED

With money tightening up, unless the Federal system gets more efficient and more disciplined, things are going to get far worse—not only for the business community and not only for the public at large but for the working force out there.

With that in mind, I would like to just ask that our prepared statement be included in the record, as I understand it will be, and say thank you again.

Mr. CYNKAR. Thank you, Mr. Leighton.

As the Senator mentioned, all of your prepared statements will be in the record.

In his absence, there are a few questions I would like to pose to you for the record. There are other questions which we would like to submit to you in writing and would ask for the same time constraints for your responses. If we could have your answers by the middle of next week, on Wednesday, it would be very helpful.

The first question really picks up on Mr. Leighton's observations. In his statement, Mr. Winger spoke of overregulation. Similarly, in his prepared statement, Mr. Post referred to the Business Roundtable study of the "incremental" costs of regulation.

Since the rationale for regulation is to deal with the so-called spillover costs, not reflected by the free market, isn't regulation designed to impose incremental costs, that their borrowing Mr. Post's words, those "costs over and above expenditures that would have been incurred in the absence of regulation." Isn't the question then whether those incremental costs are excessive? And how do we know compliance costs are excessive?

Gentlemen, that question is all yours.

Mr. POST. Maybe I should address it, since you refer to the Roundtable statement, and just give you a little more background on it.

The statement was very carefully prepared. I should point out to you that after it was issued, it was very carefully reviewed by the EPA and those in the Carter White House.

Universally, it was well accepted as a conscientious effort to determine the excessive regulatory compliance costs beyond those which a company would normally incur in the absence of regulations.

It is feasible to measure these costs, as our cost study shows.

The cost study measured the direct, incremental costs that exceed those which would have been associated with the most cost effective way of achieving a regulatory goal. We could show you many ways to accomplish that. Some of those were evidenced in the report itself.

Mr. WINGER. I would like to give you three examples, rather than generalize. You have read the general studies, but just from my own personal experience.

Our headquarters organization was established in 1970 with just about 50 people and with the idea of keeping it very small with no sales or manufacturing but just headquarter functions. Today it has grown to over 150, almost entirely due to the need for additional legal, accounting, and similar types of talents to comply with Government regulations.

That is a generalization on a specific company.

Let me give you two more examples that I don't consider were necessary costs that are clearly incremental.

One of our operations is a manmade fiber plant near Asheville, N.C. It has a tower on top of a nylon plant which we were required to put a fence around the roof of. Nobody goes up on that roof. It

has a 2-foot parapet already. The OSHA people felt that an additional fence, at the cost of some $20,000, was essential for the safety of people who don't even go on the roof.

I think that was an unnecessary expense, quite apart from the additional things that they used to do, like worrying about how high your fire extinguishers were on the wall, rather than whether you had them or not, and a number of such things.

Now let me give you a final one that is much more significant.

Our discharge from that plant flows into a small stream—relatively small—which flows into a larger river 7 miles downstream. EPA concluded that the temperature of the water in our effluent was 4 degrees too high. We had to put in a cooling tower at the cost of something around $1 million plus, in order to cool that water 4 degrees. When it got 7 miles downstream, it went into a much larger stream where there was no question that there was any need for any cooling: $1 million.

These are specific examples of the kinds of things which I think, if we had a cost-effectiveness analysis requirement, might be prevented.

CAN COST-EFFECTIVENESS APPROACH WORK?

Senator LAXALT. You were all here when Mr. Marlowe testified. There was a colloquy between Senator Leahy and him. I think it dealt with a core question here philosophically.

He attacked the idea, if you will recall, of a cost-effectiveness standard calling it essentially meaningless because, in his words, "there is no consensus as to how to value continued good health, clean air and water, or maintenance of the ecological balance." All of you here, to one degree or another, support the cost-effectiveness standard. How would you respond to that for the purpose of this record? Does someone want to handle that?

COST EFFECTIVENESS CAN WORK

Mr. LEIGHTON. Briefly, he's just dead wrong. That's the simplest explanation. Federal agencies are doing it now.

He also testified with some pride that OSHA was doing some cost-effectiveness work. You can't have your cake and eat it.

Your bill defines costs and benefits broadly to mean not only money—we keep thinking only in terms of money—but also social costs and social benefits. Any disciplined agency decision that is made in these sensitive areas has to involve, one would hope, a judgment as to what the social and economic costs are and what the benefits are and a weighing of those judgments to determine whether action is appropriate.

For example, if we were going to live by the concept of total safety, no one would be at this hearing right now. We wouldn't venture onto the streets, because there is obviously a possibility that somebody could be hit by a car. But, assuming that we won't, we came here to discuss S. 1080. In that situation, risking our lives was worth it.

You can't argue in black and white that no one can attempt to make such value judgments. It's just wrong.

Even though agencies are beginning to use cost-benefit analysis, the system is not working well right now along those lines.

I think, in my personal view of the system, that workers through the ineptness of OSHA and other agencies, are being subjected to physical and economic dangers that they need not be subjected to.

Does anybody else wish to speak to that? Mr. Westcott?

Mr. WESTCOTT. I would like to comment.

Many of the questions to the previous panel had to do with OSHA and safety. Many of the regulations impact the ability of managers to actually manage our companies.

Many of the regulations are not cost effective; they cause interminable paperwork. They prevent us from economically and efficiently managing our companies and preparing for the future.

One of the regulations that is particularly onerous has to do with minority business enterprises (MBE's) and women's business enterprises (WBE's). This has nothing to do with health or safety.

The Environmental Protection Agency, in its wisdom, is actually playing a numbers game with respect to the use of minorities and women. They have made absolutely no attempt to evaluate the ability of the MBE or WBE community to participate in their program. They have come out with artificial numbers, generated from God knows what kind of statistics, and then are insisting by regulations that all prime contractors adhere to their artificial numbers.

This is expensive to the country. It has wasted a lot of money in the EPA program and should really be seriously looked at.

Senator LAXALT. Does anybody else wish to speak to this?

Mr. POST. Senator, I would like to subscribe to those statements, particularly Mr. Leighton's statement.

I am bemused by the position of labor on this. Years ago, I used to engage in collective bargaining, and there are some inherently dangerous jobs, whether they be deep sea diving or working on high towers or involve exposure to some other dangers.

We used to bargain about how much extra pay should be provided for people who were engaged in those inherently dangerous operations. There was a way of arriving at some kind of measure of the relationship between a basic cost and a benefit.

Our view is that this is a matter that can be handled by an agency in terms of the numbers of lives saved and the number of diseases avoided, without necessarily putting a dollar value on them.

It is up to the agency to do this as it arrives at its own judgment as to what the rules shall be.

Senator LAXALT. In a prepared statement, which is going to be delivered later, witnesses from Congress Watch observe what they call a "cross-town hypocrisy" of regulated industries, exaggerating the compliance costs of regulation. We had some testimony to that effect this morning.

They cite the following example:

> In the early 1970's, chemical manufacturers announced that a proposed OSHA standard on vinyl chloride, a proven carcinogen, could cost 2 million jobs and $65 to $90 billion. The standard is simply beyond the compliance capability of the industry, said their trade association. OSHA implemented the standard and the industry complied without job losses and at a cost one-two hundredth of its original estimate.

The Securities and Exchange Commission sued U.S. Steel because the company had allegedly established two estimates of the cost of some pollution standards—a higher estimate that it publicly released and a lower estimate that it sent to the SEC. The case was later settled.

Would any of you on this panel like to respond? If this sort of thing happens regularly, doesn't it undermine the value of regulatory analysis, just purely from the standpoint of credibility? Would anybody like to speak to that?

Mr. MUTH. If I may go back to the copper industry for just a moment, it is easy to cite examples of people making mistakes in projections of costs.

In 1970, or thereabouts, the Federal Government projected that the copper industry could clean up all of its emissions in all of its copper smelters throughout the country for somewhere between $35 and $50 million. To date, the industry has spent well over a billion dollars, and we are still being pressed to spend more.

There can be mistakes. There have been a number of them on all sides of these issues.

I see this morning in the Washington Post a headline that says: "After $30 billion No One Knows If The Nation's Water Is Any Cleaner."

Congress Watch may have some comment on that.

I think what it shows is that there is a pressing need for better analysis than we have had in the past.

AGENCIES NEED NOT ACCEPT DATA WITHOUT QUESTION

Mr. LEIGHTON. I think that's a red herring.

If the company did that intentionally to deceive the Government, there should be some sort of reprimand. But there is nothing in this bill, or in current law, that says that the Government agency has to accept without question what any participant in a proceeding says.

Indeed, just the opposite happens usually. Usually there is either an adversary process or a semi-adversary process. Everybody gives their point of view. The facts are capable of being tested. If it's in a situation where it's very important, you have another provision in your bill which provides for limited cross-examination, even in an informal rulemaking area.

That's the type of thing that can be tested. It can certainly be tested by a so-called expert agency.

Senator LAXALT. I would think so.

How do you respond to claims that judicial review of regulatory analysis, even the limited form that we have here in S. 1080, will just produce unnecessary litigation and disrupt the regulatory process--the lawyer's paradise is how it was referred to. Do any of you want to comment on that?

We don't want to create a process here which is going to be counterproductive. We would like to think that this will not be, because we already have ample work for lawyers in this whole regulatory process in the present condition.

Mr. Leighton?

S. 1080 IS NOT A LAWYERS' RELIEF ACT

Mr. LEIGHTON. I don't view this as a lawyers' relief act. In fact, anyone who has studied the antiregulation movement knows that some of the lawyers in the more traditional Washington practices are hurting and the trend looks like it is going to continue.

Most of the lawyer's work is not in the area of judicial review. That's probably an extremely small percentage of it. Most of it is in the enforcement and counseling area, in terms of complying with the great number of Federal regulations.

We shouldn't confuse the attempt by the sponsors of S.1080 to clean up the regulatory process by requiring better initial decision-making with difficulties in enforcement of poorly promulgated rules under existing laws.

However, back to the point.

JUDICIAL REVIEW NEEDED

If something is important enough to be a requirement, passed by Congress and imposed upon the executive branch, it is important enough to make sure that it gets complied with.

When you realize that that should be a guiding principle and you also realize the fact that many agencies are not doing what Congress intends, you have to have some sort of oversight or review.

There are several ways to go about it, of course. The most effective and direct usually has been judicial review.

If you put an agency's analysis and determination of whether something is a major rule within the context of the entire rulemaking proceeding and let a judge look at it and see if the result was arbitrary because the agency failed to follow the law on these procedures, the rule should fall. It's as simple as that.

What is so sacred about this that someone doesn't want a judge to take a look at it? I just don't understand.

It's a simple and time-tested process. Both sides of any controversy would have access to judicial reviews. It's not just something that business would use.

I think that's another red herring argument.

Senator LAXALT. Is there anybody else?

[No response.]

We have other questions, and I'm certain that my colleagues on the subcommittee do as well. If we may, we would like to address those to you in writing. As I have indicated to the other panels, if we could have a return on those questions by next week, we would like to expedite the process here.

[Mr. Leighton's prepared statement follows:]

PREPARED STATEMENT OF RICHARD J. LEIGHTON

I am Richard J. Leighton of the law firm of Leighton Conklin Lemov Jacobs and Buckley. I serve as Chairman of the U.S. Chamber's Council on Administrative Law. The Council consists of informed representatives of the business, academic and legal communities. We serve by recommending policy on regulatory proposals through the Chamber's key committees to its Board of Directors.

On behalf of the 120,000 members of the Chamber of Commerce of the United States, I wish to express our support for S.1080 and make several recommendations that, if adopted, will accomplish additional needed regulatory reforms.

Consensus On Need For Regulatory Reform

The U.S. Chamber has long been in the forefront of efforts to improve the economy through improving the federal regulatory process. Seeing bills such as S.1080, therefore, provides a certain sense of vindication. This positive feeling is tempered, however, with a caution that comes from an appreciation of the difficulty that Congress will have in balancing the important interests and needs that are at stake.

While there may be differences with respect to <u>how</u> to effectuate regulatory reform, the important point is that there clearly is a long-overdue consensus on the <u>need</u> for reform. We are very pleased to see that this subcommittee and its counterpart in the House recognize and are a part of this consensus.

It is in Congress that the regulatory system was created. It is by Congress that the system was nurtured and grew. It is to Congress that we all are looking for the lasting solution to the very real problems we have with federal regulatory efforts.

Perceptive Presidents can help greatly through the issuance of regulatory reform executive orders such as order number 12291, issued by President Reagan. But these executive orders are subject to relatively easy change, and constitutional debates result when attempts are made by the President to dictate to the so-called independent regulatory agencies.

Congress Must Provide the Solution

The essential solution must lie with Congress. And, the beginning of that solution will be to devise reforms of the procedures by which the federal bureaucracy decides how

to regulate the personal and professional lives of Americans. S.1080, the bill before you, is such a procedural reform bill. We endorse the concept of such omnibus procedural reform legislation. We also believe that Congress must make a systematic review of all substantive regulatory statutes and repeal out those whose usefulness is past.

The job is not an easy one. The federal agency system is the most complicated social system ever devised. If you could draw a flow chart of the interacting, overlapping and duplicating functions of the federal bureaucracy, you would have a schematic that, by comparison, would make our national telephone system look as simple as a salad fork.

But, of course, no one could draw a regulation-by-regulation schematic to determine how each restraint or benefit works within the total federal government for the good of the public. The system has gotten too big for that. We do not know how many federal regulatory agency units there are, no less what they do. We all are increasingly uneasy about this. As we begin to perceive its size and complexity, we wonder whether the federal agency mechanism is out of control or beyond control.

Yet, one has to hope that any machine built by Congress can be fixed by Congress, especially if Congress can agree on the basic functions it desires that machinery to perform. The strong bi-partisan support this bill has already received in the Senate demonstrates clearly that regulatory reform is neither a Democratic nor a Republican program alone. The popularity with which this initiative has been greeted in both Houses, and in the Administration, demonstrates a strong commitment to reform throughout government. The support already evidenced from the U.S. Chamber, and other business groups, proves our willingness to help. Over the past few years, the Chamber has developed its own perspective on regulatory reform which comports with this bill.

Basic Objectives of Reform

In February of 1976, the U.S. Chamber's Board of Directors considered and endorsed recommendations on regulatory reform prepared by a special Regulatory Reform Task Force. The Board enunciated the two basic functions that we believe should be the objectives for a reformed federal system:

— To retain a competitive free market and provide an incentive for innovation and other productive economic activities; and

— To limit regulations to those essential to the protection of the health, safety and the general welfare, revising and administering existing requirements so as to —

- Provide that degree of regulation essential to the proper functioning of a competitive free market system;
- Eliminate inequitable enforcement;
- Eliminate regulatory duplication and conflict;
- Provide for prompt regulatory decisions consistent with due process;
- Assure adequate consideration of costs and benefits before promulgating regulations;
- Minimize compliance costs after promulgating regulations;
- Provide federal preemption only in essential instances, and
- Assure a more orderly development of regulation with the Congress establishing basic policy, the agencies regulating in accord with the intent of Congress, and Congress reviewing regulatory actions within its oversight function.

Within this policy framework, the Chamber is pleased to support the comprehensive direction of S.1080, and especially the regulatory analysis and regulatory agenda objectives of the bill. In fact, the Chamber has supported an omnibus regulatory reform bill for several years. In the 96th Congress, the Chamber joined with a number of other business and labor organizations to formulate and support such legislation.

Regulatory reform, further, is a top priority of the Let's Rebuild, America program of the U.S. Chamber. This program, which is receiving nationwide attention and support, offers a comprehensive set of concrete proposals to bring inflation under control, rebuild our economic base, regain our international leadership position, and rekindle people's confidence in our country's basic institutions. The full range of the program's specific recommendations, in the regulatory area and in other important fields, is contained in the publication Let's Rebuild, America, which we shall be happy to make available to you.

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Along with support for efforts to obtain a comprehensive procedural reform bill, the U.S. Chamber has in the past favored other specific bills to accomplish regulatory reform. Notably, the Chamber has supported legislative veto proposals, the so-called "Bumpers Amendment" to strengthen judicial review of regulations, and sunset review of agencies and programs. The Chamber's regulatory reform advocacy also has stressed the role of Congress in conducting regular and stringent oversight of agencies during the authorization and budget hearings, and periodically through sunset hearings.

We believe, in short, that no single reform proposal will solve all of the problems that hamper the federal regulatory system. We recognize that regulatory reform does not lie exclusively in the domain of any single branch of government, and that this subcommittee lacks adequate jurisdiction to accomplish all the work that must be done. S.1080, however, is a good start. It incorporates a number of excellent proposals into a well-integrated, constructive package to achieve reforms that are clearly in the public interest.

Major Attributes of S.1080

More specifically, we especially like the following major features of S.1080:

1. The scope of S.1080's regulatory reform is broad enough to cover not only the traditional Executive Branch agencies, but the so-called independent regulatory agencies. The application of regulatory procedures should be as uniform as possible. The effect on a business from regulation by the independent Federal Trade Commission can be just as serious as from a Health and Human Services Department action.

2. Regulatory analyses must be performed by federal agencies when proposing major rules and when promulgating them. Mandatory analysis is the keystone to the regulatory reform movement. Requiring this type of precision from federal regulators will create a new breed of informed, effective decisionmakers and, hopefully, get rid of those undisciplined bureaucrats who now use the Federal Register for trial balloons and other unstudied ideas that amount to little more than regulatory graffiti.

3. In a similar vein, we like the concept of requiring agencies to perform cost-effectiveness studies on alternative approaches to the requirements they choose. Again, this is a form of disciplined thinking that can cure federal officials of the wasteful practice of regulation by intuition.

4. Also consistent with this more disciplined approach is the bill's requirement for systematic reappraisals by federal agencies of their existing major rules. All too often, federal agencies put a higher priority on issuing new regulations than they do on enforcing existing regulations or determining if existing regulations are achieving their intent. It's almost as if some agencies kept score on the basis of how many new regulations they could allege a need for.

5. A particularly constructive step forward is the regulatory agenda and calendar requirements in S.1080. This will not only be of invaluable assistance to those affected, but it will be of significant help to Congress in conducting its oversight and to the President in administering the Executive Branch. The "Big Picture" of federal regulatory activity will emerge from the mosaic eventually created by these requirements.

6. The strengthening of judicial review of agency regulations is favored by the Chamber. The so-called modified Bumpers Amendment approach taken in this bill is consistent with our view that, with respect to questions of law, agency lawyers are in no better position to interpret questions of law than the courts.

7. The express exclusion of the so-called "enabling" or "gateway" regulations from the additional regulatory steps required for promulgating a major rule is an enlightened approach. Delay has been the major abuse of the process of getting a new drug or a food additive approved or obtaining generally recognized as safe status for a food. It would be ironic if a regulatory reform bill made that abuse worse.

S.1080 Needs Strengthening

These are among the major provisions that we feel would be especially beneficial. The Chamber has no significant criticisms of any of the major concepts in

S.1080. We do, however, urge that the bill be expanded to include three needed additional major regulatory reforms. We suggest that you —

1. Add a stronger sunset provision giving Congress the responsibility of performing terminal oversight for regulatory programs. The bill now would require only agencies to review their own programs without requiring any terminations. We suggest a tougher sunset provision which would eliminate major regulatory programs on a scheduled basis unless affirmative action to save them is taken by Congress and justified. A sunset provision is one thing that is guaranteed to get the attention of federal regulators and force them to give a true accounting of their stewardship.

2. Require the choice of performance standards rather than design standards wherever the choice is not inconsistent with controlling statutes. The benefit of this is self-evident.

3. Expressly allow for judicial review of the agency decision on whether a rule is a major rule as part of any judicial review that might be sought for that rule.

Mr. Chairman, we repeat that S.1080 is more than a fine beginning to what we hope will be a new and beneficial regulatory reform era. We join you in your concern for improving the regulatory process and urge you to make your bill even stronger in that regard.

Thank you.

Senator LAXALT. Are there any closing statements?

[No response.]

Senator LAXALT. On behalf of the subcommittee, I want to thank all of you. It has been very interesting.

We will stand in recess until 1 p.m.

[Whereupon, at 11:55 a.m., the hearing recessed, to reconvene at 1:00 p.m. the same day.]

AFTERNOON SESSION

STATEMENT OF SENATOR ALAN K. SIMPSON, A U.S. SENATOR FROM THE STATE OF WYOMING

Senator SIMPSON [acting chairman]. The hearing will come to order.

I am pleased to be able to participate in the hearing on this legislation. Certainly, regulatory reform in the past decade has come fully to the front of the public mind, even despite its rather arcane nature, certainly with greater vigor and clarity than anything else.

The cry which is prevalent, to get Government off the backs of the people, somehow focuses in this area. Whether that is justifiable or not, I guess, is not the issue; it is a fact, no longer just a political slogan. It is certainly a central focus of the political dialog. I suppose those reasons, to the members of the committee, are not difficult to understand on both sides of the aisle.

It has been fascinating for me to review the most recent front-page stories of the Washington Post with regard to the unbelievable waste of the taxpayers' money caused by the construction of unneeded, unwanted, and at times unworkable sewage waste treatments and waste water facilities, and so on.

I think one of the parts of the article was that $30 billion that had been expended in that effort had been wasted through fraud, mismanagement, and bureaucratic incompetence, which are easy targets, but the issue is that money is a findable target, and those were the figures presented.

Certainly, the EPA continues to be one of the Federal Government's leading propounders of new and exceptionally costly rules and regulations.

I would, at this point, without objection, insert those articles in the hearing record.

[Material follows:]

[From the Washington Post, May 10, 1981]

Costly Monuments to Idealism Now Lie Rusting in the Mud

(By Patrick E. Tyler)

PART I—DIRTY WATER—A FEDERAL FAILURE

Elaborate hulks of expensive and failing machinery litter the American landscape, the wreckage of Washington's good intentions. They are monuments built by one of the nation's largest and most idealistic public works program: the drive to clean up America's water. And much of it doesn't work.

At Lake Tahoe, Calif., a world-acclaimed advanced waste water treatment plant whose effluent was heralded as "clean enough to drink" has killed fish regularly in the next county, to where the treated water is piped.

In Greenville, Maine, a sophisticated sewage treatment plant was padlocked after completion because the engineers couldn't get it to work.

And, rising out of the Mojave Desert near Las Vegas, is a $53 million plant city officials say was built to solve a pollution threat to Lake Mead. The threat, it turns out, didn't exist.

The construction grants program of the Environmental Protection Agency built these plant as part of America's premier effort to clean up pollution in its lakes and rivers.

Launched by Congress in 1972 on a tide of fervent rhetoric and with a promise to end water pollution by 1985, the program has funneled $30 billion in federal funds to thousands of communities for the contruction of waste water treatment plants.

But the program has achieved dismal results. After nine years of massive federal investment to build or upgrade sewage treatment works in 18,000 communities, about 2,000 of the projects have been completed, and most are small plants in small communities where pollution threats are often the least serious.

While no comprehensive statistics are available, authoritative government surveys of the completed plants show that at least 60 percent of them, and perhaps as much as 90 percent, don't perform up to anti-pollution requirements more than half of the time.

Nearly a third of the federally funded plants have been designed, built or operated so poorly that they are effectively out of commission much of the time.

Ten years and $30 billion later, water quality in America may be only marginally better despite this heavy investment. Experts say the major clean-up investments made by private industry probably are more responsible for the water improvements that have occurred.

Meanwhile, horror stories about local sewer scandals, cost overruns, design failures, lawsuits and construction controversies are being played out in hundreds of cities across the country.

Except for an occasional low-key congressional inquiry, this nationwide breakdown of an enormous public works program has occurred with little public notice. Each city with a failed system or a sewage scandal suffers its problems in relative isolation, often unaware of the national epidemic.

The consensus of administrators and critics of the EPA grants program is that it will fail to reach its ambitious goal of making all rivers and lakes "fishable" and "swimmable" by 1983 and eliminating the discharge of all pollutants into American waterways by 1985.

How did the good intentions and high hopes of a decade result in national failure?

The blame spreads in several directions: to Congress and the driven spending philosophy of the environmental architects who saw an opportunity to capitalize on the county's concern about pollution, to the almost blind faith in high technology solutions for water pollution problems, and to a host of lapses in control by EPA.

Those lapses included a benevolent federal negligence as a few hundred engineering consultant firms in effect took the grants program captive through their ability to influence the decisions on technology.

State and local officials, spurred on by the EPA, have set water quality standards for rivers and lakes that have little to do with swimming or fishing goals, but are tailored to the capabilities of expensive, high-technology treatment plants promoted by their highly paid engineering consultants.

In many cases, advanced waste treatment plants were sold to communities before adequate scientific analysis determined the pollution threat to their water.

And, instead of concentrating the available federal funds in areas where the greatest pollution threats existed, members of Congress rushed to spread the pork barrel of the grants program across the country based on congressional district size.

In the beginning, worry about pollution enabled environmental spokesmen to stir the national conscience and create a powerful clean water constituency as part of the general environmental movement of the late 1960s and early 1970s.

The fears of water degradation and depletion were real and intense. In some regions, antipollution campaigns had been building momentum since the end of World War II. So armed, the movement's political gurus seized an opportunity to win spending commitments never before thought possible.

But there was little discussion of the true costs of environmental clean-up. To raise the question was almost a breach of faith.

"Can we afford clean water?" asked then-senator Edmund S. Muskie (D-Maine) during the floor debates of 1972. "Can we afford rivers and lakes and streams and oceans which continue to make possible life on this planet? . . . Those questions were never asked as we destroyed the waters of our nation, and they deserve no answers as we finally move to restore and renew them."

As the funding floodgates opened, the players in another forum positioned themselves to benefit. One Wall Street analyst noted at the time: "We project above-average growth rates for the environmental control markets . . . [and] a favorable psychological atmosphere for the stocks."

Sewerage equipment manufacturers with names like Ecodyne and Envirotech became the "buy now" recommendations of stockbrokers. Hundreds of consultant firms set up environmental engineering divisions overnight to garner retainers from every American city forced to study the adequacy of its sewage treatment facilities.

EPA was endowed by Congress to pay the bulk of the costs, 75 percent, for waste water treatment plants built under the grants program. Other federal loan assistance was made available to many communities. There was little incentive for penny pinching. The attitude that "it's someone else's money" was cited by one congressional report as prevalent.

As a result, examples of waste, poor planning, faulty design, mismanagement—and fraud—abound:

In Toledo, millions of dollars in federal and local funds have been spent on a modern sewage treatment plant that has had many operating difficulties, but outside consultants have found that millions of gallons of raw sewage never make it to the plant. They are diverted directly into Lake Erie and the Maumee River through numerous bypasses in the sewers.

In Sacramento, the EPA has funded a $500 million project to close more than 20 sewer plants and build 85 miles of huge concrete pipes to a single, giant sewer plant, none of which will improve the water's quality.

The New Mexico state water pollution control director "invented" a sewer district with an EPA grant number and won $400,000 in state matching funds. It took state law enforcement agencies three years to catch up to the fiction of the "Greater Mesilla Valley Sanitation District."

The tiny Alaskan town of Skagway (population 850) has abandoned its EPA-required waste treatment plant because the town cannot afford the fuel to run it. In addition, the plant was located below the high-water mark on a saltwater canal where 20-foot tidal surges occasionally flood it.

In St. Louis, the city was required by the EPA to remove a high degree of suspended solids from the waste water it puts into the Mississippi River just below its junction with the Missouri, but the river's muddy waters are already thick with suspended solids from agricultural runoff. "It's like pouring clean water into dirty water," one official said.

Outraged officials of Suffolk County, N.Y., in January filed a $270 million lawsuit alleging a "pattern of rackteering" by some of the engineers, consultants, contractors and former county officials who presided over $1 billion in cost over-runs and $1 million in alleged kickbacks on a big sewer project in that easternmost Long Island county.

The ambitious orators of the environmental movement erected the EPA clean water grants programs as an act of faith. "Our planet is beset with a cancer which threatens our very existeance . . . If we entertain any serious hopes of preserving life on this planet, the water pollution bill will have to be paid, soon," Muskie said in the floor debate of 1972.

Today, in the Reagan administration, the faith has changed. Questioning costs is the new catechism. The EPA annual survey to determine the cost of reaching the goals set in 1972 now exceeds $100 billion, a chilling figure to the newcomers.

For the fiscal year that begins in October, President Reagan's budget director, David A. Stockman, has proposed a one-year funding moratorium for the grants program. Funding would resume the following year at $2.4 billion, $1 billion less than the Carter administration's last yearly level.

The renewed program would concentrate on high-priority projects, mostly in urban areas, and would leave sewer pipe expansion—growth—to the cities and states.

But fundamental questions remain for Reagan. Is the administration committed to the grants program as the best method of achieving water quality goals based on the "fishable, swimmable" standards?

Can it overcome the bureaucratic snares that have ensnarled success in hundreds of cities? Can it get a grip on the current runaway program, the technology that propels it and the industry that thrives on it?

The grants program affects nearly every congressional district, which will make the budget cutting a difficult political business. But even deep cuts will not eliminate some of the basic sources of waste that have sent millions, perhaps billions of dollars down the drain.

"The real trick is to cut the budget and keep cleaning the water," said Larry Silverman, legislative director of the Clean Water Action Project. "Any fool can cut the budget."

At the center of responsibility is the EPA, whose employees are in many cases the most severe critics of the program. Thomas Jorling, the EPA's assistant administrator in charge of water programs from 1977 through 1979, said the grants program" . . . is a microcosm of a lot of federal programs that are put together to serve many masters."

In the Senate, he said, the goal was environmental protection; in the House, it was public works, where pork-barrel enthusiasm added pressures to fund plants of questionable priority in favored congressional districts.

To the states and municipalities, the goal was control of growth and progress, for where the sewer lines go in America, so go the new subdivisions and shopping centers.

While Congress was willing to spend $3 billion to $4 billion a year for sewer plant construction, it consistently refused to spend a few million extra for adequate numbers of program supervisors, auditors and investigators, according to Jorling.

"The system works when closely supervised" Jorling said, but in the absence of tough state and federal oversight, "There's just so many ways this program has been ripped off that I'm sure there are cases where people have not built whole portions of these plants or built them so poorly they don't work."

As the EPA consistently failed to meet deadlines for setting limitations on various pollutants, the agency at the same time organized "steam teams" to get the grant money out faster in response to pressure from Congress.

The rush to get the money out the door was such that in the last month of the 1977 fiscal year EPA officials frantically pushed $3 billion through to the states, representing the bulk of the $4.5 billion appropriation for the entire year.

"There have been extreme pressures to make grants for questionable projects," said a House Appropriations subcommittee staff report in 1979.

David Jones, the General Accounting Office official whose critical reports on the program stand two feet high on his desk, said he believes that the new president is "crazy if he doesn't cut it. This [program] is an example of a mandatory technology solution that ignores local conditions, the assimilative capacity of a body of water and less expensive alternatives like septic tanks."

[From the Washington Post, May 11, 1981]

The Law and Polluters—U.S.-Backed Sewer Plants That Don't Work Place Local Officials in Jeopardy of Prison

(By Patrick E. Tyler)

PART II—DIRTY WATER—A FEDERAL FAILURE

In hundreds of American cities, mayors, councilmen, city managers, county executives—all sorts of officials—are breaking the law and are, potentially at least, subject to imprisonment because the sewer plants given to them by the federal government don't work.

This rampant lawlessness may not be their fault, but local officials nonetheless are technically culpable as water polluters. As such, many live under the threatened wrath of the Environmental Protection Agency, which enforces the 1972 Clean Water Act.

And the wrath of Washington comes in many forms, from notices of violation and administrative orders to civil contempt charges, criminal fines and even jail.

Local officials everywhere are in this predicament because the federal govenment's well-intentioned program to renew the purity of the nation's lakes, rivers and streams has gone awry. So far, thanks to the disarray of federal enforcement, nobody has gone to jail over a faulty sewage treatment plant.

A handful of municipalities and their officials, however, have been convicted in recent years for falsifying reports on the pollution discharged from community treatment plants. The most recent criminal conviction, according to EPA, involves Ashland, Va., where city officials pleaded guilty in March, 1980, to doctoring reports. The town paid a $2,500 fine and was placed on one year's probation.

About $30 billion has been spent to plan or construct waste-water treatment facilities in 18,000 communities as the primary effort to eliminate water pollution.

But after nine years only 2,000 plants have been completed and, at any given time, according to various congressional and EPA samplings, more than half are not working well and are violating EPA anti-pollution permits. The most frequently cited reasons include poor design, operation and maintenance.

Another problem, not cited by the EPA, is the tendency to try to cure some problems by throwing money at them where underfunding is, not the difficulty.

"Violation of [pollution] permits is the norm, not the exception," concluded a November, 1980, report of the General Accounting Office. The permits describe the types and amounts of pollutants that can be discharged.

It is lucky for this generation of potential public service "criminals" that the EPA has a wretched record of enforcing municipal water pollution control laws.

Municipal enforcement "was not our focus," said Sara Compton, EPA deputy assistant administrator for water pollution enforcement. "For the last several years," she said, "we went after industrial [polluters]."

EPA's poor record, however, has not prevented it from dispatching frequent reminders to local officials that its will must be done. A 1978 EPA telegram to Las Vegas authorities who were resisting an unneeded advanced wastewater treatment plant read in part:

"If for any reason . . . construction is stopped or discontinued, current and future EPA grants for wastewater treatment works will be jeopardized and will probably force recovery of [already] expanded federal funds. Since violation of the compliance schedule would occur, EPA enforcement actions will ensue. Remedies under law are penalties up to $25,000 per day . . . ."

In an effort to determine the scope of municipal violations, GAO investigators studied 242 plants in the Northeast, Upper Midwest and Far West for 12 months.

The plants, it found, were doing a miserable job.

Of the 100 sewage plants studied in the Northeast, 94 violated pollution discharge permits during at least one of the 12 months checked; 61 violated the permit limits for more than half the year. And, nearly a third violated discharge permits so seriously—for four consecutive months or more—that they did little to cleanse streams of raw sewage and other pollutants.

The figures were similar in the other regions. Thirty-six of 92 plants in the Upper Midwest and 22 of 50 West Coast plants violated their permits for more than six months.

In the United States today, if you want to dump anything dirtier than tap water into a river, lake, stream, ocean, bayou, creek or drainage ditch, you have to get a permit.

The EPA calls these National Pollution Discharge Elimination System (NPDES) permits. They set legal discharge limits for numerous substances, including particles that rob oxygen from the water as they decompose. Oxygen-starved water is deadly to fish.

The permits also set limits for suspended solids and coliform bacteria, which are native to sewage and can cause a variety of diseases.

These pollutants can be reduced to safe levels and the wastewater substantially cleansed by standard secondary treatment plants. If designed and operated properly, the two-step plants settle out solids (primary) and then use microorganisms to speed decomposition (secondary).

But when designed or operated poorly, the plants are ineffective. "I used to represent some municipalities in New England," said EPA's Compton, "and they don't have to top-notch people running these plants".

In Merrimack, N.H., municipal planners built a modern secondary treatment plant in the early 1970s for $5.4 million, almost $3 million of which was federal funds. But when the plant received its EPA pollution permit in 1974, local officials discovered they had misjudged the effect on the plant of an Anheuser-Busch brewery, whose high levels of organic wastes cause regular overloading.

In 1974, EPA issued an enforcement letter to Merrimack and a notice of violation. Since neither the city nor the brewery was willing to accept blame, nothing happend.

In 1975, an administrative order was issued by the agency, again citing the violations and demanding to know how the city planned to get back into compliance.

EPA finally gave the city a hint. It told the city to apply for another federal grant to upgrade the plant. A $3.7 million grant was issued, more than doubling the original federal investment.

According to GAO, when the modifications were completed at Merrimack in 1977, the plant continued to violate its pollution permit, but "no further enforcement action has been taken."

Money, frequently too much of it, often is the root of the trouble.

To meet more stringent pollution permit requirements set by EPA and the states, many communities were forced to build advanced waste treatment plants. More than 1,000 have been built or are under construction at an estimated cost of $21 billion.

Many were forced on communities without adequate study to determine whether they would produce measurable water quality improvements, as in Las Vegas, where one county official said an advanced phosphorus removal plant was "shoved down our throats."

Adding to this municipal grief is the fact that this generation of sophisticated sewer plants has a dismal performance record, putting local officials under the gun of EPA anti-pollution enforcers.

From 1977 to 1980, EPA officials say they issued about 1,300 administrative orders to municipalities, but have no centralized information on whether the orders are being complied with or ignored. In all, agency officials acknowledge they have been slow to move against the cities.

The GAO concurred: "[EPA] enforcement action varied from none to minimal and followed no consistent pattern."

Meanwhile, EPA has conducted a vigorous enforcement program against private industry to eliminate discharge of industrial wastes, some toxic, into the waterways.

The GAO study concluded that "wastewater treatment plants that continuously violate their permits are not helping the nation meet its water quality goals. Federal grants are provided to build . . . plants that can meet their permit condi-

tions. But we are getting something less, which represents a potential waste of tens of millions of dollars in federal, state and local funds."

GAO officials looked behind their statistics at 15 plants to determine why they violated pollution permits. Three-quarters had both faulty designs and inadequate maintenance. Five suffered overloads from local industries whose effluents either gummed up equipment or killed the microorganisms used to speed decomposition.

Even when local officials have scrupulously complied with EPA pollution permit conditions, they sometimes have paid dearly. EPA regulations—carrying the force of law—govern virtually every state and local activity in building wastewater treatment plants.

Officials in Northern Virginia communities served by the Upper Occoquan Reservoir, for instance, contend that an early EPA regulation requiring sewage plants to be constructed in "operable segments" added $32 million to the price tag of the sophisticated Centreville plant.

The purpose of the regulation was to assure the federal government that for every block of funds, it got something that contributed to cleaning up the water. The effect of this regulation, however, ran counter to normal construction practices.

"We ended up building the project assbackwards," said Norman M. Cole Jr., former director of Virginia's State Water Control Board.

Instead of using one block of grant funds to build sewer collectors to the site, another to build the plant and yet another for a reservoir system, EPA required Northern Virginia officials to build a totally connected system in phases so each phase could process wastewater.

The EPA requirement forced the sewer district to redesign the plant for the phased construction, increased the number of contracts as well as the EPA review of the contracts and forced contractors to return to the project over and over as the phases progressed.

These factors dragged out construction over four years and upped the price tag of the project from about $50 million to $80 million.

EPA did not agree with this figure, but acknowledged in its analysis that the "operable segment" rule cost the Northern Virginians "$11 million more in grant funds and three more years to complete."

[From the Washington Post, May 12, 1981]

The Profit Motive in War on Pollution

(By Patrick E. Tyler)

PART III—DIRTY WATER—A FEDERAL FAILURE

When Congress mounted its colossal attack on water pollution in 1972, a new industry quickly positioned itself to benefit, employing a familiar piece of war machinery in Washington—the revolving door.

Just as it twirls Pentagon colonels and generals around the military-industrial complex, and just as it shuffles lawyers and scientists between regulated industries and regulatory jobs, this carousel wedded environmental protection to another sort of industrial complex, the eco-business complex.

Criticisms of the eco-business complex, it is clear, resemble many of the perennial complaints against the military-industrial complex—revolving-door careers, cost overruns and overly elaborate technology, faulty designs and faulty products. The eco-business equivalent of an airplane that doesn't fly is a waste-water treatment plant that doesn't work.

The business works like this:

Item: The executive director of the California water pollution control board, J. B. (Jerry) Gilbert, quit his job in 1972 to start his own consultant engineering firm, which subsequently was hired to design portions of a $500 million sewer project in Sacramento. After nine years of private consulting work in California and elsewhere, Gilbert returned to government in Oakland as director of its mammoth water and sewer district.

Item: The director of Cleveland's sewer district, Andrew Ungar, left his post in April, 1979, to work for Great Lakes Construction Co., which won a $20 million contract in November, 1980, on Cleveland's biggest sewer project.

Item: William E. Korbitz, the director of Denver's sewer district, quit his job last year to open a new office for Boyle Engineering Corp. His assignment is to get new business for the firm, including the lucrative consulting contract for the city of Denver.

Item: Metcalf & Eddy Inc., a subsidiary of a publicly owned consultant engineering firm, has been a consistently high performer on the New York Stock Exchange with billings in excess of $35 million a year. But its solutions to water pollution problems have not always been known for frugality. In 1971, the firm recommended that Northern Virginia residents pipe their treated sewage out of the Upper Occuquan basin to the lower Potomac River at an initial cost of $220 million and a total, 30-year cost of $429 million. The Virginia officials chose instead a relatively modest $50 million treatment plant.

Item: Jeffrey A. Klein, a Wall Street analyst for pollution control stocks, noted in his 1979 investment letter that a "continuing favorable psychology" was creating investor enthusiasm in the pipe-and-pump market because "the concern about environmental threats to health appears to be intensifying."

Item: One of the most prominent engineering firms in the water pollution control business is CH2M Hill Inc. (named for its partners, Cornell, Howland, Hayes, Merryfield and Hill) whose annual billings approach $100 million. The firm did pioneer waste-water treatment work at Lake Tahoe, Calif., where a 27-mile pipeline carries treated water over the mountains to an adjoining county. But the sewer district has sued the firm, contending that the $5 million pipeline has broken down 38 times and cost $1.2 million to repair.

By the time Congress passed the 1972 amendments to the Clean Water Act, the new environmental control industry was on a threshold of opportunity built on public concern over the pollution of the nation's waterways. The legislation committed the federal government to fund three-quarters of the cost of municipal sewer plants.

Nine years later, after a $30 billion public investment in sewer works for 18,000 communities, a few hundred engineering and equipment firms have reaped enormous benefit from the grants program. Few of those who bought their services are happy with the job they've done, however.

Only 2,000 of the plants have been completed, and more than half do not perform up to antipollution standards. A third are considered "serious violators."

When Congress inaugurated the EPA grants program, then-senator Edmund S. Muskie (D-Maine) urged his colleagues "to chart a new course of action in our fight to clean the nation's waters."

As they did, a parallel course was plotted in some investment houses. The prospect of a lavishly funded public works program prompted stock analyst Klein, now with Kidder, Peabody & Co., to conduct a major study in 1971 of the opportunties that would result.

"Recognize that my analysis was not from the perspective of an environmentalist, but rather from that of a capitalist," he told a congressional subcommittee in 1979. "The purpose was, and still is, to identify and invest in the industrial companies positioning themselves to benefit from the nation's need to control environmental degradation or improve the environment."

Klein focused on equipment manufacturers whose products included the aerators, pumps and incinerators used at many sewer plants.

Working backward from figures reported by Congress, Klein found that "the analysis . . . indicated a then current annual municipal wastewater equipment market size of just $150 million." But as the EPA construction grants program began to gain momentum. Klein said, "the projections called for a $300 million size by 1976 and a market size of almost $800 million by 1980."

Still, for various reasons, the market did not turn out to be as lucrative as Klein projected. In an August, 1979, report to investors, Klein wrote, "Government regulations and bidding procedures continue to foster competitiveness . . . resulting in adverse impact on profitability of major equipment suppliers."

To federal overseers some of these regulations were justified:

In 1974, the EPA ordered an end to cost-plus contracts, which allowed engineering consultants to set their fees as a percentage of the total project cost. The obvious incentive of this system was to design bigger and more sophisticated wastewater treatment plants with emphasis on costly "advanced" solutions where simple ones might do.

In 1977, the EPA told engineering firms they could no longer dictate to construction contractors the brand of machinery and other components to be installed in treatment plants. This regulation upset both the enginering firms, who say their designs must be tailored to the capabilities of certain equipment manufacturers, and municipal officials, who accuse some construction firms of buying cheaper components the later break down.

For the sewer industry and its engineers, the start was at Lake Tahoe, before there was an EPA and before Congress injected billions into construction funding. The Lake Tahoe advanced waste treatment project was the pilot for the nation and

was used by federal officials to justify the elaborate and generously funded program that was to come later.

Advance waste treatment (or AWT) goes beyond the standard two-step sewage treatment process, which settles out solids in the first step and then uses microorganisms to decompose the remaining sewage. Chlorine often is added to disinfect the final effluent.

In advanced treatment, chemical processes using lime, alum or iron chloride may be added to remove further solids oxygen-consuming material and phosphates, including those from detergents.

More than any other project in the country, the $18 million wastewater treatment plant built with federal funds at Lake Tahoe was heralded in 1968 as the triumph of technology over pollution.

The governors of California and Nevada at the time, Ronald Reagan and Paul Laxalt, now President Reagan and Sen. Laxalt, affirmed an interstate agreement that the environmental integrity of the lake was so important, because of the tourist and gambling industry, that it required the exportation of all sewage from the drainage area around it.

"Just from a scientific perspective, you could deal with the [treated] wastewater in the [Lake Tahoe] basin," said state engineer Roy C. Hampson. "But the political reality was that this is the greatest body of water in the world." The idea of piping the water over the mountains was never questioned politically after the governors and other politicians adopted this approach.

The 27-mile pipeline was designed by CH2M Hill and constructed up and over an 8,000-foot mountain pass and down into adjoining Alpine County (population 600) where the treated water was stored in a man-made recreational lake for fishing and boating.

An EPA brochure on the Tahoe plant says of its treated water: "The exported wastewater is crystal clear, colorless and odorless. . . . It actually meets public health service standards for drinking water . . . [and] it supports a thriving population of rainbow trout." Reagan was so enthusiastic that he asked to narrate a film for visitors to the facility.

Today, Lake Tahoe remains unpolluted, one of the most pristine lakes in the world.

But the treated water pouring out in the adjoining county has been regularly killing thousands of the those trout stocked in the manmade lake. The ammonia level of the water is too high, because none of the three ammonia-removal systems works.

The sewer plant has worked so poorly and has been so costly to operate that the sewer district now proposes to abandon nearly half of its systems and go back to basic secondary treatment—at an additional cost of $28 million.

A congressional study concluded: "The facility was held out as being the showplace of the advanced waste treatment world, [but] the staff was not able to verify the existence of any published EPA reports which document the problems experienced so others might learn from the Lake Tahoe experience."

In 1976, however, the EPA nominated the South Lake Tahoe plant for an American Bicentennial Award as one of the 200 most noteworthy projects in the history of our nation's public works. And it won.

Near Las Vegas is another example of planning failure. Cutting an eerie, space-age profile against a mountain backdrop just east of the city, a $53 million advanced wastewater treatment plant is nearing completion.

But experts across the board have determined that the costly plant was designed to treat a pollution threat that does not exist.

In 1969, Nevada officials received complaints that there were dead algae plants floating in Lake Mead, sending off odors and fouling the bottoms of boats in the marinas.

At the time, the lake was an unpolluted reservoir that was used for swimming, fishing and boating—and even provided drinking water for Las Vegas.

In 1978, the city of Las Vegas sued its county government, the state and EPA for ignoring federal planning requirements that might have prevented the construction of what is now called "the white elephant in the desert," the highly sophisticated plant that was designed to remove phosphorus from the effluent of existing secondary treatment plants that discharge into Lake Mead.

The plant was built under pressure from EPA and state officials, because phosphorus was suspected of producting algae at nuisance levels.

But most experts believe today that the plant is not needed to control phosphorus levels in Lake Mead. One consultant found in 1976 that algae levels had decreased in the lake even though wastewater discharges from Las Vegas had increased substantially.

The plant is almost two years behind schedule and mired in lawsuits between contractors and consultants. In addition, the county government now proposes to abandon the phosphorus-removing systems and convert the plant to a regular secondary treatment plant.

The story of how the Las Vegas plant got built is one of blind faith in technology. Instead of studying Lake Mead to discover what levels of waste the giant reservior could tolerate, county officials—on the advice of their consultant engineers and under pressure from EPA—grabbed for the state-of-the-art technology.

Instead of setting specific water quality standards that would support fishing and swimming goals and control algae, the county hired a biology professor from the University of Nevada at Las Vegas and an engineering consultant. The professor produced a report on the cause of algae growth in the lake based on data that state officials did not consider reliable. Then the engineering consultant recommended discharge limits based not on the standard of maintaining fishing and swimming but on the capability of the most sophisticated plant technology available.

Meanwhile, in the lawsuit between the city and the county, both sides hired consultants to undertake intensive studies of Lake Mead's water quality.

City officials made their legal case on the basis of what Congress set forth in the Clean Water Act: if a state chooses to set stricter requirements for water pollution control than the national standard of secondary municipal treatment, then it must set specific water quality standards for a body of water and show that they can only be achieved by advanced waste treatment.

It didn't happen that way in Las Vegas.

Today, county officials have largely recanted their faith in the high-technology approach and will try to salvage their investment in the plant by converting it to a modified secondary treatment plant. The conversion is difficult, partly because the construction company building the plant has filed a lawsuit for greater fees, claiming that design flaws are contributing to cost overruns.

Current cost studies show, however, that if they proceeded with the advanced treatment plant, Las Vegas governments and their taxpayers would pay $360 million more over 20 years.

One county official was quoted in a congressional report as saying that the EPA "stuffed the AWT down our throat."

County Manager Bruce Spaulding said in an interview, "I'm not going to use language like 'shoved down our throat,' but the standards set were so extraordinarily stringent that upon review they appear to be overstated. All we were getting out of EPA was that they wanted the state of the art."

The report called Las Vegas a classic example of "EPA requiring local communities to construct an AWT facility without clear evidence that . . . the receiving water has pollution problems"

[From the Washington Post, May 13, 1981]

EPA's Tactics Have Left a Legacy of Bitterness

(By Patrick E. Tyler)

PART IV—DIRTY WATER—A FEDERAL FAILURE

In Spearfish, S.D., a waste water treatment lagoon required and approved by the Environmental Protection Agency dissolved underlying gypsum deposits and became a subterranean river of sewage that poisoned wells and surfaced at nearby cattle ranches.

Three small communities at Mountain Top, Pa., have teetered on the brink of bankruptcy since they completed their $10 million sewer plant, and were unable to build collector pipes to get much of the sewage to the plant.

When EPA officials cleared out of Ely, Minn., after building an experimental waste water treatment plant, they left the town's 5,000 residents to pick up annual operating costs equal to nearly half the community's total budget of $1 million.

In the last 10 years, the federal government has spent $30 billion to eliminate pollution from the nation's lakes and rivers. Through the EPA, it has employed both the stick and the carrot.

The stick is the threat of criminal penalties and the loss of funds for communities that discharge pollutants from their sewer systems. The carrot is the government's offer to pay 75 percent of the costs of highly sophisticated treatment plants.

One result: whatever the improvement in water quality, the EPA grants program has left a legacy of bitterness and fiscal turmoil in communities victimized by its rigid administration.

In some cases, the federal apparatus imposed on small communities sewage treatment requirements that are completely out of touch with reality.

As a result, during last year's presidential campaign, Ronald Reagan struck a chord that was already reverberating in a thousand town halls across the country.

His promise to get the government off the backs of taxpayers and local officials seemed to be long-prayed-for salvation from frustrations like those produced by the EPA grants program.

It is not clear, however, that the Reagan administration will be any less rigid or any more effective, even if the program is stripped of its funding or turned over to the states.

As the Reagan era begins, cities and counties everywhere are shouldering the financial burden of costly waste water treatment plants, many poorly designed, needlessly complex and incapable of removing the promised degree of pollutants.

The communities' operating and maintenance costs for fuel, electricity and chemicals have grown faster than the federal grants for plant construction.

In the end, millions of Americans have been unpleasantly suprised by soaring sewage bills. Taxpayers are hit several times: first to support the federal grants program with tax funds, second to help pay their local share and third to pay the operating costs through sewage fees.

Some cities appear to accept the hardships as the price of modernization. Others are fighting back.

At Mountain Top, local officials have taken construction contractors and their bonding company to court for walking away from unfinished work. Even though federal funds are at stake, the EPA has remained above the fight.

In Ely, local officials expressed outrage at the costly, energy-gobbling systems that EPA designers approved for the $2.6 million advanced waste treatment plant. To appease them, the EPA agreed to subsidize part of the plant's operating expenses until a solution can be found.

In many cities, citizens have banded together to fight, often in federal court, their local governments and the EPA. In Marshall Township, Pa., a group of neighbors has organized to protest a $4 million EPA sewer project whose major benefit will not go to the community's 220 families but to a 1,000-acre industrial park.

In Skagway, Alaska, town officials have hired the Pacific Legal Foundation to represent them in their fight to make the EPA take back its treatment plant, which the city claims is subject to flooding, too costly to operate and not needed to protect any body of water.

Skagway's legal champion is known for its ties to White House counselor Edwin Meese III, who was on its advisory board, and Interior Secretary James G. Watt, who worked for a sister foundation.

The EPA has retaliated by taking Skagway officials to court, seeking $10,000 a day in civil penalties and threatening the mayor with criminal penalties.

A group of South Dakota ranchers is suing the engineers, contractors and government officials who built the lagoon at Spearfish because it poisoned wells and fouled property.

"It was just a fiasco from the word go," said Elizabeth Swift, the town's finance director. She said town officials have been reluctant to challenge EPA edicts.

The ranchers' lawyer, Joseph V. Karaganis, explained: "Out in western South Dakota, the land is loaded with gypsum. Gypsum is a rock, but when its exposed to water, it's just like sugar in coffee.

"Along came an engineering outfit in the early '70s to build a treatment plant for Spearfish, and they said, 'We're going to build a lagoon.'"

Despite the ranchers' warning that the sewage would get into the undergound water supply, the EPA approved the engineers' plan and the lagoon was built.

"From the day the lagoon opened, it was leaking," the lawyer said. "They had put a clay liner under it, but clay, like any other material if you take the support out from under it, will go 'blooey.'"

When the gypsum dissolved, the lagoon did just that.

"An underground cavern opened up," Karaganis said, "and dropped the support out from under the lagoon, whereupon all of the sewage in the lagoon drained out and showed up a mile and a half away on my clients' property."

Local officials around Mossehead Lake, near the central Maine town of Greenville, tried to tell EPA officials that the area didn't need a multimillion-dollar, high-technology sewer plant to handle a few hundred houses on the lake's southern shore.

Town leaders preferred a simpler, cheaper system that would spray waste water as fertilizer on farmland. But the EPA insisted that the lake, which showed no signs of pollution, must be protected.

Local officials relented after the EPA offered a $3 million grant to finance the bulk of the project. It was completed in 1976, but never accepted. Even the engineers who designed it could not get it to work.

In addition, by the time it was completed, estimates of operating costs had leaped from $28,000 a year to $125,000. In a town where the average income was about $9,000 a year, sewer bills would have jumped from almost nothing to as high as $400 a year had the plant been commissioned. It remains idle, a monument to the lawsuits that have followed.

As it is, the sewer district has defaulted on its local share of funding for the project, and is five years behind in payments to the Farmers' Home Administration on a $527,000 loan.

When they went back to the drawing board, the EPA and Maine agreed to spend additional millions to build what the Greenville leaders asked for in the first place; a system that sprays waste water on the land, where they are now happily growing Christmas trees.

Thus, in six years, the federal government and the state of Maine have spent $9 million in a town of fewer than 2,000 residents for sewage treatment facilities that have not in any way improved the water quality of neighboring Moosehead Lake.

As a National Science Foundation report asked about a similar circumstance in another city, "Would it not have been more effective, in terms of national water pollution control, to spend the funds in communities with more serious problems?"

In 1979, the company that manufactured much of the concrete pipe was convicted, along with one of its owners, of defrauding the EPA.

Two county politicians and the chief partner of the consulting engineering firm that designed the sewer project face trial on felony charges that they lied to a grand jury when they denied receiving part of nearly $1 million in payoffs related to the project.

The investigation into sewer corruption in Suffolk County has cost taxpayers an additional $500,000. In January, the district attorney filed for damages totaling $270 million, alleging a "pattern of racketeering" by former county officials, the consulting engineer, several construction firms and the concrete pipe manufacturer.

Earlier this month, a New York grand jury returned indictments alleging that the county's principal engineering firm, Bowe, Walsh & Associates, bribed public officials and political figures to get contracts.

The Long Island newspaper Newsday reported in 1979 that two of the largest contractors on the sewer project had rescued the Bahamian land venture of a prominent Suffolk Republican officials, Nicholas Barbato, and his partners.

Barbato had played a leading role in overseeing the sewer project. The contractors who rescued the land deal had been awarded $200 million worth of construction work by the county.

The EPA, which has committed more than $200 million in federal tax funds to the project, did not make an inspection of construction activity on Long Island until four years after it began.

Senator SIMPSON. Just this week, the Judiciary Committee of the Senate marked up legislation that dealt specifically with one of these aberrations of regulatory confusion. That was the classic absurdity surrounding the Consumer Product Safety Commission's now rather discredited rule requiring that children's sleepwear manufacturers treat the garments with Tris, the fire retardant. And now we are advised that Tris causes cancer.

Possibly, if the CPSC had been required to follow a more careful route prior to issuing those regulations, that danger would have been perceived and prevented without the anguish of exposing children to a cancer-causing agent.

So we had to go unravel that one in Judiciary the other day, and I believe the vote was unanimous to do so.

Perhaps even if the Consumer Product Safety Commission had known of that danger it might have thought the risk was worth it—that the danger of being burned was so great it was worth the lesser risk of exposure to a known cancer-causing agent. In short, I

guess they would have then had to have decided that the benefits justified the costs of the proposed rule—or it might have decided that they did not.

But this legislation we are dealing with would not mandate either outcome. It would only mandate that the agency undertake this type of regulatory analysis prior to making its final determination about issuance of a new rule or a new regulation. That is what we are doing. That is what we are dealing with.

To me, that sounds like a bit of common sense, and I am somewhat bemused by those who so vehemently attack the validity of that. We are simply demanding or attempting to demand that the regulators think about what they propose to do when they decide to do it and that they explain to us, the unwashed in Congress, in concise and understandable terms, why and how they arrived at their conclusions.

Crafting such legislative directives does not mean that those doing so want children to be burned or to contract cancer, any more than those who legislate would want workers to work in unsafe factories. We have heard those rebuttals before.

I believe the sponsors of this legislation are simply seeking to assure that if OSHA, say, insists that a factory owner install millions of dollars of noise-suppression equipment, then it should explain why it might then have rejected the suggestion of issuing a rule which might have requested that each of the workers wear earplugs. That seems worth pursuing.

I am sure that some of the next witnesses will have some differing thoughts on that subject—So I will welcome them.

First, let me recognize Pat Leahy, the Senator from Vermont.

If you have any commentary, Senator Leahy——

Senator LEAHY. I made it this morning. Thank you.

Senator SIMPSON. Then I would like to welcome Nancy Drabble and Carolyn Brickey of the Public Citizen's Congress Watch project, Robert Nichols of the Consumers Union, and Frances Dubrowski of the Natural Resources Defense Counsel to this hearing.

With the recognition that there is a time limitation, I think you have been advised of that. That will give us an opportunity for questions. It is nice to have you here.

STATEMENT OF NANCY DRABBLE, ACTING DIRECTOR, PUBLIC CITIZEN'S CONGRESS WATCH, AND CAROLYN BRICKEY, STAFF ATTORNEY

Ms. DRABBLE. Thank you, Mr. Chairman.

Ms. Brickey and I are going to split our time since we are both from Congress Watch.

Senator SIMPSON. Thank you.

Ms. DRABBLE. It is a pleasure to testify on regulatory reform again. Public Citizen has been involved for the last several years on this subject.

As we look at the new bill under consideration today, it does have one distinct virtue, in contrast to the bill we were looking at last session, and that is that it is considerably shorter than last year's bill. I think we all appreciate that.

But there is a danger, as this bill moves through the legislative process, that it could become weighted down with everyone's favor-

ite amendment and end up turning into what one might call a regulatory redundancy act which would impose new paperwork requirements on each agency and perhaps exacerbate the delay in the regulatory process rather than eliminate it.

I think we would all like to cut down on delay. It would be supremely ironic if the regulatory reform bill ended up doing exactly the opposite.

JUDICIAL REVIEW OF MAJOR RULE DETERMINATION

There are already a few provisions in the bill which would contribute to delay. The first one is that the bill would allow courts to separately review the decision of whether a rule is major. We believe that this is an invitation to chaos and one of the most serious defects in the bill, for a few reasons.

First, the agencies are going to be sued on all sides whenever they make a determination of whether a rule is major. Judges may end up having to decide, without really having a hearing record yet at the agency level, whether the rule meets a $100 million test or even the vaguer tests in the definition of "'major rule" of whether there would be a serious adverse effect on productivity or innovation.

I do not really see how judges are in a position to make that determination, particularly if it is an interlocutory appeal.

If there is judicial review of the major rule determination, I think the regulatory analysis will turn into the environmental impact statement of the 1980's, and I would be surprised if that is what the sponsors of this bill would like to see. So we would recommend that there be no judicial review of the major rule decision.

DEFINITION OF MAJOR RULE

This problem of judicial review is particularly acute because the definition of "major rule" is so vague. We have three problems with the definition of "major rule."

First, it apparently exempts deregulatory actions. The definition says that rules which have a $100 million effect in "direct or indirect enforcement or compliance costs" are major. The trouble is that this implies that rules which remove costs, even if they would harm public health or safety, are not major and are not worthy of regulatory analysis.

We think this is an enormous loophole in the law and that deregulatory actions deserve the same scrutiny as other administrative actions.

In addition to the deregulatory exemption in the definition of "major rule," the definition is too vague. It would be, once again, ironic if the directives to the agency in this bill are just as vague as the confusing statutory language which gave rise to the cry for regulatory reform. So every effort should be made to give the agencies as specific guidance as possible, and the definition of "major rule" has a long way to go before it becomes as specific as it should be.

The last problem with the definition of "major rule" is that it allows a variety of special exemptions for the Internal Revenue

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Service, for certain kinds of ratemakings, for putting certain products onto the market, such as additives. Each one of these exemptions should be examined carefully and perhaps removed.

If regulatory analysis is a good idea, it is going to make the agencies examine their decisions more carefully. I do not see any reason why it should not apply to certain major decisions of the IRS which have a very important effect on all of our pocketbooks.

COST-BENEFIT ANALYSIS

The next topic I would like to address is cost-benefit analysis. Without getting into all of the problems that have been raised over the years about cost-benefit analysis, I would just like to emphasize two points.

We know that the problem with cost-benefit analysis is that companies have a tendency to exaggerate the cost of compliance with the rule, and it is difficult to quantify the benefits of the rule.

On the first point, agencies should be able to verify the cost estimates made by companies. We filed a petition at the Securities and Exchange Commission a while ago asking that companies be required to make consistent disclosure.

The problem is that a corporation goes to the regulatory agency and says: "This particular rule is going to put us out of business or have a catastrophic effect." Then they go to the SEC and to their shareholders and say: "No problem here." They should be saying the same thing to different agencies.

We would suggest that that kind of consistent disclosure be required, and, second, that the agencies be able to ask companies for the backup data on which they base their cost estimates, and if they will not supply those backup data then the cost estimates should be disregarded.

Second, on the difficult question of putting a dollar value on human life, we believe that Congress should face that question directly. Since most economists base the value of a human life on a person's wages, children, older people, and the poor lose out in this calculus.

For example, the auto safety agency, has determined that a life is worth about $100,000 at infancy, $250,000 in young adulthood, and then only $31,000 when somebody is over 65.

I would be surprised if Congress would like to encourage agencies to discount the value of people's lives who are over 65. That is something that should be confronted head on this year. Otherwise, that decision is going to be left up to the bureaucrats over in the agencies.

FOIA

We have severe problems with the section of the bill which would allow agencies to rely on secret material that is exempt from disclosure in the FOIA. I think a serious look should be taken at that. There already is case law which allows internal documents to be excluded from the rulemaking file.

We remain opposed to the Bumpers amendment. I think it is going to put a premium on determining whether it is a question of law or fact leading to endless disputes.

The last point is that there is a provision that we do support very strongly in the bill. We are delighted to see that the ridiculous problem of the race to the courthouse, with lawyers running relay races down the courthouse corridors, will be solved by the venue provision of the bill.

Ms. Brickey has a few comments.

Senator SIMPSON. Thank you.

Ms. Brickey?

Ms. BRICKEY. Thank you, Mr. Chairman.

MODIFICATION OF RULEMAKING PROCEDURE

With regard to some provisions that modify the rulemaking procedures, I have a couple of observations to make. A more detailed discussion of this issue is provided in our testimony.

The first problem that we see is with subsection (D)(2) on page 9 of the bill which allows for an extension of time to participate in the rulemaking process. In effect, we think the provision makes a presumption that the agency should allow delay whenever it is requested. Also the delay period which the agencies are required to grant is an arbitrary period of time—that is, 30 days.

We believe there is already sufficient flexibility in the law now to allow two things: One, granting an extension where the agency thinks it would be fair and/or important to the proceeding; and, two, the agency can consider late comments, which they do now, wherever it is practicable.

We also think the agency should be able to consider a request by any participant and would like to avoid setting up a class of participants, as this section does.

The second point is that subsection (E)(4) apparently requires reopening the comment period in a potentially broad number of circumstances. We think that any requirement to open up the record should be limited to critical issues that the agency is deciding.

AGENCY REVIEW OF RULES

As to the section dealing with Agency review of rules, we think that this concept is basically a very good idea. In our testimony, we mention a set of regulations which were adopted in 1962 for hours of service that drivers of 18-wheeler trucks can work. We believe that these rules should have been reviewed and modified some time ago. Under S. 1080, a review would have been scheduled for 1972.

We think there are some problems with the implementation of this review mechanism. The first is that we think review should be based on whether or not a rule is major at the time of the review, not at the time the rule was promulgated. This would provide for an efficient use of the process and of Agency resources.

It would also ameliorate the effect of the difficulty of classifying rules that were promulgated prior to the use of the term "major rule." Cost projections by year when a rule is promulgated would also be helpful to deal with this problem.

We are also concerned that subsection (E)(2) of the bill might require agencies to redo the original analysis to show that a rule continues to comply with cost effectiveness requirements.

We are very concerned that there is no mention in the bill as to whether this section would be subjected to separate judicial review. We obviously would oppose such a review.

EFFECTIVE DATE OF THE BILL

As to the effective date of the bill, we think that the bill is designed to address what proponents would surely call an urgent problem, yet delay is tacked on to the effective date of the bill. We think this is hypocritical. It is an apparent political buyoff with the administration for its support of the bill at a time when there are echoes of doubt in the administration about certain regulatory reform provisions, notably Bumpers and the legislative veto.

We have attached to our testimony a separate discussion of our opposition to legislative veto, which we will not go into here today.

Thank you.

Senator LEAHY [acting chairman]. Thank you. Without objection, your prepared statement will be included at this point.

[The prepared statements of Nancy Drabble and Carolyn Brickey and responses to questions posed by Senators Laxalt and Leahy follow:]

Prepared Statement of Nancy Drabble and Carolyn Brickey

Mr. Chairman and members of the subcommittee, it is a pleasure once again to testify on regulatory reform. Public Citizen, a nationwide consumer organization which has over 70,000 contributors, has taken a serious interest in regulatory reform over the years.

Public Citizen shares the premise implicit in the bill under discussion today, that regulatory reform is needed to compel agencies to better perform their assigned missions. In a series of books for the last decade, * we too have found that federal regulation is often weak, wasteful, dilatory and misguided. As we examine the provisions of S.1080, the original purpose of regulatory reform should be kept in mind: will the amendment streamline the agency process and promote increased accountability and better management without adding unnecessary delay to the regulatory process?

Determination of Major Rule and Judicial Review

S. 1080 would allow the courts to separately review an agency's decision on whether a rule is major. This invitation to chaos is one of the most serious defects of the bill. An agency would be sued on all sides whenever it makes a major rule determination, and judges would have to decide whether a proposed rule, for which there is no hearing record, meets the $100 million test or other even vaguer tests of "significant adverse effects on competition, employment, investment, productivity or innovation." Litigating the major rule decision will tie the agency up in knots. To allow judicial review of this managerial decision will turn the determination of whether a rule is major into the environmental impact statement of the 1980's; we would be surprised if that is what the sponsors of this bill intend. We recommend that judicial review of the major rule determination be prohibited.

A prohibition of judicial review is particulary important since the definition of major rule is seriously defective in several ways.

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*The Monopoly Makers, the Interstate Commerce Omission, The Nader Report on the Federal Trade Commission, The Chemical Feast, Vanishing Air.

First, it exempts deregulatory actions. Rules which have a $100 million effect in "direct or indirect enforcement and compliance costs" are considered major. This implies that rules which remove compliance costs, even if they harm public health or safety, are not major. The definition should be changed so a rule is major if it has a $100 million effect on the economy as a whole, not just on business's compliance costs. To do otherwise would create an enormous loophole in the law. Deregulatory actions deserve the same scrutiny as other administrative decisions. If the regulatory analysis is a useful tool, it should be applied across the board to major decisions, regardless of where the costs fall.

Second, the definition of major rule should be simple and clear. That way the agencies will know when to conduct a regulatory analysis. Congress should provide maximum guidance on this point. It would be ironic if the directives to the agencies in the regulatory reform bill were as vague as the confusing statutory language which gave rise to the cry for regulatory reform.

Keeping this principle in mind, we believe that subsections (ii) and (iii) are too open ended, leaving the agencies wide discretion to choose major rules. Also, despite the long list of factors to be taken into account, health and safety considerations are noticeably missing from the list. Isn't a substantial adverse effect on health just as important as a change in cost for local government agencies? We recommend that these sections be narrowed and tightened to give the agencies clear guidance in complying with the bill. Since each of these analyses will be very expensive, we should be sure that each one is necessary.

Third, the Internal Revenue Service is exempt from the bill's regulatory analysis requirements. In our judgment, the IRS should not be exempt. The IRS issues many rules that are of critical importance to taxpayers and businesses. If regulatory analyses will force agencies to consider their decisions more carefully, why shouldn't this principle apply to the IRS, which has such a notable effect on our pocketbooks? The costs of many IRS rules are clear, and the benefits hazy. While it may not make sense to subject all IRS rules to regulatory analyses since some have

such particular applicability, most "legislative rules" should undergo regulatory analysis. Even under the new Executive Order, the IRS must analyze "major" legislative rules.

Similarly, the bill exempts certain ratemaking. This would include some FERC and FCC decisions. We believe that many decisions on rates, even if they apply to a specific company such as AT&T, should be subject to very close scrutiny. The language in paragraph (B) (i) on page three should be clarified so that important rate decisions would be analyzed.

Cost-Benefit Analysis

Regulatory analysis should be a managerial tool agencies can use to make better decisions, not a rigid formula which dictates regulatory results. While it makes sense for agencies to explain the need for a proposed rule and to discuss reasonable alternatives, a mechanical cost-benefit analysis would put the agencies into a decisional straightjacket.

Cost benefit adherents argue that before any health or safety rule is adopted, it should be proven that the benefits of the rule outweigh the costs. In theory, this sounds like common sense. But in practice, the game is rigged. There are several major problems with cost-benefit analysis.

First, regulated industries frequently exaggerate the costs of complying with a rule. Because industries control the information about regulatory costs, there is no easy way to check on the accuracy of their assertions. But industry's record on predicting the price tag of proposed regulations has not been impressive. Consider a few representative cases.

In the early 1970, chemical manufacturers announced that a proposed OSHA standard on vinyl chloride, a proven carcinogen, could cost two million jobs and $65 - $90 billion. "The standard is simply beyond the compliance capability of the industry," said their trade association. OSHA implemented the standard and the industry complied, without job losses and at a cost one-two hundredth its original estimate.

The Securities and Exchange Commission sued U.S. Steel because the company had allegedly established two estimates of the cost of some pollution standards -- a higher estimate that it publicly

released and a lower estimate that it sent to the SEC. The case was later settled.

This kind of "crosstown hypocrisy" was documented in a petition by Public Citizen's Litigation Gorup to the Securities and Exchange Commission. The petition, which was denied largely because the SEC said companies were already forbidden from making inconsistent disclosures, asked that the Commission adopt rules requiring corporations to be consistent -- to disclose to shareholders the same information submitted to regulatory agencies. Currently, many corporations complain to agencies that reulations will have a catastrophic effect on their businesses while telling the SEC a different story.

For example, in a March 15, 1979 letter to the Environmental Protection Agency the Mead Corporation said that its costs for meeting proposed regulations for hazardous waste disposal "could greatly exceed $115 million," which was at least $21.2 million more than its 1978 earnings. The letter said that "Mead and the paper industry simply cannot withstand these intolerable burdens." But then, only thirteen days later, Mead filed its 10-K report with the SEC, in which it said that it would cost "$40 to $66 million" to comply not only with hazardous waste rules but with all federal, state, and local air, water and environmental laws and regulations.

Because of the prevalence of this kind of hypocrisy, agencies should be able to verify the representations made by regulated companies. To help in this, S.1080 should be amended to say that whenever a company submits an estimate of the cost of complying with the proposed rule to a government agency, (1) it must disclose this estimate to the SEC, and (2) it must honor reasonable requests from the regulatory agency (on its own behalf or at the request of interested persons for the back-up data on which it bases its cost estimate. If it fails to supply this data for public examination, its cost figures should be disregarded.

The second major problem with strict cost-benefit analysis is that it is often impossible to put a dollar value on the obvious benefits of regulation. How does one estimate now the number of lives that may be saved by avoiding long-gestating diseases - e.g., ingestion of DES today can cause cancer in 30 years? What is the value of avoiding pain and

suffering to an auto crash victim, or the loss of consortium to the victim's spouse? Can a dollar figure be put on the benefit of a six-year-old not disfigured from flammable sleepwear?

A recent study by Public Citizen, Business War on the Law: An Analysis of the Benefits of Federal Health/Safety Enforcement, attempted the difficult task of estimating the measurable benefits of five federal health/safety agencies. Not included in the calculations were such real but measurable benefits as enhancement of recreational facilities, avoidance of pain and suffering, aesthetic gains and distributional benefits. This 162-page report concluded that the benefits of regulation for these five agencies in 1979 was about 37 billion and in 1985 would be over 80 billion in terms of lives and dollars saved and injuries avoided. There are also aspects of American life that can never be, and shouldn't be, subject to an economic yardstick. One wonders whether the abolition of slavery, the end of child-labor laws, or the existence of jury trials would pass a strict economic cost-benefit test.

One of the difficulties of cost benefit analysis is that its proponents claim that a price tag must be attached to human life and most economists base the value of life on a person's wages. Children, the poor, and older people lose out in this calculus. For example, one index values the life of an 85-year old black woman at $128. As pointed out in Business War on the Law, the "discounted future earnings" method of evaluating benefits implies that 20-year olds should be saved before infants because of their greater economic value to society. Under the National Highway Traffic Safety Administration's discount rate for lives lost in auto crashes, a life is worth $103,395 at infancy, $244,155 at young adulthood, and only $31,700 over 65 years.

On the assumption that the Committee intends to include some regulatory analysis requirment, we have the following specific comments:

1. On page 8, line 1, it is unclear whether "reasonable" alternatives means only lawful alternatives or any alternatives, whether or not permitted by statute. The legislation should direct the agency to discuss alternatives which it is permitted by law to take into account. Similarly, in paragraph (d), the agency is required to explain how the benefits of a proposed rule are likely to justify the costs, except where the agency's enabling statute "directs otherwise."

It seems unlikely that any statute would "direct" that an "explanation" was against the law. It may be helpful to consult the language used in Executive Order 12291 on this point.

2. It is useful to include an explanation of the margin of error in any numerical estimate of quantifiable benefits. Since cost-benefit analysis is such a primitive tool, a description of the margin of error is a critical safeguard. It is also helpful that the bill states that "an agency is not required to make such an evaluation primarily on a mathematical or numerical basis."

3. On page 9, paragraph (4) is unclear. It seems to suggest that any significant modification of a proposed rule will trigger another regulatory analysis. Why require an entirely new analysis for a revision of a rule? It should be sufficient to amend the analysis already completed.

4. On page 11, in section (e) (1) (B), we suggest that the agency be required to discuss only the "principal" alternatives.

5. On page 12, paragraph (B) should require that the agency make "a determination, based upon the rulemaking file considered as a whole, that the benefits of the rule are likely to reasonably justify the costs and adverse effects of the rule."

6. On page 12, paragraph (3) contains useful restrictions on the use of consultants in preparing regulatory analyses. These restrictions should be retained.

7. See also our prior comments which recommend that the decision as to whether a rule is major not be subject to judicial review.

Freedom of Information Restriction

On page 14, section (f) (2) would allow the agency to exclude from the public rulemaking file documents exempt from disclosure under the Freedom of Information Act, yet the agency would be able to rely on such material in making its decision. There are serious due process problems for an agency to rely on secret materials in deciding on a rule; the public should be able to know on what documents an agency bases its decision. This provision would encourage agencies to withhold information.

We understand that this section arises from a concern about disclosure of internal agency recommendations or internal staff memos. But FOIA case law already holds that such internal memos do not have to be

made publicly available. See Montrose Chemical Corporation v. Train 491 F. 2d. 63 (1974) (D.C. Circ.). We recommend that it be deleted or at least be clarified to ensure that it extends only to the types of internal documents at issue in Montrose.

Modifications of Rulemaking Procedures

Subsection (e) (1) of Section 553 would exempt a rule which grants or recognizes an exemption or relieves a restriction from the requirement of final publication 30 days from its effective date. This exemption, though long a part of the APA, should be eliminated. The thirty-day waiting period before the effective date gives interested parties time to plan on subsequent action, such as filing a petition for reconsideration or taking the agency to court. There is no particular reason to dispense with this 30-day period since the rule would have already been subject to notice and comment.

With regard to subsection (c) (1) of Section 553 we recommend two changes. First, because personal service is rarely used, we suggest that the agency publish all notices of proposed rulemaking in the Federal Register and make a reasonable effort to let interested persons know about the Federal Register notice. Second, instead of (c)(1)(A), we suggest the language which appears in H.R. 746 at Sec. 201(a)(1)(A): "(A) a statement of the time during which public comments will be received concerning the proposed rule, and the time, place, and nature of any hearings to be held concerning the proposed rule." This description is complete and clear.

While we support efforts to encourage participation in the rulemaking process, we have serious objections to the automatic extension provisions of subsection (d)(2) on page nine. This provision will create even more delay in the regulatory process. It puts a burden on the agency to deny a request for an extension of time, even though agencies already have discretion to grant additional comment time. Furthermore, the agency would be pressured to grant additional 30-day delays after the initial extension when such delays are requested by other parties. The agencies should have the flexibility to grant shorter extensions to any participant. This procedure should be scrapped in favor of giving the agencies the discretion to grant reasonable extensions, along with language encouraging the agencies to consider late comments whenever practicable. Finally, the words "whose personal rights or economic

interests are directly and adversely affected by the proposed rule" should be deleted from (d)(2)(A). That phrase seems to set a new test of standing for participation in administrative proceedings.

The requirement that agencies allow oral presentations for major rules should be limited to significant issues of material fact upon which the agency is likely to rely in making a final determination. The agencies should be given broad discretion to decide whether to use such tools as cross-examination. The Joint Report of the Committee on Governmental Affairs and the Judiciary Committee which accompanied S. 262 last year provides guidance on this issue.

Subsection (e)(4) seems to require the agency to re-open the comment period under certain circumstances. While we agree that agencies should allow comment on new material critical to an agency's decision, agencies should not be forced to open the record unnecessarily, fearing judicial review. We are troubled by this provision because it seems to tip the balance toward re-opening the comment period , which could lead to an endless series of comments. We would be glad to work with the subcommittee to improve this section.

Public Participation Funding

We are committed to the concept of public participation funding and believe that it should be an important part of any regulatory reform bill. A public participation program provides an opportunity for many different points of view and accompanying expertise to be heard by the agencies. Small businessmen have supported the program because it provides a vehicle for many of them to express their support or opposition for regulatory approaches when they could not otherwise afford to become involved or be represented. Existing programs have safeguards to ensure that funding goes to those who need assistance, have expertise, and express a different view than agency staff.

Agency Review of Rules

We agree that it is a good idea to require the agencies to periodically review those major rules already in effect. A ten-year review deadline is a reasonable timetable for such a

review. In some cases, new or additional information may show that the original rule was based on a faulty premise or was an inadequate response to the problem it was designed to remedy. In other cases, there may be no further need for the rule.

A good example of regulations that we feel were ill-advised when promulgated and in need of serious review are the hours of service regulations for drivers of 18-wheeler trucks.[1] Finalized in 1938, the regulations were amended in 1962 to their present form. These regulations, prohibiting more than 10 hours of driving within a period of 15 non-consecutive hours on duty following a minimum of 8 consecutive hours off duty, conflict with numerous studies commissioned by NHTSA and BMCS since the regulations were promulgated. A lawsuit challenging the regulations was dismissed on August 21, 1974 with leave to refile if no Notice of Purposed Rulemaking was published within 18 months.[2] No NPR has been published to date.

A rule may fit the criteria of a major rule at the time of its enactment, but its impact may lessen by the time of review to the point that it is no longer a major rule. The agency's decision to review a rule should depend upon whether the rule is a major rule at the time of review, not enactment. Also, those rules which were promulgated before the term "major rule" was ever used may prove difficult to classify when they are reviewed. It would be helpful to future assessments of major rules to project, at the time a rule is finalized, the cost to be incurred each year in order to provide a time-table to determine when a rule is no longer major.

Subsection (c)(4) of Section 560 seems to make an exception for those rules no longer "major" at the time of review, but the effect of the language is unclear. The language is subsection (e)(2) is also troubling in that it could require the agency to redo its original analysis showing that the rule is cost-effective. In addition, no mention is made in this section whether the agency's

1. See Professional Drivers Council, et al., v. Drew Lewis, et. al. (D. D.C. Civ Action No. 80-3118). The Stipulation of Fact, attached to this testimony,outlines in agonizing detail the dilatory behavior of the agencies involved.

2. Prod, Inc. v. Brinegar, (D. D.C. Civ. Action No. 2058-73)

review procedures will be subject to separate judicial review. We hope that this omission is an oversight which will be remedied by the sponsors of the bill.

Because the Executive has access under subsection (a) (2) to the review agenda 90 days before it is published, it would be helpful to the public to know which rules the President has designated for review that did not appear in the agency's original list. We recommend that those rules be delineated in the published schedule.

Bumpers Amendment

This amendment would eliminate any presumption of validity of agency legal determinations and would require agencies to show that factual determinations are supported by substantial support in the rulemaking file. The agency would also have to show the reviewing court that its authority to promulgate a rule was granted expressly by statute, or, in the event of ambiguity, other evidence of legislative intent.

We believe that this provision would damage judicial and administrative processes because it sets up an artifical distinction between factual and legal questions which will be extremely difficult for judges to administer. It would put a premium on determining whether an issue was a question of law or fact, leading to endless disputes on this point.

For example, in NLRB v. Hearst Publications, Inc. 322 U.S. 111 (1944) the Supreme Court faced the question of whether the NLRB had correctly decided that "newsboys" were employees within the meaning of the National Labor Relations Act. In deciding to uphold the Board's determination, the Court analyzed both the details of the terms and conditions under which newsboys worked and the NLRB's legal interpretation of the meaning of "employee." The Court's analysis of this mixed question of law and fact shows how difficult it is to separate the two:

> "Undoubtedly questions of statutory interpretation, especially when arising in the first instance in judicial proceedings, are for the courts to resolve, giving appropriate weight to the judgment of those whose special duty is to administer the questioned statute.,,, Put where is the question is one of specific application of a broad statutory term in a proceeding in which the agency administering the statute must determine it initially, the reviewing court's function is limited."

It doesn't make sense to totally ignore an agency's interpretations of legal questions. For example, if the IRS has long had a ruling that a certain deduction is allowable and its statute has been examined by Congress many times and the provision has never been changed, should the IRS interpretation be given no deference by a court? Certainly agency interpretations of law should be examined closely, but they already are given careful scrutiny under the case law. The Supreme Court has held that courts must engage in a "searching and careful" inquiry into the legality of an agency rules, and that the presumption that an agency has acted properly "does not shield this action from a thorough, probing, in-depth review." Citizens to Preserve Overton Park, v. Volpe, 401 U.S. 402 (1971).

At its core, the Bumpers Amendment has a contradictory rationale. It springs from the desire to make agencies issue rules that are more responsive to the will of Congress. But the amendment would give increased power to federal courts, which are not accountable to Congress the way federal agencies are. There is no reason to expect that court decisions on agency rulemakings will be any more acceptable to Congress than agency decisions. Also, ironically enough, if the purpose of the amendment is to make agencies more accountable, the result may be counterproductive. If a court wishes to reach a particular result, it is likely to base its determination on factual findings, not legal questions. Congress can change law, but not facts.

In addition, the multitude of challenges to agency rules that the Bumpers Amendment invites would be a boon for lawyers, who will fashion arguments from every bit of confusing legislative history that will necessarily accompany this amendment. More litigation means even longer backlogs in our already overburdened judicial system. Therefore, at the very least, we urge the Committee to delete the final sentence to revise Section 706 (c) [p 22, lines 6-8].

Venue

The venue provision offers the only sensible solution to the "race to the courthouse" problem. Courts should not have to try to divide half-seconds in order to determine which party filed first and lawyers should not run relay teams down courthouse corridors. We have a few technical suggestions to improve this section:

1. The legislative history should emphasize that the transfer provision in (b) (3) would rarely be used. Random selection should be sufficient for all but a few cases; for example, transfer may be appropriate when all parties except one are in the same part of the country or when there has been a previous judicial decision and the case is coming back to the same court after remand.

2. The Administrative Office should adopt procedures to ensure that venue is proper in the courts in which cases have been filed before making its random selection.

3. Since the Administrative Office is not subject to 5 U.S.C. Section 553, a section should be added to require the Administrative Office to take public comment on the method of random selection and the procedures required.

Effective Date

Any delay in the effective date of S. 1080 after it is enacted is inconsistent with the avowed purpose of the bill. Proponents of this legislation have clamored for regulatory reform as a means to deal with a governmental problem of urgent, almost crisis proportions. Yet, cynically they have accepted a provision to delay the regulatory analysis and cost-benefit sections of the bill to accomodate an Administration fraught with second thoughts about the so-called reforms this bill seeks to implement. Most inexcusable is the delay until January 1,1983 of the rulemaking procedures of sections 2 and 3 and the "Bumpers" mechanism for judicial review in section 5. The remaining delays are less lengthy, although they are puzzling. How do the sponsors of S. 1080 conclude that it would be easier to implement the venue section than the review of existing rules or the establisment of the regulatory calendar and agenda? There appears to be no rationale for this political appeasement.

Legislative Veto of Agency Rules

The legislative veto in the "one and one-half house" form was declared unconstitutional in Chadha v. Immigration and Naturalization Service, 634 F. 2d 408 (9th Cir. 1980). The Court held:

> "... We cannot accept that definite, uniform, and sensible criteria governing the conferral of government burdens and

> benefits on individuals should be replaced by a series of nonlegislation, wherein the Executive branch becomes a sort of referee in making an initial determination which has no independent force or validity, even after review and approval by the Judiciary, save and except for the exercise of final control by the unfettered discretion of Congress as to each case. The defects of this procedure are aggravated by the unicameral aspect of the statutory mechanism and the deficiencies of that procedure preclude justifying congressional action as a separate and independent way of adjudicating the status of aliens outside the executive and judicial processes. " Id. at 44

Constitutional scholars have long condemned the veto for violating Article 1, Section 1 of the Constitution, which mandates bicamerialism, and Article 1, Section /, which defines the necessary role of the chief executive under the separation of powers doctrine.

Just as damning to the legislative veto, however, is the impracticality and unworkability of the procedure. It is not, contrary to the claims of its proponents, the answer to bureaucratic caprice and delay, for it creates an abundance of both by adding a new layer of bureaucracy to the old, turning congressional committees into Boards of Aldermen who must carefully review thousands of pages of facts and commentary to reach a fully informed decision about the advisability of a particular rule. Because the workload of congressional committees is already stretched by new efforts to perform oversight of agency administration of programs, it is unrealistic to expect that more than a handful of regulations with strong business opposition will be reviewed each session. In those cases, a complex administrative issue may be reduced to a simple up or down vote on a resolution to disapprove a rule. The agency, meanwhile, will be left to enforce its statutory mandate in some manner without offending those members of Congress who think the rule went too far and those who think it didn't go far enough.

The amount and depth of review would be determined by Committee staff since members simply would not have time to review voluminous hearing records personally. Thus, the political interaction between committee staff and agency personnel would be intensified. Accountability to the public would not be increased by this cumbersome procedure.

Unfortunately, the legislative review procedure set out in S. 344 suffers from each of the infirmities previously mentioned, eventhough it is probably constitutional because of the involvement of the President. The additional mechanism of automatic delay would simply exacerbate a

regulatory time-table already in slow motion. During a debate on S. 1945, the predecessor of S. 344, in the Senate Governmental Affairs Committee, Senator Jack Danforth lamented the cumbersomeness of this procedure, stating, "Businessmen in my state have told me they can deal with government regulations if they are implemented in a reasonable time with finality." He criticized S. 1945 for the uncertainty and confusion created by the delay. An additional 60 legislative days may be routinely tacked onto the automatic 30 legislative days of delay because there is insufficient time to review a rule.

The complexity of this approach is particularly unnecessary when compared to current alternative solutions. Congress can now pass a law to override an agency action as it did with the saccharin moratorium. More specifically, Congress can enact a statute with a short duration date in order to review the workability of a law. The process would have the additional benefit of forcing Congress to examine carefully the ramifications of a law and to assume responsibility for tough political decisions.

Realistically, the best procedure is still the least dramatic, complicated and expensive. The shift of the 96th Congress toward oversight of existing law to make sure it is working effectively and away from creating massive amounts of new law is a responsible trend which should be continued.

Questions Posed by Senators Laxalt and Leahy

Question 1. The "General Requirements" of E.O. 12291 (Section 2) are imposed "to the extent permitted by law." What does this phrase mean? What law does not permit the requirements of E.O. 12291 to be applied to regulatory action? What law limits the application of E.O. 12291? (Question posed by Senator. Laxalt.)

Answer. We are unable to discern the meaning of this phrase with any precision, particularly since we did not draft it, nor were we consulted about it, and there does not appear to be any "legislative history" concerning it. In our view the phrase, at the very least, means that an agency may not undertake the cost benefit anaylsis indicated if costs are not legally relevant to its determination. Thus, for instance, the Nuclear Regulatory Commission may not lawfully consider costs in determining the standards for reactor safety and hence would not be required to make the analysis under the Executive Order. Similarly, the costs imposed upon removing unsafe drugs from the market are irrelevant and need not be assessed.

Question 2. In the past, some have suggested that all judicial review of rulemaking be vested in the Court of Appeals. Do you support such a change in jurisdiction? If so, please discuss the practical application of such a change. How would such a jurisdictional change affect post-enforcement review of rules? Don't the District Courts offer more opportunities for settlement than the more rigid procedures of the Courts of Appeals? (Question posed by Senator Laxalt.)

Answer. In general we support judicial review of all rulemaking in the Court of Appeals, particularly if the provisions of S. 1080 requiring the assembling of a rulemaking file are instituted. We assume that such a limitation applies only to pre-enforcement review unless Congress explicitly provided to the contrary. One reason which we favor immediate review in the Court of Appeals is that most of the

challenges to rulemaking go up to the Court of Appeals in any event, and hence district court review simply adds to the expense and delay. Since there is, in general, no opportunity to adduce testimony in judicial review of final rules, there is no need to go to a district court. In any event, provision could be made for allowing testimony to be taken if that were required. See 28 U.S.C. § 2347(b)(3). It is also our view that there would be no decrease in the opportunities for settlement in the Court of Appeals, in part because the differences in the procedures are not that great, and in part because the cases involving judicial review of rules have already been thrashed out to the point where settlement is not particularly likely. In any event, the statute could provide for mandatory settlement conferences if they were thought to be desirable, as the Second Circuit now does on its own. We have one important caveat to our support of this proposal: the race to the courthouse question must be resolved satisfactorily as we believe S. 1080 does, subject to the comments we have previously made. If that provision is deleted, we would simply multiply the number of races and seriously burden courts and litigants by having all rules to go to the Court of Appeals.

Question 3. All of you are concerned with an agency's ability to assess benefits in rulemaking. Do you think S. 1080's provisions for hybrid rulemaking could help develop better benefit data by allowing groups such as yours to challenge both the agency's and the business community's methodology and data? (Question posed by Senator Leahy.)

Answer. It is our view that the provisions for hybrid rulemaking are not likely to aid groups such as Public Citizen to challenge either the agency's or the business community's methodology and data. Those provisions, which apply only to major rules, only permit cross-examination and the right to make an oral presentation. Our problem is that we need to have access to backup data and not simply the final conclusory figures. Only when such data is available, as we have proposed in our testimony, would the hybrid procedures be of assistance.

Question 4. You have raised some legitimate concerns about the agencies' reliance on the regulated industries' assessments of compliance costs. Short of disregarding industry data, what means would you suggest could be incorporated in S. 1080 to avoid this problem? (Question posed by Senator Leahy.)

Answer. As we suggested in our testimony, agencies should be able to verify the representations made by regulated companies. To help in this, S. 1080 should be amended to say that whenever a company submits an estimate of the cost of complying with the proposed rule to a government agency, (1) it must disclose this estimate to the SEC, and (2) it must honor reasonable requests from the regulatory agency (on its own behalf or at the request of interested persons) for the back-up data on which it bases its costs estimate. If it fails to supply this data for public examination, its cost figures should be disregarded.

Question 5. All of you have indicated your support for increased public participation in agency rulemaking and have endorsed the intervenor funding mechanism. We cannot ignore, however, the state of our economy and the current political climate favoring substantial budget cuts. What suggestions do you have for enhancing agencies' ability to get the views of those affected by their regulations, which we all agree is critical, and at the same time minimizing the administrative costs of agency rulemaking? (Question posed by Senator Leahy.)

Answer. We remain committed to public participation funding as the best way to get informed views from those who cannot afford to participate in agency proceedings. Only with the help of the experts and attorneys that are necessary to do a good job in complex agency proceedings can citizens have a real chance to make a difference. In the absence of public participation funding, other techniques can lessen the burden on citizens. For example, agencies could (1) minimize the transcript fees and costs of reproduction of necessary materials for citizens groups; (2) give better notice of pending proceedings through the general and trade press, mass mailings, and agency publications.

Citizens groups, particularly on the state and local level often do not even hear about federal proceedings until they are well underway; (3) provide adequate time for participation; (4) use consumer complaints in formulating policy and informing the public about the performance of the regulated industry; and (5) cut down on delay in the regulatory process, which severely chills public participation in rulemaking.

Question 6. Do you think S. 1080's regulatory analysis requirements will weigh the rulemaking process too heavily in favor of those able to afford high-priced consultants, lawyers, and experts? (Question posed by Senator Leahy.)

Are the hybrid rulemaking proposals subject to the same criticism?

And if so, how can we avoid this?

Answer. S. 1080 regulatory analysis requirements will tilt the balance even further in favor of well-financed business interests. Since agencies will be required to conduct analyses involving substantial social and economic research and will be considering industry-sponsored analyses, public interest groups will be at a severe handicap. They simply do not possess the resources to hire the experts necessary to conduct such detailed research. Only if citizens have the ability to examine the back-up data on industry and agency cost estimates would they have any chance to participate meaningfully. Even then, experts and lawyers are necessary to properly evaluate this data, and without public participation funding, citizens groups will be unable to analyze the data.

Question 7. Should a deregulatory rule making be subject to regulatory analysis? (Question posed by Senator Laxalt.)

Answer. Deregulatory actions should be subjected to regulatory analysis because they deserve the same scrutiny as other administration decisions. The virtues of regulatory analysis are the same for all major decisions. Deregulation should meet the same cost-effectiveness tests that regulation must meet.

Question 8. Assuming that the President or his designee is given the authority to designate certain rules as "major," do you feel that the President or his designee should also have the power to waive regulatory analysis for certain major rules? If you support such waiver authority, please give specific examples (in addition to IRS rules) of rules for which such a waiver power would be needed. If you favor such waiver power, but with criteria set out in the statute, please elaborate on the details of such criteria. In addition, if you favor the addition of a waiver power, please explain why you do not feel that putting such discretion in the Executive inserts a major loophole in the requirements of S. 1080. Should the exercise of such a power be subject to judicial review? (Question posed by Senator Laxalt.)

Answer. We do not favor the delegation of such a waiver power to the executive branch. As we indicate in our testimony, we believe that regulatory analysis should be used across the board for major rules. Placing this kind of power in the hands of the executive would completely transform the regulatory mechanism into a highly politicized behind-the-scenes process.

Question 9. Several of the witnesses the Subcommittee heard from, recommended that the President or the OMB be given the authority to oversee the agencies' determinations of which rules are major, to designate rules as major, or to waive specific rules from the bill's requirements. Please give us your comments on these ideas. (Question posed by Senator Leahy.)

Answer. We oppose giving these wide-reaching powers to OMB. OMB staff are no more accountable to Congress or the public than agency employees. The agency rulemaking process could be circumvented by direct political contacts between OMB and lobbyists—an unattractive prospect whether the administration is Democratic or Republican. This delegation of power erases important distinctions between independent and executive agencies. Independent agencies are creatures of Congress, made independent to avoid politically motivated executive control. A clear definition of major rule would be a far more beneficial regulatory tool. Also, GAO could perform a valuable independent oversight role because it already has extensive experience in monitoring agency compliance with regulatory analysis and other legislative requirements.

Question 10. Many have said that regulatory analysis should not be the sole criterion of a rulemaking. What impact should regulatory analysis, as provided in S. 1080, have on a particular regulatory decision? What other criteria should be guiding a regulator in addition to the regulatory analysis? (Question posed by Senator Laxalt.)

Answer. The regulatory analysis should be part of the whole rulemaking record. As such, it would be considered along with all the evidence and comment that the agency receives. In making the final decision on a rule, the regulator should take into account the whole record, not just the regulatory analysis. In particular, a regulator must follow the mission of his particular agency, as defined in the statutory mandate.

Question 11. Why not have a standard for rule making that a final rule should be the one that saves the most lives and avoids the most injuries, unless the agency offers an explanation to the contrary? (Question posed by Senator Laxalt.)

Answer. This would be a perfectly acceptable standard; it would create a presumption that saving lives and avoiding injuries is an important goal, and that costs are not paramount. If cost benefit analysis is to be a neutral, managerial tool rather than a political device with pre-ordained conclusions, there should be no presumption one way or the other in the formulation of the regulatory analysis.

Question 12. When considering the definition of a major rule, most witnesses addressed subparagraph (1), dealing with $100,000 million in compliance costs. Do

you feel that subparagraphs (ii) and (iii) are to vague to be practically useful? Are these subparagraphs necessary? (Question posed by Senator Laxalt.)

Answer. As we discussed in our prepared testimony, the definition of major rule should be simple and clear. That way the agencies will know when to conduct a regulatory analysis. Congress should provide maximum guidance on this point. It would be ironic if the directives to the agencies in the regulatory reform bill were as vague as the confusing statutory language which gave rise to the cry for regulatory reform.

Keeping this principle in mind, we believe that subsections (ii) and (iii) are too open ended, leaving the agencies wide discretion to choose major rules. Also, despite the long list of factors to be taken into account, health and safety considerations are noticeably missing from the list. Isn't a substantial adverse effect on health just as important as a change in cost for local government agencies? We recommend that these sections be narrowed and tightened to give the agencies clear guidance in complying with the bill. Since each of these analyses will be very expensive, we should be sure that each one is necessary.

Senator LEAHY. I should mention that Senator Simpson left because there is a 15-minute rollcall vote on the floor, and I will stay here until he comes back and continue with the testimony.

I would ask—because I have to be in Vermont later this afternoon—that, as you go along, you try to address a couple of points which would be in my questions, and I will submit further questions for the record afterward.

You raise concerns about the Agencies' reliance on industry's assessments of compliance costs. Short of disregarding industry data, how do you get around that problem? It is one of considerable concern of ours, and we have discussed it a great deal in drafting the legislation.

Also, I would want you, in your testimony, to go a little bit into your views of whether the regulatory analysis requirements are going to weigh the rulemaking process too heavily in favor of those who can afford the best in consultants or lawyers and experts. I think the hybrid rulemaking proposal is subject to that same criticism. If so, how do we avoid it?

There was testimony this morning on some concerns as to whether parts of this bill may be considered the Lawyers Relief Act of 1981.

So, if you would just have those ideas in mind as you testify, I would appreciate it. And I do apologize for the fact that when Senator Simpson comes back I will be leaving to hit the same 15-mill roll.

Please go ahead, Mr. Nichols. It is nice to see you back here.

STATEMENT OF ROBERT W. NICHOLS, LEGISLATIVE COUNSEL, WASHINGTON OFFICE, CONSUMERS UNION

Mr. NICHOLS. Thank you, Mr. Chairman. It is good to be back, and I like it on this side of the table almost as well as that side.

Senator LEAHY. You see, on that side, you can get up and leave.

Mr. NICHOLS. That is right, Senator. I was just telling someone what I really liked was having water here. As a staff person, you could never get any water because you had to serve the Senators.

Senator LEAHY. Well, you are missed an awful lot. [Laughter.]

Mr. NICHOLS. Senator Leahy, I am now legislative counsel to Consumers Union. Consumers Union has a long history of involvement and interest in regulatory affairs throughout the Government and also has participated in a number of studies over the years of what we can do to make that regulatory system work better.

I have submitted a relatively detailed statement, which I would like to be included in the record.

Senator LEAHY. Without objection, it will be.

Mr. NICHOLS. Rather than try to summarize that statement in detail, I would like to try to step back and give you my conceptional approach of how our testimony fits in with the other testimony presented today.

Consumers Union has no problem with numbers. We are not afraid of numbers. We use numbers in our magazine all the time. What we are afraid of, I am tempted to say, is economists when they start using those numbers. However, I will not say that because that is not quite accurate. What we are particularly concerned about is what lawyers do with the numbers developed by economists.

We do not wish to participate in a debate on whether or not cost-benefit analysis or cost-effectiveness analysis makes sense in the science of economics. We believe it does make some sense. We also believe that it is important to listen to the economists when they say this technique has substantial limitations.

I had a chance to read the prepared testimony, for instance, of Professor Yandle. He is going to say later on today, I think, that "Some areas of regulation almost defy the application of cost effectiveness or benefit-cost analysis even in the crudest form."

I think it is important for us to listen to the economists, not only when they tell us that there are millions and millions of dollars worth of cost in regulation but also that this technique has limited effectiveness in controling that problem.

Let us turn, then, to what we really think the core issue is. How do you utilize valuable economic tools and those of other disciplines, in the decision-making process to produce a better result?

We suggest that this bill has a mild case of schizophrenia—if you can have a mild case of that condition; that is, it is not quite sure whether to treat economists' cost-benefit studies as a substantive test of regulation or as one tool among many that managers and executives can use in making decisions.

Our suggestions is that it should be the latter—that regulatory analysis should be one decisional tool which has recognized limitations. We feel that certain changes in the bill are necessary to clarify the bill's position in this regard.

For example, the concept of judicial review. If this bill purports to be a procedural amendment to law—the steps by which Agencies act to regulate—it should not permit the Federal judiciary to review a regulatory analysis as if it had become a substantive test of regulation.

We feel that the limitation on judicial review in this bill is insufficient, for many of the reasons that Ms. Drabble and others have spoken about.

But second, and perhaps most importantly, we feel the defect in this statute, as drafted currently, is a structural one. In other words, the statutory changes designed to incorporate this important idea of cost effectiveness and to recognize its limitations, are placed in section 553 of the existing Administrative Procedure Act. We believe that is not the proper location for these provisions.

To afford the appropriate limitation on judicial review, the bill drafters have had to carve out a little portion of section 553 and say that all the traditional rules of the APA that we have had for 30 years do not apply to this little portion—we are going to write new rules.

We think it makes much more sense and creates much less havoc with the Administrative Procedure Act to put the provisions of S. 1080 in chapter 6 of the Administrative Procedure Act—5 U.S.C. sections 601 et seq. Chapter 6 already contains management and analysis-type functions and carefully limits the degree of judicial review over decisionmaking pursuant to these provisions.

Consumers Union is pleased to be able to join the administration in making this suggestion. It is also the position of the American Bar Association, so we are certainly not alone in making this point.

We suggest that if you really want a procedural review and not a substantive review of these cost-benefit analyses you make the changes that we suggest in our testimony.

Thank you.

Senator LEAHY. Thank you. Without objection, your prepared text will be included at this point.

[The prepared statement of Robert W. Nichols follows:]

Prepared Statement of Robert W. Nichols

Mr. Chairman, Consumers Union* appreciates the Subcommittee's invitation to express its views on the various regulatory reform proposals now pending before Congress. In particular, we will direct our comments to S. 1080, "The Regulatory Reform Act" recently introduced by Chairman Laxalt, Senator Leahy and other members of the Senate Judiciary Committee.

Consumers Union has long been interested in and actively involved with the work of many federal agencies. More recently our experience has involved particularly the Federal Trade Commission, the Consumer Product Safety Commission, the National Highway Traffic Safety Commission and the Food and Drug Administration. We also have labored long and hard on the subject of regulatory reform. For example, our Executive Director, Rhoda H. Karpatkin, served as a member of the Commission on Law and the Economy of the American Bar Association during its four year (1975-1979) study of this

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* Consumers Union is a nonprofit membership organization chartered in 1936 under the laws of the State of New York to provide information, education, and counsel about consumer goods and services and the management of the family income. Consumers Union's income is derived solely from the sale of Consumer Reports, its other publications, and films. Expenses of occasional public service efforts may be met, in part, by nonrestrictive, noncommercial grants and fees. In addition to reports on Consumers Union's own product testing, Consumer Reports, with over 2.9 million circulation, regularly carries articles on health, product safety, marketplace economics, and legislative, judicial, and regulatory actions which affect consumer welfare. Consumers Union's publications carry no advertising and receive no commercial support.

important subject.* We hope that the lessons we have learned over the years will prove valuable to the Subcommittee.

Interest in improving the fairness and efficiency by which federal agencies implement Congressional mandates has been increasing in recent years. But it is not a new topic. Since the mid-1930's Congress has watched a passing parade of advisory commissions, congressional committees and students of government speak on this issue. The parade has resulted in a myriad of reform proposals directed at perceived defects in the regulatory system. The fanfare of publicity accompanying many of these studies has added some color and excitement to the often dull pastime of trying to comprehend the long procession of rules marching from the pages of the Federal Register.

The danger in watching such a lengthy parade of reform proposals is that--much like hearing twenty-five bands playing different tunes during a real parade--they all seem to blend together. But we also seem to forget the occasion for the parade in the first place: producing better government decisionmaking.

In this regard, we suggest that it is important to keep in mind several fundamental principles gleaned from the long history of regulatory reform while evaluating the specific proposals before the Subcommittee today.

First, it is important to remember--as Senator Laxalt stated in his remarks upon introduction of S.1080--that the Subcomittee is examining proposals for <u>procedural</u>, not substantive regulatory reform. For thirty years the Administrative Procedure Act (APA) has served as a procedural

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* American Bar Association, Commission on Law and the Economy, <u>Federal Regulation: Roads to Reform, Final Report (1979)</u> and separate statement of Rhoda H. Karpatkin on p. 167.

"constitution" for administrative action. It delineates the essential steps in the process by which agencies do their job. However, the mission and authority of the various agencies are conferred by their underlying substantive statutes--not the APA. For example, it is the Occupational Safety and Health Act which grants OSHA the power to regulate toxic substances and lists the factors it must consider when performing that mission. We fully agree with Senator Eagleton's recent admonition that Congress should resist the temptation "to use neutral-seeming procedural changes as vehicles for making far-reaching modifications in particular substantive statutes."*

Second, the APA is not only a procedural law, but a government-wide procedural law. It applies to the whole range of federal agencies when they engage in covered activities such as rulemaking, ratemaking, adjudication and the like. This, of course, was a major purpose of the APA in the first place: to adopt uniform, generic procedural standards for government action. This fact helps explain why the current APA is not cluttered with detailed requirements. Congress realized in 1946 that what might make sense for the Interstate Commerce Commission could hamstring the operations of the Labor Department.

Consumers Union is convinced that this argument for exercising extreme care in altering or greatly expanding the APA remains a valid one. Procedural laws should be simple. Government-wide procedural laws should be simpler still.

In fact, with many more regulatory agencies in existence now than thirty years ago, this consideration has become even

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* Testimony of Senate Thomas F. Eagleton before the Subcommittee on Administrative Law and Governmental Relations, House Judiciary Committee, March 24, 1981, page 8.

more important. Thus we strongly urge the Subcommittee to carefully examine the impact of S.1080's proposed changes upon particular federal agencies. Additional hearings devoted to the testimony of those agencies and groups familiar with their operation would appear essential. The language of S.1080 is substantially different from that of S.2147 and S.262 adopted by the Senate Judiciary Committee last year. We are certain that this subcommittee would not want to risk taking action without a careful "impact analysis" of the likely effect these new APA changes would have in the real world.

The third fundamental principle is that procedural reforms should be designed to improve agency decision-making, not hopelessly constrain it or subject it to time-consuming outside reviews. Current regulatory activity is vastly different from the old style "economic" regulation of the past. In the 1940's and 50's, government regulation consisted mainly of controlling prices of, and limiting entry into, the utilities, communications and transportation markets. Appropriate to these issues, agencies pursued their missions primarily through case-by-case adjudication (governed by section 554 of the current APA).

Since the 1960's, most of the significant regulation has been of the "social" variety. New health, safety and environmental agencies were established and required to contend with much more complex factual issues and competing values. Today, problems in regulation usually lie at the cutting edge of scientific understanding, and the evidence regarding risk is usually inadequate to assure consensus even within the scientific community. Agency decisionmakers must balance short-term costs to industry from regulation against potentially much greater long term health, safety and environmental risks.

For example, the EPA is required by the Safe Drinking Water Act to promulgate standards for the presence of toxic chemicals in drinking water. In that regard the agency surveyed the water in Cincinnati and found trace amounts of over 700 different organic chemicals. As then EPA Administrator Douglas Costle commented in 1979, "it is impossible for scientists to say today that those chemicals, either individually or in combination, are going to cause health effects 5, 10, 15, 20 years down the road."* But, as Costle then noted, common sense requires that if the EPA can purchase an insurance policy against the occurrence of disease 20 years in the future for a reasonable price today, the agency should consider action.

In order to achieve better regulatory decisions in this increasingly uncertain and complex environment, it is tempting to graft additional procedural formalities and layers of review upon the relatively simple structure of the current APA (particularly in secton 553). This probably will not achieve the desired result and may produce unfortunate side-effects desired by no one.

In the first place, as the Office of Technology Assessment recently concluded**, regulatory decisions in the 1980's need a flexible, informal procedural structure. Assessing future risks of enormous consequence (such as cancer), but which are exceptionally difficult to quantify in current terms, is not

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* Hearings before the Subcommittee on Administrative Practice and Procedure of the Committee on the Judiciary, United States Senate, 96th Cong., 1st Session, Part 2, June 13, 1979 at pp. 28-29.

** Testimony of John H. Young, Office of Technology Assessment before the Subcommittee on Administrative Law and Government Relations, House Judiciary Committee, on H.R. 746 "The Regulatory Procedure Act of 1981", relying in part on a study by Professor Richard B. Stewart of Harvard Law School.

best done in a formalistic, adversary context. Thus, extensive encumbering of the informal rulemaking process runs the risk of making reasoned, balanced agency decisions even less likely than today. Paradoxically, this would require greater reliance on the federal judiciary to make the sensitive, technical yet value-laden decisions involved in today's regulation. Many commentators have noted that this role is not one within the particular institutional competence of federal judges. They usually lack technical training in engineering, biology or risk assessment. In addition, as life-time appointees, they are more insulated from changing public values which are an essential part of regulatory decision-making.

Clearly, the preferred course is to give agencies the additional managerial tools and Congressional direction they need to make better initial decisions about regulation. This can be done by insuring that agency decisionmakers have access to better information, improved methods of testing that data and more public input earlier in the decision-making process. Then, Congress should require a detailed articulation by an agency of the basis of its decision, what information it relied upon, and the reasons it rejected available alternative proposals. The final agency action should then demonstrate that the agency considered all relevant factors, solicited and considered public comment, and examined the advantages and disadvantages of alternative action. In summary, the evidence in the whole rulemaking file should demonstrate "reasoned decisionmaking." It is in this direction that present law is moving.* Congress should codify this balanced and sane approach.

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* See, e.g., Greater Boston Television Corporation v. FCC, 444 F.2d 841 (D.C. Cir. 1970).

With these basic principles in mind, we now proceed to discuss some of the major features of S.1080. At the outset we note that this bill is not as comprehensive as other measures pending in the House of Representatives (i.e., H.R. 746). It does not include provisions regarding intervenor funding or legislative veto which the Chairman has asked we not address at this time. (The position of Consumers Union in favor of public participation funding and against the legislative veto have been made in public previously.**) S.1080 also omits reforms of more formal, trial-type proceedings governed by section 554 of the APA. Thus, the thrust of our remarks will be directed at the two central concepts in the bill: (a) changes in the informal rulemaking provisions of the APA (sections 551 and 553); and (b) the judicial review provisions. We will address other issues in supplemental comments.

DEFINITIONS

The bill adds a definition of "major rule" to section 551 of the APA. This definition is extraordinarily broad and in parts overly vague. As a result, agencies will be required to perform far more regulatory analyses than is useful or than their budgets can presently afford. In addition, the introduction of vague new terms like "significant adverse effects on...investment, productivity, innovation..." is unworkable. These terms and phrases have no reasonably precise definition in the abstract and have not gained practical meaning through years of agency experience interpreting them. In contrast, the $100 million criteria has been used since 1976

** Testimony of Mark Silbergeld of Consumers Union before the Committee on Governmental Affairs, United States Senate, May 18, 1979, contained in part 1 of the Committee's hearings on Regulatory Reform, pp. 1305-1335.

when President Ford included it in his Economic Impact Statement requirement. President Carter's Executive Order 12044 continued its use so that this concept has developed a practical meaning. Most of the other terms in subparagraphs (16)(A)(i) and (ii) of the proposed section 551 have not accumulated such gloss and should also be dropped.

A troubling set of vague definitions becomes infinitely more troubling because S.1080 permits judicial review of agency determinations regarding major rules. This is because, unlike H.R. 746 or last year's Senate Judiciary Committee bill S.262, the major rule determination requirement is placed into section 553 of the APA by S.1080. And, unlike provisions for judicial review of regulatory analyses in S.1080, there is no provision limiting or excluding judicial review of major rule determinations.

Requiring federal courts to review agency action based on a phrase as amorphous as "significant adverse effect on...investment", for example, makes no policy sense. Courts will inevitably issue conflicting rulings and constructions leading to substantial confusion.

In addition, S.1080 arguably would permit parties to challenge an agency major rule determination in court in the middle of an agency rulemaking. No provision in the bill precludes interlocutory review of such an agency determination. Parties would thus be free to argue that the major rule decision was "final agency action" and thus ripe for judicial review when made, perhaps when preparing the regulatory calendar. No responsible student of administrative law supports the crippling delay of agency decisionmaking which would certainly result from such interlocutory review.

Even if the bill is amended to forbid an interlocutory court challenge, court review of an agency's major rule

determination at the end of a rulemaking proceeding is inefficient. The only remedy available would be to require the proceeding to begin all over again. Perhaps years of work would be in vain. The only conceivable goal served by S.1080's major rule procedure is the total frustration of federal rulemaking. Statements by bill co-sponsors state that such is most definitely not their goal.

In summary, we believe that the major rule definition should return to the criteria used by agencies for the past four years in interpreting executive orders. Judicial review of agency determinations on this matter, whether interlocutory or otherwise, should be expressly precluded. Enforcement of S.1080's definition should be left to Congress through oversight mechanisms or the Comptroller General (as in H.R. 746).

S.1080 excludes from the definition of major rule any rule "directly regulating rates..." We believe that some ratemaking decisions in fact set general agency policy. These ratemakings of general applicability should be subject to regulatory analyses. The language in section 2 of S.1080 should be modified or clarified to produce that result.

REGULATORY ANALYSES

As Chairman Laxalt said upon introduction of S.1080, the regulatory analysis provisions are the heart of this bill. Consumers Union believes that regulatory analysis can be a useful managerial tool assisting agencies in making better decisions. To do that it should require agencies to extend their search for alternative courses of action, better identify and assess the tradeoffs in costs and benefits involved and improve agencies' ability to provide a sound, fully supported rationale for their final action.

A regulatory analysis should not require excessive reliance on a weighing of the economic costs and benefits of the rule. Many costs and benefits are not reliably quantifiable. But once a dollar estimate is made, that figure tends to develop a life of its own and its limitations are forgotten. Finally, because a regulatory analysis should be considered a management tool, the analysis itself should not be subject to excessive judicial review.*

S.1080 contains some provisions which are consistent with this outline of the proper role for regulatory analysis. Other provisions are very troubling. We will focus only on those provisions we consider most important in this statement, but will be happy to express more detailed views in later comments.

Structural Problems. The regulatory analysis provisions should be moved from section 553 of the APA to chapter 6. In 1980 Congress and the President acted to create a new chapter in the APA: "Chapter 6.--The Management, Planning and Analysis of Regulatory Functions". Currently it contains provisions requiring agencies to produce "Regulatory Flexibility Analyses". Provisions in S.1080 pertaining to regulatory analyses, regulatory review, regulatory agendas and calendars and judicial review should be among those provisions placed in Chapter 6. There are several reasons for this suggestion.

First, it is the logical place for these provisions. Existing law already has a new chapter of the APA concerning the analysis, planning and management functions of regulation which S.1080 also addresses.

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* See discussion of judicial review contained in the footnote on page 19 of this statement.

Second, placing S.1080 changes in chapter 6 would avoid a detailed amendment of APA section 553 that would be counter to the basic principles of regulatory reform presented earlier in this statement. It would enable the informal rulemaking formula of section 553 to remain simple, flexible and applicable across-the-board to all agencies. Yet it would introduce needed management tools for major rulemakings, helping them become more efficient in fulfilling statutory mandates without producing unnecessary and costly burdens.

Third, this revised construction would greatly clarify the precise application of the limited judicial review provision regarding regulatory analyses now in S.1080. In the bill's current form, courts will have to stand on their heads to ferret out the varying standards of judicial review applicable to a single section of the APA. Surely this result violates a central principle of statutory construction and foreshadows extensive litigation over the applicability of the various review standards.

Substantive Problems.

Senator Laxalt goes to some length in his statement accompanying the introduction of S.1080[9] to say that the bill does not impose a strict cost/benefit substantive test. While we wish that that were true, we do not read the bill's actual language with the degree of confidence of Senator Laxalt. At the least, the bill's revised sections 553(e)(2) and (e)(3) and 553(e)(2) are not as clear as they could be in avoiding this danger. At the worst, they do just what Senator Laxalt wants to avoid doing: raising cost/benefit analysis to a substantive regulatory standard for all agencies. They should be revised.

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[9] Cong. Record. April 30, 1981 at page S.4228 et. seq.

Section 553(c)(2). Subparagraphs (A) through (C) are needlessly wordy but largely unobjectionable. This is because they require various "descriptions" from the agency of benefits, costs and reasonable alternatives. They also require "explanations" of how the agency expects benefits and costs to derive and who likely will benefit and who will pay. Such language is consistent with the conception that regulatory analyses are management tools, not strict cost/benefit substantive standards.

The opening phrase of new section 553(c)(2)(D) is troubling, however. It states: "...except where the enabling statute pursuant to which the agency is acting directs otherwise..." the agency must explain how the benefits are likely to justify the costs of the proposed rule. This is insufficient protection against APA usurpation of substantive standards of regulation. This is because many health, safety and environmental statutes do not expressly "direct" agencies to avoid cost considerations. This is a well known fact and the subject of much litigation. Absent a section-by-section clarification or other report language modifying the "directs" language of the bill, this provision is too loosely drawn. It may be construed to modify the substantive standards of rulemaking.

These serious concerns become strong objections in the bill's revised section 553(e)(2). Here, in subparagraph (A), agencies must perform a "comparison" of the benefits, costs, and adverse effects of the rule. This language implies that an agency must perform an analysis in which each variable must be quantified on a common scale (e.g., dollars). One cannot compare eggs and elephants without a common scale of comparison (i.e. weight, volume, intelligence). One can "describe" or "explain" the two without such a scale, however.

The next paragraph in the bill [section 553(e)(2)(B)] proceeds to elevate the cost/benefit analysis dangerously close to a substantive standard of regulation. This is accomplished by coupling the insufficent phrase (examined earlier) "except where the enabling statute...directs otherwise" with a requirement that the agency make a "determination" that the benefits of the rule justify its costs.

It is true that the use of the word "justify" connotes something less than a rigorous, technical balancing. However the controlling word in this sentence in the bill is "determination". That word is clearly stronger than the previously used "explanation" and plainly connotes a more formal, substantive decision by the agency. Thus, contrary to Senator Laxalt's stated intention, S.1080 appears to require a rather strict cost/benefit test and then elevates it beyond mere procedure to a substantive standard.

Perhaps this serious problem can be cured by clear report language interpreting the bill. Preferably, these sections will be redrafted to conform with Senator Laxalt's intent. One possible substitute would be to require "a detailed analysis of the projected costs and other economic effects, and of the project health, safety, environmental, and other effects which may result from the rule." If this analysis is then appropriately insulated from separate judicial review the analysis may be required regardless of the ability of any particular agency to consider costs when promulgating a rule. In this manner, Congress will have provided a useful management tool but avoided amending dozens of social and economic statutes authorizing agency action.

Finally, we turn to new section 553(c)(3). This paragraph is not clearly written. Its general drift is too far in the

direction of indicating that agencies must quantify costs and benefits. However, it contains an excellent sentence requiring agencies to explain the margins of error involved in any quantification or estimation method used. This is an essential provision.

Consumers Union opposes bill language which unduly emphasizes cost/benefit analyses for the same reasons, we suppose, that Senator Laxalt stated that such was not his goal in S.1080. Cost/benefit analyses are invaribly flawed. There are a number of reasons for this: the difficulty of identifying and quantifying many costs and benefits; the inevitably arbitrary nature of valuations of human life or health; the special difficulty of evaluating extremely low risk but catastrophic events (e.g. a meltdown of a nuclear reactor); the problem of interpersonal and intergenerational comparisons of utility; and many others.* Because of the limitations, cost/benefit studies should constitute only the beginning of the inquiry, not its conclusion.

There remains a deep feeling among Americans that our air and water should be clean and our work places and consumer products safe. And public opinion polls continue to show strong support for government action to better insure the attainment of these values, even through regulation.

We are disappointed that this bill does not reflect this perspective. There is an overpowering emphasis on cold, hard numbers and dollars. Very little is said about the benefits derived from rational, balanced government action. If the bill sponsors expect this bill to be considered a consensus approach

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* Peter H. Schuck, "Regulation: Asking the Right Questions", National Journal [April 28, 1979] pp. 711-717.

to regulatory reform, then greater recognition of regulatory benefits should be included throughout.

JUDICIAL REVIEW

Consumers Union does not believe the approach to judicial review in S.1080 is sound. First, as discussed earlier, all of the management sections of the bill should be removed from section 553 and placed in chapter 6 of the APA. That is essential to insure that the principle of limited judicial review of the regulatory analyses can be realized.

Second, section 553(f)(3) of the bill does not go far enough to ensure that the regulatory analyses remain management tools and not separate grounds for challenging a rule. This bill section states that no court shall invalidate a rule because of an "inadequacy" in the regulatory cost/benefit analyses prepared by the agency.

A sounder approach is that taken by H.R.746 in its section 623 on judicial review. That provision is exactly what the Senate Judiciary Committee adopted last year in its version of S.262. It has the support of the American Bar Association, the Business Roundtable and other business groups, and labor and consumer groups. It should be adopted by S.1080 also.

The advantage of the H.R.746 approach is that it insulates any determination by an agency concerning the new regulatory analyses from separate or interlocutory judicial review. However, it does permit such analyses to become part of the

whole rulemaking record and thus be before a court ruling on the validity of the final rule.*

S.1080 probably allows judicial review of the failure of an agency to perform a regulatory analysis and of several of the determinations required by the agency by amendments to section 553 (i.e., section 553(e)(2)). It also does not expressly exclude the possibility of interlocutory judicial review of a major rule determination and the consequent failure to perform a cost/benefit analysis. This will raise the very real likelihood of agency paralysis by litigation-prone parties.

The Bumpers Amendment. S.1080 includes a revision of the scope of judicial review of informal rulemaking which has come to be known as the Bumpers Amendment.

Consumers Union opposes these provisions. First, existing standards for judicial review of agency action eliminate any need for change. This was clearly expressed by the late Judge Harold Leventhal in testimony before the House Judiciary Committee a year and one half ago:

> The apparent assumption underlying the Bumpers proposal--that courts defer uncritically to agencies--is simply inaccurate. While we express a degree of deference to the accumulated expertise of an agency in their substantive

* This treatment of the regulatory analysis preserves current law. As the late Judge Harold Leventhal stated in testimony before the Judiciary Committee on May 10, 1979, language purporting to bar judicial review of a regulatory analysis would likely be inoperative. He stated that such a document would probably be examined by a court in determining the validity of a challenged rule because the analysis could be expected to contain the reasons set forth by the agency for the development of the rule. Hearings on Regulatory Reform before the Committee on the Judiciary, 96th Cong., 1st Sess. 10 (1979). Under current law, courts look to the statement of basis and purpose published by the agency along with other documents which reveal the agencies thinking, to determine whether the rule itself passes the "arbitrary and capricious" test. See K. Davis, ADMINISTRATIVE LAW TREATISE Sections 6:10 - 6:12 (2nd Ed., 1979) vol. 2 Providing that the cost/benefit studies of the agency be a part of the whole rulemaking record makes it no more available for judicial review than other documents relied on by the agency for factual or value judgments.

> areas, we still engage in a hard look at a rule's consistency with its supporting Congressional mandate.*

Courts defer to agencies only where the statute and legislative history are not clear. There are sound reasons, in such cases, to continue to turn to the agency for help. Perhaps the main one is that agencies, unlike courts, can view one case as a part of a large universe of factual situations and value judgments. In addition, turning to the agency in such instances promotes greater certainty and consistency in administrative law.

By establishing what is billed as a "new" test for judicial review, S.1080 is likely to foster a significant increase in litigation. For example, the distinction made in section 5 of the bill [section 706(a)(2)(F) of the APA] between "facts" and "law" or "policy" is one virtually impossible to make in practice. Disputes on this matter occur quite frequently under existing laws. See e.g., WNCN Listerners Guild v. FCC, 610 F.2d 838, 854-55 (D.C. Cir. 1979), rev'd. 49 L.W. 4306 (S.Ct., March 24, 1981). But S.1080 would significantly elevate the significance of this purported distinction because of the need to apply different standards of review.

The Bumpers approach has the sole virtue of sounding like a reform leading to real relief from out-of-control bureaucrats. But that politically popular characterization should not overwhelm good judgment based on the evidence. The evidence is that the Bumpers amendment is not needed and would significantly promote warrantless, time-delaying litigation.

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* Hearings before the Subcommittee on Administrative Law and Governmental Relations, House Judiciary Committee, 1979-1980, pp. 432-433.

OTHER TOPICS

There are a number of other topics in this bill which deserve careful consideration. Among these are: the suggestion to create a discrete rulemaking file which will become the exclusive basis for judicial review of the rule [section 553(f)(1) of the APA]; the requirement for additional or "hybrid" procedures of oral argument and cross-examination in proceedings for a major rule and a special standard of judicial review for such additional procedures.

Because of time constraints and the lack of any detailed section-by-section analysis of S.1080 at this time, Consumers Union prefers to submit additional comments on these and other topics at a later time.

Once again, we appreciate the Subcommittee's invitation to participate in this important examination of regulatory reform proposals.

Thank you, Mr. Chairman.

Senator LEAHY. Ms. Dubrowski, I think we will stop at that point until Senator Simpson returns. I will have questions to submit, but I have just been watching that 15-minute rollcall tick down.

If Senator Simpson is not back here in 5 minutes, just start the testimony again if either he or I am not back.

[Brief recess taken.]

Senator SIMPSON [acting chairman]. Had we reached the point where Ms. Drabble, Ms. Brickey, and Mr. Nichols had completed their testimony?

Mr. MANDELMAN. Yes, sir.

Senator SIMPSON. Well, we might just as well let you proceed, Ms. Dubrowski. And then I will ask some questions. Some will be specific, some directed to the panel.

STATEMENT OF FRANCES DUBROWSKI, SENIOR ATTORNEY, NATURAL RESOURCES DEFENSE COUNCIL

Ms. DUBROWSKI. Thank you, Mr. Chairman.

I would like to start off by saying that it is a pleasure to be invited to testify here today. We have a number of concerns about this bill, and we welcome the opportunity to discuss those concerns with you.

I would like to begin with a concern that I think is one of the motivating factors for this bill, and that is the question of costs and benefits in rulemaking—how do you get agencies to address the question of costs and benefits sensibly.

As we said in our prepared statement, the House Oversight and Investigations Subcommittee conducted extensive hearings into the merits of cost-benefit analysis last session. They concluded that cost benefit analysis is in far too primitive a stage of development to be used for agency decisionmaking. We concur with that judgment.

People tend to think of costs as the easy side of the equation—the thing we can get a handle on and state definitively. But, in fact, costs can be very difficult to estimate.

Cost estimates vary widely, and, at times, cost estimates can change because new developments in technology or unanticipated benefits from a rule may combine to reduce the initial estimates of what a rule would cost.

At the same time, benefits are extremely difficult to quantify, and even when they can be identified it is sometimes impossible to put a dollar value on them—to assign a dollar value to human life, to natural resources, to health or safety measures.

When you start comparing costs and benefits, there is the potential for serious errors in judgment, in part because what we are looking at are the aggregate effects, ignoring the fact that those who bear the costs and those who enjoy the benefits of conduct are not necessarily the same group of people.

In some cases, Congress has already decided—and we think for good reason—that certain sectors of the population already bear risks that are far too high or that some types of risks should not be borne at all. When Congress has decided that an agency ought to regulate, we think the agency should not be second-guessing that judgment.

When we look at a statutory formula for taking costs and benefits into account, we have three concerns. One is that the analysis does not become so complicated that it ends up delaying a needed rule.

In our testimony, we talked about the fact that delayed rulemaking can also have costs on the economy. We mentioned acid rain as an example. Senator Simpson, earlier you mentioned the construction grants program. That is a program we have serious concerns about.

One of the facts which emerged from the Washington Post articles is that often sewage treatment plants are not meeting the limits we initially anticipated they would meet because industrial toxic discharges into the sewage treatment plants interfere with their operation.

We have been urging EPA to come up with a program which is required by statute for pretreating industrial toxic discharges before they go into sewage treatment plants. Those regulations are being delayed for additional analysis of their costs and benefits.

Thus rules necessary to protect investments we have already decided to make are being held up for additional analysis.

A second concern we have with cost-benefit analysis is that we not interfere with the formula Congress has already given an agency for making a decision in a rulemaking context—that we not second-guess what Congress has told the agency to do.

A third concern is that we not interfere with commonsense decisionmaking—that we not allow costs to define the objectives, as

opposed to costs simply being part of the information the agency has at its disposal.

In our testimony, we stated that perhaps the best place to deal with these questions is in the context of the enabling statutes. But certainly, if we are going to develop a generic approach for considering costs and benefits, we have suggested a number of amendments, which we think the subcommittee ought to consider. These amendments would measurably improve the direction this bill gives to the regulatory agencies.

Senator SIMPSON. We will want you to share those with the subcommittee.

Without objection, your prepared text will be included at this point.

[Ms. Dubrowski's prepared statement and responses to questions posed by Senators Laxalt and Leahy follow:]

Prepared Statement of Frances Dubrowski

Mr. Chairman and members of the Subcommittee, it is a pleasure to be invited to testify before you today. The Natural Resources Defense Council is a 40,000 member national organization committed to the protection of human health and the environment. For the past decade we have been deeply involved in the administrative processes of many federal agencies. We have commented and testified on their proposed regulations, worked closely with them to ensure that their decisions reflected sound environmental policy, and, at times, challenged their decisions in the federal courts. We have also provided information to the various Congressional committees that authorize, oversee, and appropriate money for these programs.

Our testimony on the Regulatory Reform Act of 1981, the bill you are now considering, reflects this experience. We address three central questions raised by the bill: Under what circumstances should we require agencies to consider the costs and benefits which flow from their rulemaking decisions? How can we best ensure that this is done? What, if any, changes are needed in the way the courts approach the task of reviewing agency decisions? In addition, we also comment on constraints the bill would place on public access to the rulemaking process.

COST-BENEFIT ANALYSIS

We have grave reservations about imposing cost-benefit analysis on all major rulemakings. As we discuss below, cost-benefit analysis is seriously flawed; it cannot be used as the ultimate basis for regulatory decision-making. Furthermore, it will drain agency resources and delay needed health and environmental measures.

Congress can make agencies consider costs without requiring cost-benefit analysis for all major rules. But regardless of how Congress chooses to examine the costs of regulatory decisions, it should apply the same formula to relaxing environmental rules as it does to developing them.

A. Cost-benefit analysis cannot be used as the ultimate basis for regulatory decision-making.

The House Subcommittee on Oversight and Investigations conducted three days of hearings into the merits of cost-benefit analysis last session. In its report, the Subcommittee acknowledged that cost-benefit analysis sounds appealing -- as if we are encouraging agencies to engage in common sense decision-making. But they also cautioned that the concept is "simplistic" and the methodology "in far too primitive a stage of development to be used as a definitive means of reaching regulatory decisions."*

The reasons for this conclusion are numerous. First, cost-benefit analysis assumes that costs can be accurately quantified. In fact, the opposite is often true. A recent study by independent accountants found that both industry and EPA consistently over-estimated the cost of complying with EPA regulations, although industry errors usually exceeded those of EPA.**

Errors occur, at least in part, because costs are not static. New regulations foster developments in technology which, in turn, may dramatically reduce the cost of controlling present levels of pollution. Even where new technology is not forthcoming, increased demand for pollution controls introduces economies of scale into the production of control technology. And regulation may have unanticipated, but desirable side-effects. A recent article in the Harvard Business Review illustrates several instances in which pollution control efforts increased the productivity of regulated industries, by reducing energy consumption through

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*/ Cost-Benefit Analysis: Wonder Tool or Mirage? No. 96-IFC 62, December, 1980, p.i.

**/ "Comparisons of Estimated and Actual Pollution Control Capital Expenditures for Selected Industries," Putnam, Hayes, and Barlett (June, 1980).

heat reuse, by encouraging recycling, or by creating marketable byproducts out of materials previously regarded as process wastes.*

Discriminating between the costs attributable to a particular regulation and those which would have been incurred for other reasons may also be troublesome. For example, some operation and maintenance procedures required by EPA regulations also prolong the life of a facility. How are we to disassociate the "pollution costs" from the "production costs" of such measures? Other measures required by EPA regulations enable simultaneous compliance with OSHA standards; the costs of these measures should not be double-counted against each government regulation.

Finally, there is the very thorny question of who actually adds up the costs. Because government agencies have limited resources, they often tend to rely on industry estimates of the cost of complying with new regulations. There is an inherent danger in this process that industries will pursue their own self-interest, greatly overstating their costs. The House Oversight and Investigations Subcommittee uncovered concrete evidence of this phenomenon: a company used one set of figures when reporting costs to regulating agencies, yet another when reporting to the SEC. Cost-benefit analysis contains no safeguards to correct for the systematic bias introduced into the analysis when a critical factor, the cost side of the equation, is developed either largely or solely by the regulated entity. For all these reasons, advance estimates of the cost of compliance can greatly overstate the net costs to society.

Benefits, by comparison, tend to be underestimated. Questions of environmental policy often take us to the frontiers of scientific knowledge. The limited research budgets of regulatory agencies have not kept pace with the need for information in this area. In the face of this uncertainty, scientists tend to focus conservatively on the known adverse effects of pollutants, ignoring the fact that new, more comprehensive studies many identify even greater health effects from a given level of exposure.

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* / "Thinking Ahead: Making Pollution Prevention Pay," Michael G. Royston, Harvard Business Review (Nov.-Dec. 1980).

Once benefits have been identified, they must be related to costs. Predicting how many people will die, get seriously ill, or otherwise be affected by the absence of regulation is difficult. But it is even more difficult -- indeed impossible -- to assign a dollar value to a person's health or welfare.

The task of quantifying benefits is perhaps less difficult when we ignore intangibles, such as health, recreation, aesthetics, and historical value, and concentrate solely on damage to material sectors of the economy. But even here, estimates of quantifiable damage vary widely. For example, it is theoretically possible to define at least some of the damage acid rain causes to the economy of the eastern United States and Canada by focusing on the value of decimated fish populations, reduced productivity of forests and agricultural lands, damage to statues, buildings, and other material objects, and the decline of regional economies which depend on tourism and sports fisheries. The National Academy of Sciences cites an estimate that acid rain causes $5 billion damage a year in the eastern United States.* New York State, by comparison, figures that acid rain may cause $13 billion of damage annually in material degradation alone; the value of lost fish, aquatic life, forests, and agricultural products would substantially increase this figure.** How is an agency to reconcile these grossly disparate cost estimates?

Moreover, cost-benefit analysis merely looks at the aggregate advantages and disadvantages of a rule. It ignores the fact that those who enjoy the benefits of unregulated conduct are not necessarily the same group of people as those who bear the costs. In many cases Congress, for good reason, has decided that some sectors of the public already suffer unreasonable risk and deserve relief

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*/ On Prevention of Significant Deterioration of Air Quality, National Research Council, 1981.

**/ Petition of the State of New York for Disapproval of Proposed Revision of State Implementation Plan and Comments, Submitted by Attorney General Robert Abrams to Environmental Protection Agency, March 3, 1981.

regardless of what aggregated costs and benefits may show. In other cases, Congress has decided that certain types of risk, for example, the risk of mortality or serious irreversible or incapacitating illness from toxic air pollutants, ought simply to be avoided. In these cases, it is unnecessary for the agency to engage in cost-benefit analysis because Congress has already decided how regulation ought to proceed.

Finally, the great danger in cost-benefit analysis is that it will obscure, rather than elucidate, the key facts which the agency needs to consider. Even where the analysis is not subject to judicial review, and thus presumably is not a central factor in the rulemaking, it becomes part of the "psychological package" before the agency. As such, it may tend to emphasize what is quantifiable and downplay what is unknown or unquantifiable, stressing certain facts at the expense of others. It may thus serve to add the illusion of precision to an agency's decision, masking the agency's failure to follow the thought processes intended by Congress. For these reasons, cost-benefit analysis cannot be used as the ultimate basis for regulatory decision-making.

B. Cost-benefit analysis will drain agency resources and delay needed health and environmental measures.

Although it is difficult to quantify the precise cost of the Regulatory Reform bill, we have every indication that it will be substantial. The Congressional Budget Office estimated that compliance with the Regulatory Reform bill now pending before the House Judiciary Committee would add an average of $100,000 to the cost of each major rulemaking.*

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*/ Report of the House Judiciary Committee on the Regulation Reform Act of 1980, H.R. Rep. No. 96 - 1393, Sept. 25, 1980, p. 59. In addition to identifying costs and benefits, the House bill requires agencies to assess regional differences, effects on small businesses (now required by the Regulatory Flexibility Act of 1980), effects on competition, and advantages of performance rather than design standards.

The additional analytical steps will also take time, a precious commodity for an agency like EPA that already lags years behind many statutory deadlines in promulgating needed health and safety rules. And, to the extent that the benefits of a rule exceed the costs -- such as is predicted for proposed acid rain control programs * -- delaying rules will add, rather than reduce, costs to society as a whole.

C. Congress can make agencies consider costs without requiring cost-benefit analysis.

The above critique does not necessarily mean that agencies should never do a cost-benefit analysis, nor that resources should not be devoted to exploring and improving this methodology. It does mean that Congress should be cautious in endorsing an unproven analytical technique.

We submit that the enabling statutes, rather than a generic Regulatory Reform Bill, are the best place to determine whether, and how, an agency should consider costs in promulgating different types of rules. However, if the Committee decides to address this issue in a Regulatory Reform Bill, it should consider the following amendments to the bill:

1. Congress should set up an experimental program for performing cost-benefit analyses in a few rulemakings, rather than applying the technique universally to all major rulemakings. This would allow agencies to do a few analyses well, to gain experience with the technique, and to evaluate ways to improve the methodology.

2. Cost benefit analysis should be performed out of funds specifically authorized and appropriated for that purpose, so as not to strain agency budgets even further than proposed budget cuts now do.

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* / As noted earlier, the benefits of acid rain control have been estimated to range between $5 billion annually to $13 billion plus a year. The cost of significant reductions in acid rain-causing pollutants, by comparison, is substantially lower. Studies conducted for the Environmental Protection Agency and Department of Energy indicate that a reduction of about seven million tons annually of acid rain-causing sulfur oxides, more than one third of the total emitted from coal-fired power plants, could be accomplished for about $2.2 billion in annual capital and operating costs. (Greater reductions have not yet been costed out.)

3. Congress should caution agencies about the limitations of cost-benefit analysis. By providing that benefits should be "justified" in relation to costs, as opposed to "outweighing" costs, the existing bill makes an attempt to steer agencies away from mathematical formulas for decision-making. But the warning needs to be developed more explicitly so that agencies will, in practice, adhere to Congressional intent. For example:

(i) Congress should specify that, in calculating benefits, agencies should give special weight to alternatives that will achieve the purposes of the enabling statute more effectively. Thus, for example, the agency's ability to administer or enforce one alternative as compared to others would be given due regard.

(ii) Congress should specify that when agencies choose the most cost-effective alternative, they should choose an alternative that achieves the objectives of the rule and the enabling statute, rather than letting cost considerations define the agency's objectives.

(iii) Instead of saying that an agency should not be required to judge the relationship of costs to benefits "primarily on a mathematical or numerical basis" -- an ambiguous phrase -- Congress should specify that an agency shall not give less weight to benefits or effects that cannot be quantified.

(iv) Congress should specify that in no event should an agency let the need to do a cost-benefit analysis interfere with meeting a statutory deadline for promulgating a rule or with an enabling statute's formula for taking costs (and benefits) into account.

(v) Congress should take measures to ensure that the cost figures relied upon for regulatory analyses are identical to those reported to the SEC.

D. Regardless of how Congress chooses to examine the costs of regulatory decisions, it ought to apply the same formula to relaxing environmental rules as it does to developing them.

We take strong exception to the bill's current definition of a major rule. It defines a major rule (i.e., one which requires a cost-benefit analysis) as one which:

i. imposes enforcement and compliance costs in excess of $100,000,000;

ii. substantially increases costs or prices;

iii. has significant adverse effects on competition, employment, investment, productivity, or innovation.

(Rules that authorize the introduction of a product or service into commerce are exempted from the new analytical requirements altogether.)

The net effect of these criteria is to impose one set of procedures -- complicated and costly ones at that -- on rules which protect health and safety by controlling industrial pollution, and another, much simpler set of procedures on rules which relax current standards (i.e., do not increase compliance costs or prices) or otherwise permit businesses to market new products.

We fail to see why rules which remove environmental protections should escape the same scrutiny befitting new health-protective rules, unless, of course, the underlying purpose of the new procedural requirements is not the promotion of economic efficiency but the postponement of environmental protection. We urge the Committee to revise its definition of a major rule.

JUDICIAL REVIEW

The bill adopts what has been termed "the modified Bumpers" approach to judicial review. This compromise requires that a reviewing court independently decide all questions of law; the court cannot accord any presumption, either favoring or against, an agency's interpretation of the enabling statute.

As we will discuss, existing standards for judicial review of agency action eliminate any need for this provision. Ironically, by enacting the modified Bumpers' approach, the Committee may create confusion that may take years of litigation to resolve.

Proponents of this approach assume that courts now give undue deference to an agency's interpretation of law. The case law indicates the contrary. As Judge Harold Leventhal testified before Congress a year and a half ago:

> (T)he apparent assumption underlying the Bumpers proposal -- that courts defer uncritically to agencies -- is simply inaccurate. While we express a degree of deference to the accumulated expertise of an agency in their substantive areas, we still engage in a hard look at a rule's consistency with its supporting Congressional mandate.*

This same theme was reiterated just last month by the United States Court of Appeals for the District of Columbia. At the end of a 226 page opinion exhaustively examining EPA's emission standard for new coal-fired power plants, the court stated:

> We have read the record with as hard a look as mortal judges can probably give its thousands of pages. We have adopted a simple and straightforward standard of review, probed the agency's rationale, studied its references (and those of appellants), endeavored to understand them... and on close questions given the agency the benefit of the doubt out of deference for the terrible complexity of its job. We are not engineers, computer modelers, economists, or statisticians, although many of the documents in this record require such expertise -- and more... (I)n the end, we can only make our best effort to understand, to see if the result makes sense, and to assure that nothing unlawful or irrational has taken place. In this case, we have taken a long while to come to a short conclusion: the rule is reasonable.**

Particularly on questions of law, the independence of the courts is well established. Courts defer to agencies only where the statute and legislative history are not illuminating and the agency's interpretation of its mandate is reasonable. In these circumstances, there are strong policy reasons for following the agency's lead. Agencies approach such questions with a view toward the coherence of a program as a whole. Unlike a court, they look not only at the facts of a particular case, but also at other cases that will likely arise under the same provisions of law. Following their lead will minimize the potential for conflicting interpretations of statutes which do not require centralized judicial review. Furthermore, this approach is more efficient. It lends certainty to administrative decisions; those who have relied upon the agency's interpretation need not alter their course of action.

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*/ Hearings before the Subcommittee on Administrative Law and Governmental Relations of the House Judiciary Committee, 1979-1980, Serial No. 41, pp. 432-433.

**/ Sierra Club v. Costle, __F.2nd __,No. 79-1565. (D.C. Cir. April 29, 1981), Slip Opinion at 225-226.

These same policy considerations may well induce courts to continue deferring to agency interpretations of law in close cases even after the modified Bumpers approach is enacted into law. But by establishing what purports to be a "new" test for judicial review, the Committee runs the risk of creating confusion and fostering additional litigation. Indeed, the primary beneficiaries of the Bumpers' proposal will most likely be the lawyers who will brief and argue the meaning of the new phrase or the distinction between "questions of law" and "mixed questions of law and fact." Some will undoubtedly argue that the test was intended to make it easier to overturn agency decisions, although this would run counter to one of the principal aims of regulatory reform: reducing the uncertainty which stems from unduly protracted rulemaking proceedings.

Because of the uncertain and potentially adverse consequences of the proposal and the absence of any need for clarifying the courts' role in this area, we urge the Committee to refrain from adopting the modified Bumpers' approach.

PUBLIC ACCESS

One of the central tenets of administrative rulemaking is that rules must be made in an atmosphere of openness and fairness with due regard to the views of all interested parties. Public comment procedures are critical because they enhance the agency's ability to make balanced decisions. For this reason, we are concerned to see that the Regulatory Reform bill would allow an agency to promulgate a rule relying, at least in part, on material that is exempt from public disclosure. Permitting agencies to base rules on "secret data" would undermine the integrity of the entire process. We urge the Committee to delete this provision.

QUESTIONS POSED BY SENATOR LAXALT

Question 1. Assuming that the President or his designee is given the authority to designate certain rules as "major," do you feel that the President or his designee should also have the power to waive regulatory analysis for certain major rules? If you support such waiver authority, please give specific examples (in addition to IRS rules) or rules for which such a waiver power would be needed. If you favor such waiver power, but criteria set out in the statute, please elaborate on the details of such criteria. In addition, if you favor the addition of a waiver power, please explain why you do not feel that putting such discretion in the Executive inserts a major loophole in the requirements of S. 1080. Should the exercise of such a power be subject to judicial review?

Answer. Congress should decided which categories of rules require regulatory analysis, then a waiver power is unnecessary. The waiver power has several inherent dangers. It may delay rulemaking by creating confusion and controversy over when a regulatory analysis is required. It will also politicize the decision, limiting the credibility of the process and the analyses it produces.

Question 2. When considering the definition of a major rule, most witnesses addressed subparagraph (i), dealing with $100 million in compliance costs. Do you feel that subparagraphs (ii) and (iii) are too vaque to be practically useful? Are these subparagraphs necessary?

Answer. Subparagraphs (ii) and (iii) are extremely vague. They may well impede agency rulemaking by creating confusion and controversy over when regulatory analyses are needed. They may also waste scarce agency resources on overly-detailed analyses of rules that are not truly major in scope. We agree with the suggestion in the question: the subparagraphs are at best unnecessary and probably harmful, they should be deleted. In addition, subparagraph (i) should be amended to define a major rule as one which has a "$100 million effect on the economy," regardless of whether the economic impact results from compliance costs or from the health and environmental cost to society of unregulated conduct. There is no apparent reason for requiring less analysis when the public at large, not industry, suffers; indeed, if promoting economic efficiency is the goal of the bill, agencies should focus on all types of economic impact.

Question 3. In the past, some have suggested that all judicial review of rule making be vested in the Court of Appeals. Do you support such a change in jurisdiction? If so, please discuss the practical application of such a change. How would such a jurisdictional change affect post-enforcement review of rules? Don't the District Courts offer more opportunities for settlement than the more rigid procedures of the Courts of Appeals?

Answer. We support the suggested change in jurisdiction. Placing judicial review of rulemaking in the Court of Appeals would improve rulemaking by providing interested parties with a final decision more quickly than possible with two-stage judicial review. Moreover, courts of appeals are more suited to reviewing the record of an agency rulemaking than district courts.

The change in jurisdiction should not impair opportunities for settlement. Courts of Appeals frequently settle cases arising out of agency rulemakings. See, for example, *NRDC* v. *EPA*, C.A. 6, No. 76–1661 (settlement of litigation arising out of EPA's approval of the Kentucky State Plan for Implementing the Clean Air Act), and *NRDC* v. *EPA*, C.A.D.C., No. 78–1803 and consolidated cases (partial settlement of litigation arising out of EPA's general pretreatment regulations under the Clean Water Act).

Question 4. Should a deregulatory rule making be subject to regulatory analysis?

Answer. As we stated in our testimony, a deregulatory rulemaking should be subject to the same procedural and substantive analysis required in a health or environmentally protective rulemaking. We have urged the Committee to amend S. 1080's present definition of a major rule to accomplish this result. (See answer to question # 2, *supra.*)

Question 5. Many have said that regulatory analysis should not be the sole criterion of a rule making. What impact should regulatory analysis, as provided in S. 1080, have on a particular regulatory decision? What other criteria should be guiding a regulator in addition to the regulatory analysis?

Answer. A regulatory analysis should provide information to the decision-maker; it should not dictate the outcome of the rulemaking. The criteria which determine the outcome of the rulemaking can only be set by Congress in particular authorizing statutes since these criteria will vary depending upon the nature of the regulatory problem. Therefore S. 1080 should be carefully worded to ensure that the objectives and rulemaking requirements of other statutes are not impaired.

Question 6. Why not have a standard for rule making that a final rule should be the one that saves the most lives and avoids the most injuries, unless the agency offers an explanation to the contrary?

Answer. The question points out an important omission in S. 1080: emphasis on the health, safety, and environmental consequences of agency rulemaking. S. 1080 would be measurably improved by amendments which stress the Committee's intent to refrain from changing existing environmental statutes. The bill should also emphasize that, in protecting health, safety, and the environment, agencies must often act in the face of less than certain data. Their ability to act should not be diminished by the more detailed analytical requirements of S. 1080.

Question 7. The "general requirements" of E.O. 12291 (Section 2) are imposed "to the extent permitted by law." What does this phrase mean? What law does not permit the requirements of E.O. 12291 to be applied to regulatory action? What law limits the application of E.O. 12291?

Answer. Many laws do not permit the general requirements of E.O. 12291 to be applied to regulatory action. Some rulemakings are conducted under strict statutory or judicial deadlines. In these case, the need for expeditious action outweighs any advantage that could be gained from the detailed analytical requirements of E.O. 12291.

In addition, many statutues preclude an agency from basing decisions on the results of a cost-benefit analysis. For example, national ambient air quality standards under the Clean Air Act must be set without regard to costs. The Congressionally established National Commission on Air Quality, a majority of whose members represent state and local interests, recently evaluated and rejected proposals to amend the law to require cost-benefit analysis of these rules. The Commission found:

"The costs of meeting primary air quality standards are best taken into account in determining what control programs should be implemented in specific areas of the country, not in establishing a national air quality standard to protect public health. Although the level of air pollution affecting public health generally does not vary in different locations, the costs of meeting any specific standard will vary substantially, depending upon the severity of existing pollution levels, from one area to another. Thus, if a national air quality standard were based in part on the costs of complying with it, the very high costs of meeting the standard in a few severely polluted areas would probably require that the standard be set at a less protective level than is achievable in a reasonable, economic fashion in most areas of the country. The most effective balance between the beneficial effects of good air quality on human health and the economic, social, energy, and other costs of meeting health-based standards will be achieved when conditions in particular areas can be considered in deciding when the standards should be met in the areas and what measures will be adopted to meet the standards (see p. 70, 77)."

Likewise, hazardous air pollutants—those which may either cause mortality or serious irreversible or incapacitating illness—are regulated by standards which protect public health with "an ample margin of safety" despite control costs. In these cases, Congress has decided that the seriousness of the health effects necessitates control.

In addition to cases where Congress has precluded an agency from relaxing rules because of economic data, there are also situations in which Congress has spelled out how an agency is to evaluate cost information. For example, in setting standards for major new sources of air pollution, EPA has been directed to come up with the best technological system for reducing emissions (taking into account the cost of control, any nonair quality health and environmental impact, and energy requirements.) Thus, cost data is relevant to deciding what is the "best" system of control; it cannot be used to second-guess the Congressional decision to require the best technology for these sources or to reevaluate whether to regulate at all.

Questions Posed by Senator Leahy

Question 8. Several of the witnesses the subcommittee heard from recommended that the President or the OMB be given the authority to oversee the agencies' determinations of which rules are major, to designate rules as major, or to waive specific rules from the bill's requirements. Please give us your comments on these ideas.

Answer. Neither OMB nor the President should be given the powers suggested by these witnesses. Combining these substantive powers over agency decisions with OMB's existing power over agency budgets will create a super-agency with several negative results. The decisions of agency experts in their field of expertise may be supplanted by OMB officials with little or no knowledge of the highly technical

regulatory problems. The results of these agency proceedings may be quite different from those intended by Congress. And procedural fairness will inevitably suffer. That is because administrative agency proceedings are governed by strong procedural safeguards, embodied in statutes and case law and refined through years of practical experience, which serve to protect the integrity of the rulemaking process and ensure that decisions are made fairly. Having been historically set up to accomplish other tasks, OMB has never developed these same procedural safeguards for its own internal decisions. Thus, OMB has no rules specifying, for instance, that OMB officials who hear from one interested party to a rulemaking must also hear from others affected by the decision. OMB has no rules ensuring that submissions of interested parties to OMB officials must be reduced to writing and placed in the rulemaking record so that parties with opposing views may question the accuracy or completeness of the facts presented or the conclusions drawn. OMB has no rules specifying that OMB must publish its preliminary conclusions on an issue and expose those conclusions to rigorous public comment and scrutiny.

Yet without these safeguards, the danger exists that OMB officials could unwittingly become a conduit for the views of some outside parties at the expense of others. This would circumvent the carefully crafted framework of the Administrative Procedure Act and thereby undermine public confidence in the intergrity of the process itself.

The dangers of excessive OMB authority are not circumvented by placing these substantive powers directly in the hands of the President. The President will have little time for the detailed and complex factual questions which lie at the heart of these decisions. Thus, Presidential power will most likely be exercised by designees—either in OMB or elsewhere throughout the executive branch, raising the same concerns as a direct grant of power to OMB. For all these reasons, Congress should keep the important substantive powers outlined in these proposals within the agencies themselves.

Question 9. Do you think S. 1080's regulatory analysis requirements will weigh the rulemaking process too heavily in favor of those able to afford high-priced consultants, lawyers and experts? Are the hybrid rulemaking proposals subject to the same criticism? And if so, how can we avoid this?

Answer. The detailed regulatory analysis requirements of S. 1080 will weigh rulemaking in favor of parties with substantially more resources to participate in the process. The hybrid rulemaking proposals increase this danger. The danger can be partially mitigated by: a. limiting the class of affected rules to a very few proceedings, and b. providing intervenor funding for these cases.

Question 10. All of you have indicated your support for increased public participation in agency rulemakings and have endorsed the intervenor funding mechanism. We cannot ignore, however, the state of our economy and the current political climate favoring substantial budget cuts. What suggestions do you have for enhancing agencies' ability to get the views of those affected by their regulations, which we all agree is critical, and at the same time minimizing the administrative costs of agency rulemakings?

Answer. Intervenor funding will cost little in terms of the benefits it will produce: enhanced agency accountability to the public, greater balance in decision-making, and increased public confidence in the process. By contrast, the regulatory analysis provisions of S. 1080 will greatly add to the administrative costs of agency rulemaking, without necessarily improving upon (and in some cases substantially impairing) the results.

The administrative costs of intervenor funding can be minimized by reasonable criteria for distribution of funds and by recovering the costs—at least in permit and licensing situations—from the regulated entity.

Question 11. All of you are concerned with an agency's ability to assess benefits in rulemaking. Do you think S. 1080's provisions for hybrid rulemaking could help develop better benefit data by allowing groups such as yours to challenge both the agency's and the business community's methodology and data?

Answer. In certain limited circumstances, the hybrid rulemaking provisions of S. 1080 may assist development of a more detailed agency record, thus improving benefit data. But in an even larger number of cases the proposals could greatly delay rulemaking proceedings. Moreover, the limited benefits are unlikely to offset the substantial strain which additional analytical requirements will place on existing agency resources.

If Congress wants to assist collection of benefit data, it can do so more effectively and more directly by increasing agency research budgets. It can also limit requirements for detailed regulatory analyses to proceedings in which the necessary funds have been authorized and appropriated.

Question 12. You have raised some legitimate concerns about the agencies' reliance on the regulated industries' assessments of compliance costs. Short of disregarding industry data, what means would you suggest could be incorporated in S. 1080 to avoid this problem?

Answer. Our testimony raises two general concerns about the agencies' reliance on the regulated industries' assessments of compliance costs. The first is that industries pursuing their own self-interest may materially overstate their actual cost of compliance. The second is that even where industry data accurately reflects pollution control costs in the absence of regulation, it may nevertheless overstate the true cost of compliance after agency rulemaking. That is because rulemaking stimulates technological innovation and introduces economies of scale into the pollution control market; these, in turn, serve to lower the cost of compliance.

The first concern can be addressed by amending S. 1080 to:

a. require that agencies only rely on cost data where the source of the data and the methodology for deriving it are (i) sufficiently detailed to permit independent review, (ii) are placed in the rulemaking record for public comment, and (iii) are found by the agency to be reasonably accurate;

b. provide agencies with sufficient additional resources to make independent assessments of compliance costs; and

c. require each company to provide cost data supplied for agency rulemaking to the SEC.

The second concern can be addressed by giving the agencies the additional resources they will need to perform sophisticated regulatory analyses. Agencies should not be required to conduct regulatory analyses unless Congress authorizes and appropriates funds for them.

Senator SIMPSON. Let me ask just a couple of questions.

Taking a case, just for purposes of my example and the question—in the case of *Sierra Club* v. *Froelke,* that was a case that involved the construction of a multimillion-dollar flood control, water conservation, recreation project on, I think, the Trinity River in Texas.

All of the parties to the case, including the Army Corps of Engineers, the other Federal agencies, and the Sierra Club were all able to produce cost-benefit analysis of the project's intangible effects and benefits, such as recreational value.

The point I am making is not that one side or the other had the mathematically correct answer, but simply that the production of the data was not an impossibility.

Opposing sides in that dispute were able to marshal facts to support their contentions, just as opposing sides in a ratemaking case are able to produce accounting and other economic data to support their contentions.

No one here is suggesting eliminating the use of economic data in those types of cases. So why should it not also be used, and even required, in product safety and environmental types of cases as well?

Ms. DUBROWSKI. I think, Senator, no one is suggesting that we not look at the costs of a rule. In fact, in many areas of environmental law—for example, let me take national ambient air quality standards under the Clean Air Act.

Congress has specifically told the Agency it cannot use the cost information to define the ultimate outcome of the rule. EPA still looks at and attempts to develop that cost information.

What we are concerned about is, when Congress enacts a regulatory reform bill, what direction is it giving to the agency? We would hope that that direction would not ignore the costs of rules but would simply not allow the costs to define the objectives of the agency in a way other than that intended by Congress in the enabling statute. That is the real concern.

It is as much a matter of the language used in the bill as anything.

Senator SIMPSON. I think we all, and I think the majority of my colleagues believe that costs must receive new and more vigorous consideration than ever before under the previous way we have been operating the shop.

I sit on the Environment and Public Works Committee, aside from Judiciary, and I have been here just a little over 2 years. Two years ago, the claim was always made, when someone would bring up costs, they would say that costs should never enter the picture here, ever.

The voters have sent a little signal around the horn on November 4 that we should pay attention to the costs, and I think that is where we are. No one is suggesting that cost is the only factor, but it certainly has to be factored into the decision, and in the past it has not. It has just said that if this is good, humane, and marvelous, and above reproach, there should be no consideration of the cost of it.

I really think those days of doing business like that are gone, period. That is my humble opinion. It is not a right-wing conservative screwball from the West saying that. It is just the way others are reacting and responding to the situation. The costs, instead of just being shuffled to the sideline, will be part of the game from now on.

I had a couple of other questions.

I think there is a misconception as to the bill's intent. I think it needs a bit of clarification. This bill does not require that the benefits of a proposed rule must be found to exceed its costs. It does not provide that, but only that the benefits of the proposed rule justify those costs. That is a tremendous difference.

On that basis then, why should an agency be allowed to issue regulations when its own staff is unable to provide that type of reasonable justification for its actions? I might ask you that, Mr. Nichols.

Mr. NICHOLS. Yes; I would like to respond to that.

We think the choice of the word "justify" was an excellent one. We support that idea. Perhaps that shows that just as there are no right-wing crazies in the room, I do not believe there are any left-wing crazies at this table.

We also would like to see cost-effective regulation. What we do not want to see is excessive reliance on a single approach to solving a problem. That is our concern.

For example, in the wording that you just read you left out the word "determination"—the agency must make a determination that the benefits justify the costs. I have no problem with justification. I have some concern about the use of the word "determination."

"Determination," in the history of the Administrative Procedure Act, is something a bit more significant than an estimate, an explanation, or something of that description. It is a finding of the agency.

When you couple that greater significance of the justification to judicial review of that determination—that is where our concern arises. We would prefer that the cost effectiveness analysis be

made but that it not be a substantive standard or be the basis for separate judicial review.

Senator SIMPSON. I thank you, and I wish I had more time for questions.

I would ask this of Ms. Drabble and Ms. Brickey—if you would answer this, in writing, if you would, because of the time problem here. I know you have problems with the definition of the phrase major rule—that it is insufficiently precise, or something like that.

Would you please furnish us what you think would be something to assist us in our drafting and also some of your further thoughts on judicial review? The committee is faced with one simple issue on judicial review: We either have judicial review, or we have the agency judging its own case, and that is not too palatable to us. So share with us your thoughts there.

I wish I had an hour, but we have Congressman Danielson who is here, I believe, and he was to testify at 2 o'clock. I am very appreciative of your testimony.

Ms. DRABBLE. We would be glad to do that, Senator Simpson.

I would just note that one of the things we would include would be a mention of the health and safety effects. In the long list of factors to be taken into account, health and safety are noticeably absent.

Senator SIMPSON. You may feel free to do that, and we will give it our close attention. Without objection, it will be included in the record at this point.

Without objection, we will also include Senator Leahy's questions.

I thank you all for your testimony very much.

We will now go to the next panel. The next panel of witnesses consists of Raymond Momboisse of the Pacific Legal Foundation, and Nicholas Calio of the Washington Legal Foundation.

I ask your courtesy. If Congressman Danielson were to come, I would conclude briefly your statement or questioning and we would hear from him and then get back to you.

Mr. MOMBOISSE. That is perfectly all right.

Senator SIMPSON. Thank you. And I ask again, if you would, please, summarize your remarks. The full remarks will be printed in full in the hearing record. If you would, please proceed.

STATEMENT OF RAYMOND MOMBOISSE, DEPUTY DIRECTOR, LEGAL, PACIFIC LEGAL FOUNDATION

Mr. MOMBOISSE. Thank you very much, Senator.

We have prepared written statements and filed them. I have no intention of reading them. What I would like to do is hit the high points.

I am Raymond Momboisse, deputy director, legal, Pacific Legal Foundation. Pacific Legal is a public interest law firm, and I think the Senator is familiar with it if he has read the Post article.

The *Anchorage* case referred to therein was our case. In that, we had an example of EPA imposing penalties upon a municipality which would have bankrupt them—penalties that were imposed because the plant which had been forced on them by EPA did not work. So we took them into court and attacked the administrative record.

But going to the particular statute involved, for years now we have been concerned with overregulation and particularly with the tendency of many agencies to utterly ignore the cost of the regulations they were promulgating and, likewise, to ignore the benefit, if any, of many of the regulations they promulgated.

That is why we are very impressed with the bill, as proposed. We think it answers many of these problems. In one respect, it is a radical change from the Administrative Procedure Act as it now reads.

The portion that we are concerned with, of course, is the informal rulemaking. Under the Administrative Procedure Act, it has not been changed since 1946. At that time, the philosophy that prevailed was that Congress would enunciate the standards very specifically. They would then delegate the responsibility to implement them to an agency.

The agency was, in the mind of the court, an arm of the legislature and given the same presumption that the legislature was, and that was that there was no need to establish a factual foundation for the regulations they promulgated.

That was the law at the time the Administrative Procedure Act was enacted, and that was the interpretation originally given to it. It was over time that that was changed and changed by the courts.

That is the first thing to consider—this basic change that has taken place in the organization of Government.

In analyzing it further, I think you have to ask, what is the function of each of the branches? The first is, on the part of the legislature, to delegate, and you have designated agencies to promulgate rules and regulations. Therefore, they should have the prime responsibility for doing so. They certainly have the expertise.

The courts, on the other hand, should review that action to determine, first, if it conforms to the procedural requirements which you, as Congress, have established; and, second, whether or not there is sufficient evidence to support the finding. Those are the functions, as we see them. And those are certainly the functions that are envisioned under this bill.

You have also introduced a procedure which is far superior to anything we have now. You have taken the Executive order which requires the regulatory agenda and calendar. This gives advance warning so that there can be the earliest input on the part of an interested person before the regulations reach the stage where they are really frozen in.

Once you have proposed regulations, the chances of changing them at the regulatory level are nil. Time and time again, we try, but by that point there is a vested interest in the regulator.

You have now proposed for notice, which goes far beyond anything we have had in the past—specific chapters and verses—so that approaching it from the standpoint of an attorney who is going to comment, I can now key in on the relevant elements, whereas before it was a shotgun approach.

In one respect, this may answer the problem of whether this will be a more expensive process. It could very well be much less expensive because the parties know where they are going. There

will not be the bulk of material which is now required to try to answer an issue.

Senator SIMPSON. Mr. Momboisse, I am sorry to interrupt, but we do have a serious time problem. I had understood that the witnesses were advised that their remarks would take 2 to 5 minutes. I have allowed you to go beyond that further limit, and we have Mr. Calio, a couple of questions, and then Mr. Danielson will be here, and I will be gone. So, if you could, please summarize in 30 seconds.

Mr. MOMBOISSE. All right. I will finish it up.

Senator SIMPSON. I would appreciate it.

Mr. MOMBOISSE. Finally, the record that is required to be made is utterly priceless to us. Up until this point, we have had nothing to work with until we file suit. At that time, a record is created.

The provisions in the law are a definite improvement in the system from the standpoint of the participants, the agency, and the courts who will review.

Senator SIMPSON. Thank you so much. Without objection, your prepared text will be included in the record at this point.

[Mr. Momboisse's prepared statement and responses to questions posed by Senator Laxalt follow:]

PREPARED STATEMENT OF RAYMOND MOMBOISSE

INTRODUCTION

I am Raymond M. Momboisse, Deputy Legal Director of the Pacific Legal Foundation.

It is an honor to appear here in response to the request of this subcommittee to discuss our experience with administrative agencies and hopefully to be of some assistance to this subcommittee in its efforts to revise and update the Administrative Procedure Act (APA), 5 U.S.C. §§ 551, et seq.

Pacific Legal Foundation (PLF) is a nonprofit, tax-exempt, public interest organization with over 12,000 contributors and supporters located throughout the country, with offices in Sacramento, California, and Washington, D.C. Since its establishment in 1973, PLF has actively engaged in research and litigation over a broad spectrum of public interest issues. PLF advocates a balanced approach in dealing with such issues, and supports the concept that governmental decisions and policies should reflect a careful assessment of the social and economic costs and benefits involved. In short, PLF advocates a broad view of the public interest and seeks to insure that balance and common sense are the bases on which laws and regulations are established, interpreted, and administered.

S. 1080--General Observations

No one can discount the great importance of rule making in our society. The rules created affect every individual in our nation. They touch practically every aspect of our lives. They determine the clothes we wear and the food we eat. They regulate the water we drink and the air we breathe. In a word, they shape our everyday lives, and can determine our destiny.

Unfortunately, in recent years federal agencies have run roughshod over the rights of our citizens. They have often ignored both the mandates of Congress and the cost of their rules.

The impact of overregulation has been recognized by the people, who have made it clear that they wish over-regulation to be stopped and our regulatory structure reduced and modernized.

This bill is directed at revising the Administrative Procedure Act; in particular, those portions of it dealing with informal notice and comment rule making. No branch of government is better qualified to institute the needed changes than is Congress. PLF has participated in a number of such proceedings; in our opinion the proposed bill represents both a culmination of judicial development of the APA and an improvement on current administrative procedures.

The bill's purpose is to impose on an agency the obligation to use procedures that are designed to protect against unsound rule making. It recognizes that the best protection against administrative injustice is not judicial or legislative oversight after the fact, but rather proper administrative action at the outset.

The procedures of S. 1080 are designed to require more thought and careful planning by agencies and to give interested parties early and more complete notice of proposed rules. This will enable those parties to contribute to the process by making more directed, meaningful responses to crucial issues. This will help accomplish the dual objectives of enlightening the agency and protecting private interests against uninformed or unwise action, which has often been caused by a lack of insight into the needs and desires of the persons being regulated.

The proposed law corrects one of the present shortcomings of the procedure, an incomplete record for review. The mandating of a record that is open to all will immeasurably improve the process.

We believe the proposed law is an improvement of the present Administrative Procedure Act.

The proposed law recognizes the judicial interpretations and development of the APA as well as the trend of special legislation which has already applied many of these administrative improvements to rule making under specific statutes. It is this evolution of the law which we wish to stress in our comments. Let us now deal with specific sections of this bill.

Section 3--5 U.S.C. § 553(c)--Notice of Proposed Rule Making

Presently notice is provided for by 5 U.S.C. § 553(b), which reads:

> "General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include--
>
> "(1) a statement of the time, place, and nature of public rule making proceedings;
>
> "(2) reference to the legal authority under which the rule is proposed; and
>
> "(3) either the terms or substance of the proposed rule or a description of the subjects and issues involved."

There is no provision in the statute which requires notice of facts or ideas submitted by others or of facts or ideas that the agency otherwise considers. Nor does it

explicitly require any opportunity to respond to such facts or ideas.

Case law has established that the notice of proposed rule making required under 5 U.S.C. § 553(b) must be sufficient to "afford[] interested parties a reasonable opportunity to participate in the rulemaking process." Forester v. Consumer Product Safety Commission, 559 F.2d 774, 787 (D.C. Cir. 1977). As one court stated in expanding upon this requirement, the notice

> "must disclose in detail the thinking that has animated the form of a proposed rule and the data upon which that rule is based." Home Box Office, Inc. v. FCC, 567 F.2d 9, 35 (D.C. Cir. 1977).

Judicial recognition of the purpose and scope of the required notice has not always, however, been reflected in actual agency practice. In Natural Resources Defense Council, Inc. v. SEC, 389 F. Supp. 689 (D.D.C. 1974), for example, SEC regulations were remanded because the notice of their proposal failed to inform the public of something so elementary as the purpose of the regulations. Id. at 699-700.

By statute, the scope of required notice has been broadened for particular agencies. Thus, 42 U.S.C. § 7191(b)(1) provides that a notice of a proposed rule "shall be accompanied by a statement of the research, analysis, and other available information in support of, the need for, and the probable effect of, any such proposed rule, regulation, or order." The Clean Air Act Amendments of 1977 provide that a notice of a proposed rule "shall be accompanied by a statement of its basis and purpose," including factual data, the methodology, the major legal interpretations and policy considerations underlying the proposed rule, references to

comments of the Scientific Review Committee, and the times when the docket will be open to public inspection. 42 U.S.C. § 7607(d)(3).

The proposed legislation recognizes this development in notice requirement by greatly enhancing the content and usefulness of the notice of proposed rule making. The new notice is helpful to the agency itself, for the law forces the agency, at the very outset, to organize its thinking and to specifically consider the following:

1. specific statutory authority (proposed Section 553(c)(1)(B));

2. congressional intent sought to be achieved (id.);

3. the need for the rules (proposed Section 553(c)(1)(C));

4. the objectives of the rules (id.); and

5. the data base and the purpose for its rule (proposed Section 553(c)(1)(E)).

In those instances involving a major rule the agency must also:

1. describe the benefits of the rule, how each benefit will be achieved, and the person who will be benefited (proposed Section 553(c)(2)(A));

2. describe tne costs of the rule, how they will occur, and the persons likely to bear such costs (proposed Section 553(c)(2)(B));

3. describe the reasonable alternatives (proposed Section 553(c)(2)(C)); and

4. explain how the benefits justify the costs and why the rule is most cost-effective (proposed Section 553(c)(2)(D)).

In addition to forcing the agency to study the rules and their consequences, the detailed notice enables interested parties to more intelligently respond because they know the issues and the basis for them. Especially in the case of major rules, the enumerated factors which must be contained in the notice of proposed rule making will contribute to public understanding of the issues involved, to the quality of the response received by the agency from the public, and to the final decision ultimately made by the agency.

Section 3--5 U.S.C. § 553(d)(5)--No Authorization for Agency Payments to Rule Making Participants

This section makes clear that an agency is not authorized by the Act to pay attorneys' fees or other expenses of persons participating or intervening in agency proceedings.

PLF has opposed such payments for they are unnecessary and serve no useful purpose. They add immeasurably to the cost of rule making. Often, rather than resulting in a more complete record such payments have generated a biased, overblown record. They have encouraged delay and confusion which has slowed down and unduly prolonged rule making.

Section 3--5 U.S.C. § 553(e)--Basis and Purpose for the Rule

At present Section 553(c) states:

> "After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose."

Nothing in the statute requires that this statement of basis and purpose be supported by facts. The section does not require findings, conclusions, or reasons for the rule. The requirement is not for a detailed statement, or a summary of supporting facts, or a reasoned analysis, or a full account

of objectives of the rules--all that is required is a "concise general statement of [their] basis and purpose." The reason is historically clear. In 1946, when the APA was enacted, the universal assumption was that, just as Congress need not provide factual support for its enactments, an agency need not develop factual materials in support of rules. The law on the subject had been laid down by Mr. Justice Brandeis, speaking for a unanimous Court in Pacific States Box & Basket Co. v. White, 296 U.S. 176, 186 (1935): "[W]here the regulation is within the scope of authority legally delegated, the presumption of the existence of facts justifying its specific exercise attaches alike to statutes, to municipal ordinances, and to orders of administrative bodies." The APA was written with the background of the Pacific States case; nothing in the APA or its legislative history is inconsistent with the case.

But with the upsurge of rule making in the 1970's, the requirement of a statement of basis and purpose came to life. Not only did the courts require such a statement but they began to require a good deal more than that. They often demanded that rules be supported by facts, and in such cases the courts required a summary of the facts in the form of what are commonly called "findings." The courts went even further than that: When an agency rejected an important factual comment, the courts sometimes required the agency to respond to that comment with factual materials. E.g., National Association of Food Chains, Inc. v. Interstate Commerce Commission, 535 F.2d 1308, 1318 (D.C. Cir. 1976); Hooker Chemicals & Plastics Corp. v. Train, 537 F.2d 620, 634 (2d Cir. 1976); Portland Cement Association v. Ruckelshaus, 486 F.2d 375, 395 (D.C. Cir. 1973), cert. denied, 417 U.S. 921 (1974). The judicial movement toward requiring something in the nature of findings and reasons for rules has been powerful

and broad, and the degree of the requirement is often well beyond what Congress required in 1946.

Congress too has within the last decade required findings and reasons in specific statutes. E.g., 15 U.S.C. § 57a(d)(1); 15 U.S.C. § 2058(c)(2); 15 U.S.C. § 2605(c)(1); 29 U.S.C. § 655(b)(8); 29 U.S.C. § 655(e); 42 U.S.C. § 7191(d); 42 U.S.C. § 7607(d)(6).

Proposed Section 553(e) recognizes the judicial and statutory trend towards requiring findings, conclusions, and reasons. But more importantly, it forces the agency to thoroughly consider the rule and its ramifications, and to show that it is supported by the record. This amendment is highly desirable.

Section 3--5 U.S.C. § 553(f)--The Rule Making Record

The existing APA has no provision for an administrative record in informal rule making proceedings. This is understandable in that at the time of its enactment there was a presumption that facts existed and to sustain the rule the burden of rebuttal was on the one attacking the rule. The dominant assumption about rule making was that rules embody an interpretation of a statute or a policy choice, and that nothing in the nature of a record was necessary. The great increase in rule making during the last decade brought the realization that the factual ingredient of rule making is often vital, and that a record is essential when factual issues have to be fought out by litigants and reviewed by the courts.

There is provision in the Federal Rules of Appellate Procedure for an administrative record. Rule 17 states that, when review of a regulation is sought in a court of appeals, "[t]he agency shall file the record with the clerk of the court ... within 40 days after service ... of the petition for

review ...." The only guidance on what the record must contain is given in Rule No. 16(a), which states that "[t]he order sought to be reviewed or enforced, the findings or report on which it is based, and the pleadings, evidence and proceedings before the agency shall constitute the record on review in proceedings to review or enforce the order of an agency." Except for certain other statutes governing specific agencies, the existing law on informal administrative rule making record has been developed by courts.

Court decisions have established that the rule making record must include "any document that might have influenced the agency's decision." National Courier Association v. Board of Governors of the Federal Reserve System, 516 F.2d 1229, 1241 (D.C. Cir. 1975). This includes not only the evidence on which the agency relies, but also evidence in the agency's possession that contradicts its position--"the evidence relied upon and the evidence discarded." Ethyl Corporation v. Environmental Protection Agency, 541 F.2d 1, 36 (D.C. Cir. 1976), cert. denied, 426 U.S. 941 (1976).

The record must not only be available to the public, it must be intelligible as well. Documents which are "obscure if not incomprehensible to readers lacking a key to the[ir] meaning" will not suffice. WNCN Listeners Guild v. FCC, 610 F.2d 838, 847 (D.C. Cir. 1979).

Finally, the record which is eventually presented to a court must be the actual record utilized in the decision making process, and "not some new record made initially in the reviewing court." Camp v. Pitts, 411 U.S. 138, 142 (1973).

This piecemeal case-by-case approach has not been satisfactory. The problem with the "records" currently certified to the courts is that their content is unknown until

judicial review is well under way. This may lead either to inclusion of far more documents than are needed to understand the rule or to exclusion of documents that have a legitimate bearing on it. As a result the courts are confronted with huge, unwieldy records, and are forced to spend undue effort in weighing the parts of each record and extracting underlying reasons from the documents--jobs which the agencies should have done themselves.

Agency practice has often varied widely from court requirements. A chief reason for this is the current absence of any general statutory requirement that a record, available to the public, be established at some point before a final decision is made. Unless some special statutory provision requires otherwise, no discrete record is currently necessary in informal rule making until a court challenge is begun. Such an action brings 28 U.S.C. § 2112 into play, which requires that either the record, or an index to it, be filed with the court. At that point, of course, the agency's instinct is to find everything that conceivably supports its decision and claim that these materials, together with publicly filed comments, constitute the record. Unfavorable material, on the other hand, especially if its existence is known only to the agency, will not be handled so carefully. In fact, such material may even be concealed. PLF encountered an example of this after we filed suit against the Department of Transportation regarding its passive restraint regulation. We discovered that the agency had concealed, for two and one half years, an internal study of airbag equipped cars whose findings squarely contradicted the position of the agency. The agency claimed at first that the document was privileged; it finally abandoned that position and released the study, together with a newer document which allegedly

refuted it. The concealment of the study did not suffice as a ground upon which to invalidate the regulation at issue. Pacific Legal Foundation v. Department of Transportation, 593 F.2d 1338 (1979), cert. denied, 444 U.S. 830 (1979). Had the document been made public at the time it was written, rather than long after the close of the decision making, it would have had considerable impact on the public debate over passive restraints.

The existence and availability of an administrative record is essential for both public comment and judicial review, and it is necessary that such a record be prepared at the outset of the rule making--at the time a rule is proposed rather than when it is brought before a court for review. The proposed legislation would do much to remove the problem of inadequate, or nonexistent, rule making records. It defines the record and requires that it be publicly described both when a rule is proposed and when the rule is published in final form. Public accessibility is mandated, and agency reliance on outside nonrecord materials is forbidden.

The problem of internal "privileged" documents is dealt with by the requirement that their existence be noted in the record. This will alert interested parties and allow any claims of privilege or confidentiality to be tested during the rule making, rather than afterwards when it may be too late for practical purposes.

Under the proposed system, all parties would be forced by the threat of adverse legal consequences to make their contributions to a clearly defined record while rule making was in process, and that record could then be sent to the court. The court would know that all the documents before it had been available to all participants in the rule making. This is by far superior to the present system of record preparation.

Section 4--5 U.S.C. § 560--Review of Agency Rules

Section 560 is new. It requires the preparation of a schedule of review of all major rules now in effect.

As agencies have in recent years poured forth a stream of major rules with total disregard to their benefits and costs, this section forces a much needed review and reevaluation.

Section 5--5 U.S.C. § 706--Judicial Review

In evaluating this section, it is essential to set forth our conclusions as to the status of the agencies and the courts in the rule making procedure,

Agencies have been created by Congress, which has delegated to them a portion of its legislative powers. Congress has entrusted to the agencies, not the courts, the authority to shape policy and implement the statutes which they enforce.

The problem is in no small part the result of Congress's failure to be specific when it delegates responsibility and establishes defined limits of authority. During the past decade the tendency to enact broad general laws and then delegate to an agency the responsibility to define them has encouraged and, at times, forced agencies to exercise tremendous power without proper legislative guidance. The results have been a cascade of regulations which have so overburdened the people that they have demanded reform.

In response to this public outcry, some would suggest bestowing on the courts such power that they would in fact replace the agencies as the implementors of statutes. This flies in the face of the intent of Congress, which for years has been to delegate such power to agencies and not to the courts.

Moreover, the courts are not designed or staffed to assume such responsibility. Indeed, relying on the courts to curb "overregulation" is a questionable strategy.

Unquestionably the courts have a role to play. They afford remedies to persons injured by invalid action. They void arbitrary action. They secure the benefit of judicial determination of issues of law. Indeed, judicial review works best when it is invoked to curb departures from the body of procedures that Congress has ordained.

But in the last analysis, if the system is to function properly the discretion and power to develop policy and implement and enforce legislative programs must, with statutory limits, reside with the agencies, not the courts. Thus, the courts must not substitute their views for those of an agency, when the decision has been properly reached and justified by the administrative record.

There are certain portions of this section that deserve individual comment.

The distinction drawn in proposed Section 706(a)(2)(F) between factual basis as distinguished from policy or legal basis is justified and desirable.

Proposed Section 706(c) provides in part that in determining questions of law, the court shall not accord any presumption in favor of or against agency action. It would appear that as now drafted the proviso that no presumption shall be accorded agency action does not apply to questions of its jurisdiction or authority. We believe that the resolution of questions regarding the jurisdiction and the authority of the agency should be made independently by the court, without any presumption in favor of agency action.

The second provision in Section 706(c) is that, in determining "other questions of law," the court shall not

accord any presumption in favor or against agency action. The problem here is the ambiguous scope of the term "other questions of law." Does the term include broad range concepts that include mixed questions of law and fact? Further definition is in order.

Section 6--28 U.S.C. § 2112--Venue

The proposed changes in venue are important for they eliminate the "race to the court." Such races are wasteful and have led to a considerable number of disputes regarding venue in cases where petitions for review have been filed in several circuits. Under 28 U.S.C. § 2112(a), the party who is first to file has a significant advantage in selecting the court which will review the agency action. This has sometimes led litigants to take extreme measures involving the use of stopwatthes and walkie-talkies, in attempting to be the first to file. Courts have been faced with questions regarding the split-second accuracy of their clerks' timepieces. In United Steelworkers of America v. Marshall, 592 F.2d 693 (3d Cir. 1979), petitions were time stamped ten seconds apart in Philadelphia and New Orleans. The court was then faced with the contention of the losers in that race, backed by affidavits, that the timepiece in the clerk's office in another circuit was inaccurate. The court stated:

> "Unlike race tracks ... courts are not equipped with photoelectric timers, and we decline the invitation to speculate which nose would show as first in a photo finish." 592 F.2d at 695.

In American Public Gas Association v. Federal Power Commission, 555 F.2d 852 (D.C. Cir. 1976), a similar dispute arose involving petitions time stamped "12:01:00" versus "12:01:01" and "12:01:02." Id. at 856 n.1.

Litigants have also filed numerous successive petitions as an agency took a series of related steps, because there was no certainty as to which step would eventually be held to constitute the official final agency action triggering the race. In Southland Mower Co. v. Consumer Product Safety Commission, 600 F.2d 12 (5th Cir. 1979), five separate sets of petitions were filed over a period of only a month as a regulation was voted on, signed, delivered to the Federal Register, published, and finally deemed officially promulgated.

While such benavior has its comic overtones, it is also expensive and, in the words of one court, "a rather unseemly spectacle." Industrial Union Department, AFL-CIO v. Bingham, 570 F.2d 965, 970 n.9 (D.C. Cir. 1977).

The proposed legislation establishes a ten day period within which petitions may be filed, rather than the literally split-second interval which now exists. While there might still be uncertainty in some cases as to what agency action triggers the ten day period, the need for a race to the courthouse will be largely eliminated. Moreover, the random selection feature of the bill would insure that judicial power over agencies does not become concentrated in any one circuit.

Section 7--5 U.S.C. § 561--Regulatory Agency and Calendar

The new section would mandate the publication in the Federal Register in April and October of each year an agenda of the rules each agency expects to propose, promulgate, renew, or withdraw in the succeeding twelve months.

Regulatory agendas are currently required of executive agencies by Section 5 of Executive Order No. 12291, 46 Fed. Reg. 13193 (Feb. 19, 1981). The proposed legislation would extend this requirement to independent regulatory agencies as well.

The periodic publication of agendas is valuable for a number of reasons. It opens for public view the sum total of an

agency's regulatory plans. The public is given advance notice of individual forthcoming proposals and the ability to participate in the early formulative period of regulation drafting. More importantly, the agenda facilitates public understanding of, and comment on, an agency's rule making priorities in their entirety. This facilitates the evaluation of an agency's overall activity, as compared to the piecemeal picture received by the public from individual rule makings. Finally, requiring agencies to summarize their intentions in this manner can only help their own operation.

CONCLUSION

Although there are certain areas of uncertainty in the proposed bill which must be addressed, the bill proposes changes in notice, procedure, record, and review that will strengthen and improve the informal rule making procedure. Indeed, the detailed procedural standards will force the agencies to give much more attention to the entire process, to compile a more serviceable record to justify their actions and to facilitate meaningful public participation and judicial review.

Questions By Senator Laxalt to Mr. Momboisse

Question 1. Assuming that the President or his designee is given the authority to designate certain rules as "major," do you feel that the President or his designee should also have the power to waive regulatory analysis for certain major rules? If you support such waiver authority, please give specific examples (in addition to IRS rules) of rules for which such a waiver power would be needed. If you favor such waiver power, but with criteria set out in the statute, please elaborate on the details of such criteria. In addition, if you favor the addition of a waiver power, please explain why you do not feel that putting such discretion in the Executive inserts a major loophole in the requirements of S. 1080. Should the exercise of such a power be subject to judicial review?

Answer. No. There should be no additional presidential authority to waive regulatory analysis for major rules. We assume that this question covers only the ten-year periodic analysis of existing major rules in proposed Section 560; however, the reasons would apply even more strongly against any presidential authority to waive the provisions governing proposed major rules.

The goal of Section 560 is to facilitate the removal of major rules which have outlived their justification. The method by which this goal is accomplished is through mandatory public reexamination. This is not the type of process suitable for presidential involvement. A presidential waiver would be aimed at protecting a rule supported by the President, but its effect would be to make the case for the rule appear to be too weak to withstand scrutiny. Exercising the waiver would thus probably trigger petitions to amend or repeal the rule at issue and would only serve to highlight its weakness.

Question 2. Should the determination of what is a major rule be subject to some form of judicial review? If you believe that there should be some limited judicial review, please explain how such review should be limited.

Answer. Yes. There should be judicial review of an agency's determination of whether a rule is major. Without such review, the requirement that such determinations be made would become meaningless. Such review is already available under the current bill.

Under the proposed legislation, such determinations are made in two areas—in proposing new rules, and in subjecting existing rules to ten-year review. The only limitation on judicial review is contained in proposed Section 553(f)(3)—that partial limitation applies only to the promulgation process, and not to the periodic review process.

A failure to designate a rule or proposed rule as major would probably give rise to a judicially cognizable *informational* injury. *Cf., Scientists' Institute for Public Information* v. *AEC*, 481 F.2d 1079, 1087 n.29 (D.C. Cir. 1973). A party could claim that, as a result of such failure, it was denied information (regarding costs and benefits) which would otherwise be available to it and which it needs, for example, in order to fully participate in the rule making process.

Perhaps the most serious problem with such actions is the possibility that they would delay ongoing rule makings. This possibility could be minimized by changing proposed Section 553(f)(3) as follows: "(3) No court shall hold unlawful or set aside an agency rule, or restrain a rulemaking proceeding, because of * * *."

A court could still order an agency to produce the information required for major rules; it could even require that the information be produced while the rulemaking is pending—but the rule making itself could still proceed.

Question 3. When considering the definition of a major rule, most witnesses addressed subparagraph (i), dealing with $100,000 million in compliance costs. Do you feel that subparagraphs (ii) and (iii) are too vague to be practically useful? Are these subparagraphs necessary?

Answer. Subparagraphs (ii) and (iii) of proposed section 551(16)(A) are neither too vague nor unnecessary. The provisions use terms similar to the "significantly affecting the * * * environment" language of NEPA, 42 U.S.C. § 4332(2)(C). That provision, which triggers the preparation of environmental impact statements, has been adequately handled by the courts. It has not proven to be too vague.

Subparagraphs (ii) and (iii) do set forth criteria which we believe justify major rule procedure. These criteria are not encompassed in subparagraph (i), and should therefore be set forth separately.

Question 4. One of the witnesses spoke of the different balances of regulatory benefits and costs set by Congress in other statutes. Has Congress set such "balances" in other statutes? If so, do those Congressional judgments in other statutes preclude the application of S. 1080's regulatory analysis? Please be specific in your references to provisions in other statutes.

Answer. Arguably, many statutes set different balances than that of cost-effectiveness, and other statutes set no balances at all. The National Traffic and Motor Vehicle Safety Act of 1966, 15 U.S.C. §§ 1381, et seq., requires that auto safety standards be "reasonable, practicable, and appropriate." 15 U.S.C. § 1392(f)(3). But as least some legislative history states that "safety shall be the overriding consideration * * *." S. Rep. No. 1301, 89th Cong., 2d Sess. 6 (1966). It is at least arguable here that, even if all costs and benefits can be quantified, the latter need not justify the former.

In the Marine Mammal Protection Act, 16 U.S.C. §§ 1361, et seq., a number of factors are specified for consideration in setting regulations: the existence and population of marine mammal stocks, fishery resource utilization, and economic feasibility. 16 U.S.C. § 1373(b). However, it has been held that "the interests of the marine mammals come first * * *." *Committee for Humane Legislation, Inc.* v. *Richardson*, 414 F. Supp. 297, 309 (D.D.C. 1976), *aff'd*, 540 F. 2d 1141 (D.C. Cir. 1976).

In the case of any statute designed to further a certain purpose, it can be argued that that purpose takes precedence regardless of its quantified value.

Because S. 1080 explicitly yields to other statutes in cases of conflict (proposed Section 553(e)(2)(B)), there is no inherent conflict. Even when other factors are statutorily paramount, moreover, the information called for by the bill would nonetheless serve an informative purpose—the public would, for example, at least know what a regulation was costing even though cost might not be relevant under the statutory scheme.

Question 5. In the past, some have suggested that all judicial review of rule making be vested in the Court of Appeals. Do you support such a change in jurisdiction? If so, please discuss the practical application of such a change. How would such a jurisdictional change affect post-enforcement review of rules? Don't

the District Courts offer more opportunities for settlement than the more rigid procedures of the Courts of Appeals?

Answer. Judicial review of rule making should not be made the exclusive province of circuit courts. Some discovery is often necessary to assure that the official agency record is complete and accurate, but discovery is often difficult, if not impossible, to obtain at the appellate level.

Question 6. Should a deregulatory rule making be subject to regulatory analysis?

Answer. The repeal of a rule, in whole or part, should not be subject to regulatory analysis. The intent behind S. 1080 is not to require that agency action per se be justified by such analysis, but that agency regulation be justified. This requirement should apply not only to regulations which are proposed in the future, but also to regulations which exist now and which the agency may wish to repeal prior to any ten-year periodic review.

Question 7. Many have said the regulatory analysis should not be the sole criterion of a rule making. What impact should regulatory analysis, as provide in S. 1080, have on a particular regulatory decision? What other criteria should be guiding a regulator in addition to the regulatory analysis?

Answer. Regulatory analysis is clearly not the sole criterion for rule making under S. 1080. It is merely part of the procedure and becomes part of the rule making record against which the ultimate validity of the rule will be tested.

To the extent that there are no significant problems with quantifying all costs and benefits, we believe that the determination required under S. 1080 is a good criterion for rule making—unless a specific statute requires some other factor. We emphasize that S. 1080 does not set out any "sole" criterion—it rather requires that all impacts of a proposal be considered. The fact that the determination need not be mathematical in nature allows sufficient leeway for unquantifiable factors such as the monetary value of human life.

Because S. 1080 is essentially a procedural statute, its introduction of a substantive requirement (that the agency determine that benefits justify costs) may not be fully effective. At a minimum, however, the required regulatory analysis will at least bring to the foreground factors that an agency might otherwise ignore. Whether and to what extent the agency will be guided by the balancing of these factors depends on: 1. The specific statutes under which the agency operates; 2. The clarity of the legislative history of S. 1080 on the question of congressional intent to impose a substantive requirement for rule making through this law; and 3. Judicial interpretation of S. 1080.

Assuming that the language of S. 1080 remains unchanged, the area of greatest opportunity for congressional influence is, of course, through the legislative history of the bill. In order to successfully implement regulatory analysis as a rule making criterion, the authoritative House and Senate reports must make it clear that Congress intended to impose a new substantive requirement, despite its use of a procedural vehicle (the APA) for doing so.

As far as the guiding criteria, the following are pertinent: 1. Necessity to achieve purpose of statutory provision which sets out congressional intent the rule is to implement; 2. Consistency with the facts being addressed by the rule; 3. A determination supported by the record that benefits justify costs and adverse effects; 4. Rule will achieve objectives (see No. 1 above) in a more cost effective manner than alternatives; and 5. All other standards which apply, e.g., not arbitrary and capricious or contrary to law and within scope of jurisdiction.

It is obvious, of course, that the rule maker is still left with substantial discretion to decide how the rule will achieve the statutory objectives. However, rule making would be basically meaningless if the rule maker did not have substantial discretion. The purpose of S. 1080 is merely to guide that discretion and to require that the way in which it was exercised be justified on a public record.

Question 8. Some have supported a requirement for agency descriptions of the effects of a rule, but have at the same time opposed any requirement for an agency determination concerning the relationship of those trade offs. Do you feel such a determination (as in S. 1080, the benefits "justify" the costs, and the rule is a "cost-effective" alternative) is necessary to make regulatory analysis worthwhile?

Answer. The determination that benefits justify costs is not absolutely necessary in order for the regulatory analysis to be worthwhile. Even without such a determination, the regulatory analysis would at least spell out the costs and benefits, and would contain a comparison of them, in short, the regulatory analysis would still play an informative function.

But without the determination, however, the regulatory analysis would not serve any substantive function, because the agency would no longer be compelled to be guided in some manner by the information in the analysis. This would greatly detract from achieving the purpose of S. 1080.

It must be recognized that this determination requirement does little to actually limit the discretion of the rule maker. It merely forces the rule maker to demonstrate on a public record the rationality of the way he has exercised his discretion. He still determines what the "benefits" are and what "costs" and "adverse effects" are. He also decides whether the relationship of these "justifies" the rule. He likewise decides which alternatives will "achieve the objectives." Cost benefit analyses are not precise and rigorous requirements. They are extremely flexible and imprecise. The results are easily manipulated to conform to agency desires. See Rodgers, "Benefits, Costs and Risks: Oversight of Health and Environmental Decision Making," 4 Harvard Environmental Law Review 191 (1980).

Question 9. One witness contended that the regulatory situation was getting "worse." Does this mean that E.O. 12291 is not working? Why is legislation needed?

Answer. If the regulatory situation is getting "worse," it is doing so mostly in the area of substance. Procedurally, the biggest problem may be with respect to rule making records that are so large that they are useless. Legislation to replace Executive Order No. 12291 is necessary in order to: 1. Cover *all* agencies, rather than only the executive agencies covered by Executive Order No. 12291; 2. Add some degree of permanence to the new requirements; 3. remove existing questions regarding the legality of the Executive Order's requirements, especially those requirements of a substantive nature; and 4. Provide for judicial review in order to assure enforcement of the new requirements.

Question 10. Why not have a standard for rule making that a final rule should be the one that saves the most lives and avoids the most injuries, unless the agency offers an explanation to the contrary?

Answer. The value of human lives and personal safety and health is always included in any reasonable cost benefit analysis. The subject is certainly covered by S. 1080. But, a standard that the most lives be saved, and the most injuries be avoided, it unsatisfactory for the simple reason that it totally omits any consideration of costs and is thus impossible to satisfy in a world of finite resources. Jobs and cars that are as safe as possible may be theoretically satisfying, but they are totally useless if society cannot afford them. As one commentator has noted, the failure of the Clean Air Act is largely due to the fact that government was unwilling to put a price on clean air, when in fact it was absolutely necessary to establish such a price in order to act intelligently. W. Tucker, "Marketing Pollution," Harper's Magazine 31 (May 1981).

Question 11. The "General Requirements" of E.O. 12291 (Section 2) are imposed "to the extent permitted by law." What does this phrase mean? What law does not permit the requirements of E.O. 12291 to be applied to regulatory action? What law limits the application of E.O. 12291?

Answer. The phrase "to the extent permitted by law" in Executive Order No. 12291 is, of course, a formal recognition within the order that it cannot override any statutes whatsoever. The order further limits itself by explicitly omitting independent agencies from its coverage. A listing of all the specific statutes which limit the order will not be attempted here—two examples are given in the answer to Question 4.

Senator SIMPSON. Mr. Calio?

STATEMENT OF NICHOLAS E. CALIO, LITIGATION COUNSEL, WASHINGTON LEGAL FOUNDATION

Mr. CALIO. Thank you, Senator.

I am Nicholas E. Calio, litigation counsel for the Washington Legal Foundation. On behalf of the Washington Legal Foundation, let me thank the distinguished members of this subcommittee for their invitation to testify on S. 1080.

WLF is a public interest organization that engages in litigation and the administrative process in matters involving Government regulation, constitutional issues, and victims' rights. The Washington Legal Foundation has 80,000 members, the vast majority of which are individual consumers. My comments reflect solely the interests of our members and the general public, not any organizational interest of the Washington Legal Foundation. We are not lobbying for or against the passage of this legislation, but offering

our views on its public interest aspects based upon our administrative law experience.

I will try to make my comments as brief as possible, Senator.

The Washington Legal Foundation supports what we perceive as the long-term goals of this legislation—to streamline the administrative process and to eliminate costly and ineffective regulations. WLF also believes that one has to misread the statute to find some other intent.

The Washington Legal Foundation is committed to the principles of a free market economy and believe that Government interference in the private sector can be justified—I believe Mr. Danielson is here?

Senator SIMPSON. Mr. Calio, I am going to give you a little extra time, but the Congressman is here, and if he is flitting around like we flit around when we are over there, I am going to recognize him at this point, and then we will come back to you and stretch the time to fit your presentation and some questions.

Mr. CALIO. Thank you.

Senator SIMPSON. Our next witness is George Danielson.

It is nice to have you here, George.

Mr. DANIELSON. Thank you very much.

Senator SIMPSON. He is chairman of the House Judiciary Subcommittee on Administrative Law and Governmental Relations.

You, sir, have worked diligently in this area for so many years of your many years in Congress. As one of your opposite Members here in the Senate, I appreciate the difficulty you have had and we have all had in trying to get some sound legislation. You have presided over this for some time, and you have done an excellent job of that.

STATEMENT OF HON. GEORGE E. DANIELSON, A REPRESENTATIVE FROM THE STATE OF CALIFORNIA, AND CHAIRMAN, SUBCOMMITTEE ON ADMINISTRATIVE LAW AND GOVERNMENTAL RELATIONS, COMMITTEE ON THE JUDICIARY, HOUSE OF REPRESENTATIVES

Mr. DANIELSON. Thank you very much, Senator Simpson. With that, I can go home this weekend and walk around with a smile on my face. The only problem is that no one as young as I could have spent that much time on this particular bill.

Senator, with your permission, I would like to ask unanimous consent to have my written statement submitted for the record.

Senator SIMPSON. Without objection, it is so ordered.

Mr. DANIELSON. I will not abuse your time. I will just touch upon a few points.

One, I am most delighted and grateful that you and your colleagues have decided to proceed on regulatory reform this year. I think it is something that we very much need to act upon.

The Congress has an obligation in seeing to it that the laws are faithfully executed, and one prerequisite is to see to it that we have a procedural process which will enable the regulatory agencies to carry out their function.

I want to point out that among my concerns is that while we are working on the Administrative Procedure Act we not be seduced by the temptation to move into the substantive field. We all are to

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some extent, because those are the fields where our constituents are concerned.

I am sure that you, sir, as I, receive complaints frequently that something is wrong with the way the OSHA laws are being enforced, or the clean air laws, or the clean water laws, and it will go on and on and on.

We cannot tinker with those laws in the Administrative Procedure Act, but I think it is our duty to put together a procedure in which the regulatory agencies must perform certain functions in order to be sure that the regulations which they promulgate properly address the problem that they have been charged with enforcing.

With that in mind, I urge that any bill, whether it come from this body or our own, clearly require that the agencies identify what in the world their objective is before they go to work and start drawing up a regulation. If they know where their target is, they might be able to shoot in that direction, and that will help.

Today, there is such a proliferation of regulations and they address every subject on Earth, that I think we have to narrow the focus by sharpening the aim.

Second, I think they must identify their statutory authority. I think sometimes, if an agency were compelled to look back into the organic act and find out just what did Congress tell them to do, and how did they want them to do it, that might help them direct their attention to the points that they seek to address.

What I am trying to say is that we should stick to procedure, but we should, I believe, prescribe the procedures carefully enough so that the regulatory agencies cannot miss the target and will not stray into fields in which they are not authorized to stray.

This would avoid the outcry for such things as legislative veto because, after all, if they stay within their own parameters there is nothing to veto. This would probably even eliminate much of the demand for such things as the Bumpers amendment. If they just stay within their own area of jurisdiction and address the problems that they are supposed to address, we can eliminate so much of the irritating regulation that now afflicts us.

I am glad to know that this body is working, as are we, on the concept of cost-benefit analysis. Again, though, we have to be level-headed, in my opinion. Many costs and benefits simply cannot be quantified. I do not think anyone here fails to recognize that the factors that promote human life and human safety are factors that must be recognized, and some of those are going to cost more to enforce than others.

Some very important regulations may cost a great deal of money, but if they are essential for the well-being of our people, then, of course, they must be addressed, and those costs have to be recognized.

I am glad to know that you people are working hard on that. I can assure you that we are. I certainly share the concern of everyone today that once we find out what the regulatory goal is, then the process of achieving that goal should be addressed in the least burdensome, least costly manner. But we should not sacrifice the goal for the cost. We should bring the two into balance.

I am trying, and we are trying on our side, to cut down on formality in the regulatory process. There is a natural temptation when we are redrawing laws such as the APA to feel that, well, the agencies have gone overboard here and they have gone overboard there, so, by golly, we are going to build little walls so that they must jump over each of them before they get to the other end, and thereby avoid the proliferation of regulations and avoid the fact that regulations are issued which do not address a problem.

But, you know, in doing that, we can sometimes prescribe so many procedural steps and niceties that, rather than cutting down on the burden, we are actually adding to it. I think this is a hazard that we have to watch out for all along the line.

I would hate to have all of us in the Congress work as hard as we have been doing, and are yet to do, and then find out in the end that we contributed to the problem rather than worked out a solution. I think we have to be on guard for that.

I know we are trying to do that, and I am sure you gentlemen are over here. I just think that if we work together and are not unwilling to criticize each other when we stray a little bit we can come up with a solution that will truly do some good.

I really have nothing much else to bring up. I have touched on a few more points in my written statement, but that is before you anyway. If you have any questions, I would be delighted to try to answer them.

Senator SIMPSON. I deeply appreciate your coming here and the real dedication you bring to this issue. With your reputation in the House and being of the right faith over there, too, I think we are going to get some things done for the first time, and very necessary things.

Without objection, we will insert your prepared text in the record at this point.

[Representative Danielson's prepared statement follows:]

TESTIMONY OF REPRESENTATIVE GEORGE E. DANIELSON
BEFORE THE
SUBCOMMITTEE ON REGULATORY REFORM
OF THE SENATE JUDICIARY COMMITTEE

MR. CHAIRMAN AND MEMBERS OF THE SUBCOMMITTEE, IT IS A GREAT PLEASURE TO APPEAR BEFORE YOU TODAY.

REGULATORY REFORM HAS BEEN A MAJOR ISSUE OF THE HOUSE SUBCOMMITTEE ON ADMINISTRATIVE LAW AND GOVERNMENTAL RELATIONS, WHICH I CHAIR, FOR OVER SIX YEARS. SO FAR THIS YEAR, WE HAVE HELD 8 HEARINGS AND WE INTEND TO BEGIN MARKUP OF H.R. 746, THE REGULATORY REFORM BILL I INTRODUCED, AT AN EARLY DATE. YOUR INTRODUCTION OF A REGULATORY REFORM BILL, S. 1080, AND YOUR EARLY SCHEDULING OF A HEARING ON THIS ISSUE DEMONSTRATE YOUR RECOGNITION OF ITS IMPORTANCE.

DURING THE PAST 30 YEARS, SINCE THE ADMINISTRATIVE PROCEDURE ACT BECAME LAW, THE INVOLVEMENT OF THE FEDERAL GOVERNMENT THROUGH REGULATION IN THE ECONOMIC, BUSINESS, AND SOCIAL AREAS OF AMERICAN SOCIETY HAS INCREASED SUBSTANTIALLY. MANY OF THESE REGULATIONS ARE VITALLY IMPORTANT AND ADDRESS GOALS THAT CANNOT BE ACHIEVED THROUGH MARKET FORCES ALONE, SUCH AS REGULATIONS CONTROLLING THE COMPETITIVENESS AND TRUTHFULNESS OF THE MARKETPLACE ITSELF. IN FACT, IN SOME CASES, WE NEED MORE REGULATIONS, NOT LESS. ONE OF THE LESSONS OF THE THREE MILE ISLAND ACCIDENT IS THAT REGULATION OF NUCLEAR PLANTS MUST BE TOUGHER. ALSO, IN THE 1980'S WE MAY NEED NEW REGULATIONS TO DEAL WITH THE INCREASING NUMBER OF CHEMICALS IN THE ENVIRONMENT AND OUR INCREASING KNOWLEDGE THAT MANY OF THEM ARE DANGEROUS.

NEVERTHELESS, WHILE REGULATION IS A VITAL TOOL IN HANDLING THE PROBLEMS OF THE MODERN, INDUSTRIAL ECONOMY, YEARS OF NEGLECT AT THE TOP OF THE GOVERNMENT HAVE ALLOWED REGULATION TO GO TOO FAR. MANY REGULATIONS HAVE PLACED HEAVY BURDENS ON THOSE SUBJECT TO THEM. COSTS OF COMPLIANCE WITH REGULATIONS HAVE FORCED SOME BUSINESSES TO CLOSE THEIR DOORS. AT THE SAME TIME, OTHER CONFLICTING REGULATIONS HAVE PLACED CITIZENS IN THE POSITION OF HAVING TO VIOLATE ONE OR THE OTHER OF SUCH REGULATIONS AND OF NOT KNOWING WHICH WAY TO TURN. IN ADDITION,

THE FINANCIAL BURDEN IMPOSED BY THE FILING OF FORMS, THE HIRING OF STAFF TO COMPLETE THOSE FORMS, AND THE CHANGES REQUIRED IN METHODS OF OPERATION HAVE MOST CERTAINLY ADDED TO INFLATION.

CLEARLY, THEN, FEDERAL REGULATION IS CAUGHT IN A CROSS-FIRE. SOME FEEL SOCIAL REGULATIONS ARE TO RIGID AND TOO COSTLY, SEE NO REASON TO DISRUPT LONG-ESTABLISHED ECONOMIC REGULATIONS, AND ARE FRUSTRATED BY PILES OF PAPERWORK AND LONG DELAYS IN THE ISSUANCE OF LICENSES AND PERMITS. OTHERS THINK THAT SOCIAL REGULATIONS ARE DANGEROUSLY WEAK AND POORLY ENFORCED, THAT ECONOMIC RULES INFLATE PRICES, AND THAT LICENSES ARE ISSUED TOO CASUALLY.

EACH GROUP OF CRITICS WANTS SPEED IN SOME AREAS AND FORMAL PROCEDURES AND LAYERS OF REVIEW IN OTHERS. CRITICS FOCUS ON THE RULES THAT BOTHER THEM AND TEND TO FORGET THE TREMENDOUS SCOPE AND IMPORTANCE OF THE OVERALL REGULATORY PROCESS. AS THE DEBATE BECOMES POLARIZED, WE RUN THE RISK OF ADOPTING FACILE REFORMS THAT CAN MAKE THE PROCESS WORSE, NOT BETTER.

WE MUST EXERCISE GREAT CARE IN OUR EFFORT TO RELIEVE BOTH BUSINESSES AND TAXPAYERS OF UNNECESSARY BURDENS WHILE AT THE SAME TIME WE SEEK TO PRESERVE THE ADVANCES IN HEALTH, SAFETY, AND ENVIRONMENTAL QUALITY THAT HAVE BEEN MADE THROUGH THE REGULATORY PROCESS.

THE TASK NOW BEFORE BOTH OF OUR SUBCOMMITTEES IS TO THOROUGHLY ANALYZE THE LEGISLATIVE PROPOSALS BEFORE US SO THAT WE CAN MAKE THE REGULATORY PROCESS BOTH MORE EFFICIENT AND EFFECTIVE IN CARRYING OUT CONGRESS'S STATUTORY DIRECTIVES. AS YOU WELL KNOW, ONLY IF WE CORRECTLY IDENTIFY THE ACTUAL PROBLEMS IN THE WAY AGENCIES FUNCTION WILL WE BE ABLE TO FASHION APPROPRIATE LEGISLATIVE SOLUTIONS FOR THOSE PROBLEMS. I THEREFORE THINK IT IMPORTANT TO EMPHASIZE THOSE PROBLEMS I BELIEVE CAN BE ADDRESSED BY GENERIC REGULATORY REFORM APPROACHES.

MANY OF THE PROPOSALS IN EACH OF OUR BILLS ARE QUITE SIMILAR. BOTH OF THESE BILLS REFLECT A WIDE AGREEMENT THAT REGULATIONS ARE TOO OFTEN FOISTED ON THE PUBLIC WITHOUT AN ADEQUATE ANALYSIS OF THEIR COSTS AND BENEFITS. THOUGH IN DIFFERENT WAYS, EACH OF THESE BILLS ADDRESSES THIS PROBLEM BY REQUIRING FEDERAL AGENCIES TO JUSTIFY THE

NEED FOR REGULATION, TO DETAIL THE IMPACT AND COST OF THE REGULATIONS, TO LOOK FOR LESS COSTLY ALTERNATIVES IF THEY CAN BE FOUND, AND TO USE THE LEAST INTRUSIVE REGULATORY SOLUTION WHILE ACHIEVING THE REGULATORY GOAL. ADDITIONALLY, EACH BILL REQUIRES AGENCIES TO CAREFULLY REVIEW ALL MAJOR RULES AT LEAST EVERY 10 YEARS TO DETERMINE WHETHER THE RULE IS ACCOMPLISHING ITS OBJECTIVES OR WHETHER IT SHOULD BE MODIFIED OR TERMINATED. CLEARLY, THE SOLUTIONS WE HAVE EACH OFFERED TO THE PROBLEMS POSED BY REGULATORY REFORM HAVE MUCH IN COMMON.

THERE ARE, HOWEVER, SOME REMAINING ISSUES OF DEEP CONCERN TO ME. SOME OF THESE CONCERNS HAVE ARISEN DURING THE COURSE OF THE HEARINGS BEFORE MY SUBCOMMITTEE, OTHERS ARE RAISED BY PROVISIONS IN YOUR BILL, S. 1080. I WOULD LIKE TO EXPLAIN EACH OF THESE BRIEFLY.

1. PROCEDURAL SUBSTANTIVE REFORM

SINCE WE ARE HERE DEALING WITH "PROCEDURAL" REFORM, I BELIEVE WE MUST AVOID THE TEMPTATION TO TRY TO CHANGE THE SUBSTANTIVE MANDATES UNDER WHICH AGENCIES OPERATE. WE ARE NOT HERE DECIDING HOW TO CLEAN THE AIR, NOR ARE WE DECIDING HOW TO IMPROVE WORKING CONDITIONS. RATHER WE ARE ESTABLISHING A PROCEDURE THROUGH WHICH THESE DECISIONS ARE TO BE MADE. AGENCY PROCEDURES, LIKE RULES OF COURT, MUST BE FAIR TO ALL SIDES, MUST PRESERVE DUE PROCESS, AND MUST IN NO WAY TEND TO PRODUCE CERTAIN TYPES OF SUBSTANTIVE CONCLUSIONS. THESE PROCEDURES MUST OPERATE EFFECTIVELY AND CONSISTENTLY, REGARDLESS OF THE POLITICAL TENOR OF THE TIMES.

2. COST-BENEFIT ANALYSIS

WHILE WE MUST ENCOURAGE AGENCIES TO THOROUGHLY AND OBJECTIVELY ANALYZE THE SHAPE AND IMPACT OF THEIR REGULATIONS, WE MUST ALSO RECOGNIZE THE LIMITS OF STRICT COST-BENEFIT ANALYSIS AND NOT IMPOSE TOO STRICT A PROCEDURE ON THE AGENCIES. MANY COSTS AND BENEFITS SIMPLY ARE NOT CAPABLE OF ACCURATE QUANTIFICATION. ALSO, WE MUST TO RECOGNIZE THAT SOME COSTS, PERHAPS BURDENSOME ONES, WILL BE IMPOSED IF AGENCIES ARE TO ACHIEVE THEIR STATUTORY OBJECTIVES. I WOULD PARTICULARLY LIKE TO EMPHASIZE HERE MY BELIEF THAT ALL MAJOR AGENCY RULES MUST BE REVIEWED WITH GREAT CARE. A MAJOR RULE WHICH

REMOVES REQUIREMENTS OR SHIFTS BURDENS TO A NEW GROUP OR BUSINESS DESERVES THE SAME CAREFUL CONSIDERATION AS A MAJOR RULE WHICH IMPOSE NEW BURDENS. FOR THOSE WHO BEAR THE BRUNT OF THE SHIFT IN APPROACH, IT MAKES NO DIFFERENCE AS TO WHETHER THE RULE IS NEW OR REMOVED. MOREOVER, THE DEREGULATORY PROCESS ITSELF CAN BE HANDLED IN MORE OR LESS DISRUPTIVE, PAINFUL WAYS.

AGENCIES NEED TO LOOK CAREFULLY AT THE VARIOUS ALTERNATIVES BEFORE THEM. BASICALLY, THERE IS NO REAL JUSTIFICATION FOR TREATING SOME MAJOR RULES MORE CAREFULLY THEN OTHERS; ALL DESERVE THOROUGH ANALYSIS OF ALTERNATIVES AND AN OBJECTIVE, UNBIASED CONSIDERATION.

3. OVER-FORMALITY AND DELAY

DURING THE COURSE OF OUR HEARINGS IT HAS BECOME VERY CLEAR TO ME THAT ONE OF THE GREATEST BURDENS REGULATORY AGENCIES PRESENTLY IMPOSE ON INDIVIDUALS AND BUSINESSES IS THAT OF UNCERTAINTY OF THE OUTCOME. UNTIL A FINAL AGENCY DECISION IS MADE, INDIVIDUALS MUST OFTEN SUSPEND ANY ACTION OF THEIR OWN, THUS INCURRING ADDED EXPENSES DUE TO INFLATION, LOSS OF BUSINESS OPPORTUNITIES, AND PREVENTION OF LONG-RANGE PLANNING. I BELIEVE IT IS VERY IMPORTANT THAT WE AVOID TURNING INFORMAL RULEMAKING INTO A JUDICIAL PROCEEDING, WITH ALL THE ATTENDANT DELAY, OVER-LEGALIZATION, AND POTENTIAL FOR ENDLESS JUDICIAL REVIEW. INFORMAL RULEMAKING IS AN EXECUTIVE-LEGISLATIVE ACTIVITY INTENDED TO IMPLEMENT POLICY, NOT AN ADJUDICATION.

4. ACCOUNTABILITY IN THE REGULATORY PROCESS

THERE IS NO DOUBT THAT THERE ARE PRESENTLY SOME SERIOUS PROBLEMS IN THE WAY AGENCIES FUNCTION. SOME HAVE SUGGESTED THAT THESE PROBLEMS CAN ONLY BE ADDRESSED BY GIVING POWER TO THE CONGRESS TO REJECT REGULATIONS ON A CASE BY CASE BASIS (LEGISLATIVE VETO) OR TO THE COURTS BY GIVING THEM MORE CONTROL OVER THE POLICY MAKING ACTIVITIES OF AGENCIES (THE BUMPERS' AMENDMENT). WITHOUT ADDRESSING EITHER OF THESE ISSUES IN GREAT DETAIL, I WOULD SIMPLY LIKE TO EMPHASIZE THAT WE MAY ONLY ADD TO THE PROBLEM OF ACCOUNT-

ABILITY IF WE DISPERSE RESPONSIBILITY RATHER THAN ADDRESSING THE PROBLEM AT ITS SOURCE. THERE ARE AT LEAST THREE SOURCES OF LACK OF ACCOUNTABILITY IN AGENCY ACTIVITY -- OVERBROAD AND VAGUE STATUTORY MANDATES THAT GIVE AGENCIES INSUFFICIENT GUIDANCE AND VAGUE GOALS; ADMINISTRATORS WHO ARE EITHER INEFFECTIVE OR EMPIRE BUILDERS; AND INEFFICIENT AND INEFFECTIVE AGENCY PROCEDURES. CERTAINLY LEGISLATIVE VETO WILL ADDRESS NONE OF THESE PROBLEMS, AND MAY TEND TO ENCOURAGE EVEN VAGUER DELEGATIONS OF STATUTORY AUTHORITY. NEW STANDARDS OF COURT REVIEW ALSO FAIL TO ADDRESS THESE PROBLEMS AT THEIR SOURCE, AND MAY TURN POLICY-MAKING OVER TO THE LEAST ACCOUNTABLE BRANCH OF GOVERNMENT -- THE UNELECTED, LIFETIME JUDICIARY.

I URGE THAT OUR EFFORTS TO ACCOMPLISH REGULATORY REFORM REMAIN FOCUSED ON THE SOURCES OF THE PROBLEM. CONGRESS MUST LOOK TO ITSELF TO ASSURE THAT ITS LEGISLATIVE MANDATES ARE CAREFULLY DRAWN AND THAT IT THOROUGHLY AND CONSISTENTLY EXERCISES THE OVERSIGHT AUTHORITY IT PRESENTLY HAS. THE PRESIDENT MUST SELECT CAREFULLY ADMINISTRATORS WHO UNDERSTAND THE STATUTORY MANDATES THEY ARE REQUIRED TO IMPLEMENT.

ADDITIONALLY, OUR SUBCOMMITTEES IN PARTICULAR MUST TRY TO ADDRESS THE PROBLEMS OF INEFFECTIVE AND INEFFICIENT AGENCY PROCEDURES -- BUT WE MUST BE SURE THAT WE IMPROVE THESE PROCEDURES INSTEAD OF MAKING THEM OVERLY COMPLEX AND UNWORKABLE.

IN CLOSING, MR. CHAIRMAN, I WOULD LIKE TO EXPRESS MY APPRECIATION FOR YOUR WORK ON REGULATORY REFORM. I LOOK FORWARD TO WORKING WITH YOU IN THE COMING MONTHS TO PRODUCE RESPONSIBLE AND EFFECTIVE REGULATORY REFORM LEGISLATION.

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Congress of the United States
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COMMITTEES
JUDICIARY
Chairman, Subcommittee on Administrative Law and Governmental Relations
VETERANS' AFFAIRS
STEERING AND POLICY COMMITTEE
DEPUTY MAJORITY WHIP
NORTH ATLANTIC ASSEMBLY

July 13, 1981

The Honorable Patrick J. Leahy
United States Senate
Washington, D.C. 20510

Re: H.R. 746 and S. 1080
Regulatory Reform

Dear Pat:

I am sorry to be so tardy in responding to your letter dated May 15, 1981 (received by me May 27, 1981) on the above matter. A number of intervening circumstances made the delay unavoidable but I will try to make up for it by being as responsive as possible to your inquiry.

It is my belief that the regulatory analysis and related provisions of the proposed bill should be placed in a separate Chapter 6 of Title 5 (The Administrative Procedure Act) for several reasons. Fundamentally, it is because those provisions are all intended to be management techniques.

First. Chapter 6 contains the provisions of the Regulatory Flexibility Act which we enacted in the 96th Congress and which requires the analysis of rules for their impact on small businesses, organizations, and governmental entities. That Act also requires agency agendas and periodic review of rules. As you are well aware, these three management techniques are the same as those required for major rules by both S. 1080 and H.R. 746. Therefore, they logically should be brought together in the same chapter, Chapter 6, of Title 5.

Second. Placing the new management techniques for major rules in Chapter 6 avoids an extensive revision of Section 553 of the Administrative Procedure Act. This allows for a statutory requirement that all agencies adopt management techniques regarding major rules that will lead to greater agency efficiency in fulfilling regulatory responsibilities. However, it will not, at the same time, lead to confusion as to appropriate agency practice regarding other than major rules and uncertainty as to which of the various standards of judicial review apply to which agency decisions. The Chapter 6 approach for requiring the adoption of management techniques avoids these confusions and allows the informal rulemaking procedures of Section 553 to remain simple and flexible.

The Honorable Patrick J. Leahy
July 13, 1981
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Third. The placement of the management techniques in a separate Chapter 6 clearly limits judicial review of agency compliance with the techniques. If those techniques were placed in Chapter 5 we would risk bogging down the agencies and the courts in the full judicial review of procedural issues which are not related to the merits of the rule under challenge. In my view, effective oversight of the management techniques is best left to the executive and legislative branches, since rulemaking is an executive/legislative rather than a judicial function.

Thank you for the opportunity to express my views on this important subject.

Very truly yours,

George E. Danielson
Member of Congress

GED:gvv

Senator SIMPSON. I guess I had one thought, and your thought on mine would be helpful to me. I think that we come to the conclusion that the Agency has to make a decision anyway. That is what they are doing. They are going to have to often make a judgment call, too, and that is admittedly so. So why not have it on the record and have it explained? That is a point for me.

We feel that determination makes the whole analysis a more useful exercise, giving the Agency an incentive to really treat it seriously.

The way I see it, I guess, as a lawyer, is that it is those of my particular profession that are messing up the game around here. We make distinction upon distinction, and curiosity upon curiosity, and case upon case, and procedure upon procedure, and finally the whole thing just bogs into the swamp. And it is due, in many cases, to the creativity of the people who are here and who are of the legal profession. I know that I would have been doing the same thing if I were 26 years old and had been here at that time.

Mr. DANIELSON. Thank God we are both 27.

Senator SIMPSON. Yes, I agree, George. [Laughter.]

But of the whole analysis issue, and just making them get up front with what they really do in those little sessions in the back-room when the staff is whipping one together, why do we not attack this great idea, but why not tell the rest of us what the real issue is and not "the issue"? We get reasons for everything but never the real reasons around this joint.

That is just my thought. I wonder what you have to add to that rambling?

Mr. DANIELSON. I tend to agree with that. I believe that you are manifesting the same concern that was behind my comments, saying that I want an Agency to set forth, first of all, precisely what is the goal—what is it they are seeking to achieve by this regulation—and then tell us precisely where is their statutory authority for doing so, instead of just dreaming up what looks like a good idea, out of the blue, and then prescribing a regulation to reach that goal—tell us what they are trying to do, and then tell us

why they are authorized to do that, and then go ahead, if they have something to offer.

If they cannot find the statutory authorization, they should not be monkeying around with the problem. They should be implementing one of the instructions of the Congress.

Along that line, if I may, I will add this: I have looked at a few of the authorizing statutes just for fun. OSHA would drive you right up the wall.

OSHA can do anything, and yet they are within their statutory mandate. All they have to do is to be sure that what they are doing will contribute to having a healthful or safe place in which to work. That is pretty broad. You can do almost anything under the argument that this will help define healthful and safe places in which to work.

OSHA does a lot of good, but with that broad a mandate there are no limits. Their jurisdiction is as wide as the world.

Senator SIMPSON. Indeed, indeed.

Thank you so much, Congressman.

Mr. DANIELSON. Thank you very much for your great courtesy in letting me appear. Now I can go back and tend to some other knitting.

Senator SIMPSON. Thank you so much.

Mr. Momboisse and Mr. Calio, if you would, please return to the witness table.

I must go vote. There is a rollcall vote on. But, Mr. Calio, if you will proceed, I will try to hear some more of your testimony. I am sorry to have interrupted you.

Mr. CALIO. It is quite all right, Senator. Thank you.

Senator, I was at the point of saying that the Washington Legal Foundation believes that Government interference in the private sector can be justified if, and only if, the Government can demonstrate the need for regulation and the ability to meet that need in a practical, cost-effective manner. WLF believes that S. 1080 will force regulators to make decisions on those bases.

I was a little bit surprised this morning when I reviewed some of the other testimony that was submitted to this subcommittee. There seems to be a continuing attempt by some parties to portray the cost-benefit analysis requirement in S. 1080 as the a be-all and end-all of regulation. However, the Washington Legal Foundation believes that view distorts reality and provides the only way to argue with the cost-benefit analysis as it fits into the scheme of S. 1080.

As we read the statute, it seems abundantly clear that its cost-effectiveness requirements are a model of flexibility. For example, if there are public policy reasons that override the cost-effectiveness determination, the Agency can opt for the more costly approach. At that point, it only needs to justify its action.

WLF would also point out that cost effectiveness does not mean the cheapest approach. Rather, it means opting for the least expensive or least costly alternative which achieves the objectives of the regulation. The two are really quite different.

In reference to the testimony by the preceding panel on the timing of judicial review of a major rule determination, I would note that subjecting such a determination to judicial review would

not break up rulemaking proceeding. Under the applicable legal principles that determination would not be subject to judicial review until the end of a rulemaking proceeding since only final agency action is subject to review.

Other than that, Senator, I will open up to questions, except to add that the Washington Legal Foundation believes that the changes S. 1080 makes in section 553 on informal notice comment and rulemaking will substantially improve the administrative process. Those changes provide a framework for a principled decision-making process by the agencies which will serve the public interest.

Senator SIMPSON. Thank you very much, Mr. Calio. Without objection, your prepared statement will be included in the record at this point.

[Mr. Calio's prepared statement follows:]

PREPARED STATEMENT OF NICHOLAS E. CALIO

INTRODUCTION

I am Nicholas E. Calio, Litigation Counsel for the Washington Legal Foundation (WLF). On behalf of the Washington Legal Foundation, let me express my appreciation to the distinguished members of the Senate Judiciary Subcommittee on Regulatory Reform for this invitation to testify on S. 1080, the "Regulatory Reform Act," which would revise selected provisions of the Administrative Procedure Act (APA), 5 U.S.C. §§551 et seq.

The Washington Legal Foundation is a non-profit, public interest organization which engages in litigation and the administrative process in matters affecting the broad public interest including government regulation, constitutional rights, and crime victims' rights.

The Washington Legal Foundation currently has more than 80,000 members and contributors across the country, the vast majority of which are individual consumers. My comments reflect exclusively the interests of our members and the public as a whole, not any organizational interest of the Washington Legal Foundation. We are not lobbying for or against the passage of this legislation, but offering our views on its public interest aspects based upon our administrative law experience.

SUMMARY AND BACKGROUND

The Washington Legal Foundation and its members support this Subcommittee's efforts to reform the regulatory process. The problems of excessive and inefficient government regulation are longstanding and have had a significant adverse effect on our economy and on society in general. Let me stress that while WLF is committed to the principles of a free market economy, it does not oppose all governmental regulation. However, the Washington Legal Foundation does maintain that government interference in the private sector should be initiated if, and only if, the government can demonstrate a need for regulation and the ability to meet that need in a practical, cost-effective manner.

WLF believes that much of the regulatory experience of the United States over the last ten years has been an abject failure. The problems associated with Federal regulation arise in large measure out of the nature of regulatory activity; Congress enacts broad, vaguely worded statutes and relies upon the Federal agencies to implement the details of its mandate by rule and regulation. These rules and regulations have the force and effect of law and must be passed according to procedures embodied in the Administrative Procedure Act.

Unfortunately, experience teaches that the broad parameters for decision-making in the APA are often insufficient to the task of forcing agencies to engage in a principled decision-making process. Rather than carefully studying the need for regulatory initiatives and thoroughly assessing their effectiveness and impact, agencies have often relied upon questionable and ill-defined statements of need, basis, and purpose in enacting regulations.

The result has been a spate of regulatory activity, purportedly to protect the public interest, which has drained the vigor of our economy. This recent regulatory experience conclusively demonstrates the myopia of viewing the impact of regulation largely in terms of its effects on business. While business is most often the object of regulation, the costs of regulation are borne by consumers and the recent elections and public opinion polls provide an adequate gauge to the general public's view of its interest and of Federal regulation.

The Washington Legal Foundation therefore believes that S. 1080, which is directed for the most part at the notice-and-comment rulemaking and judicial review provisions of APA, has the potential to serve the public interest. The specific sections of the bill will require agencies to engage in a thoughtful decision-making process in which the basis, purpose, and effect of a rule is articulated at an early stage in the proceeding. The result will be more cost-efficient agency action and more informed public participation in, and judicial review

of, the rulemaking process. Significantly, S. 1080 in many instances accomplishes its purpose by incorporating sound administrative principles already developed in the case law.

DEFINITION OF MAJOR RULE

Section 2 of S. 1080 defines a "major rule". The definition is a key element of S. 1080 since the determination of whether an agency proposal is a "major rule" triggers the regulatory analysis requirement of the bill. Under Section 2, a rule is considered "major" if it annually imposes direct or indirect enforcement and compliance costs of $100,000,000 or more, substantially increases costs or prices for wage earners, consumers, individual industries, geographic regions, or government entities or has a significantly adverse effect on competition, employment or productivity.

The introduction of the concept of a "major rule" into the APA and its concomitant use as the mechanism for imposing greater regulatory responsibilities on Federal agencies has the potential to serve the public interest. To realize its potential, the definition must be specific in its terms, but remain flexible enough to permit agency action which conforms to differing circumstances. While any attempt to define a "major" rule is inevitably arbitrary, WLF believes that S. 1080 takes a practical approach to the problem which provides both the necessary specificity and flexibility by incorporating economic and non-economic facts into the decisional process.

The 100,000,000 figure is obviously arbitrary and, standing alone, inflexible. However, as the Washington Legal Foundation reads the definition, a finding by an agency that either of the other two definitional components is met justifies the characterization of a rule as "major." Thus, a rule with an estimated compliance and enforcement cost of $80,000,000 could still be termed "major" and require more detailed analysis of its impact if it is likely to cause significant adverse effects on competition, employment or productivity.

AMENDMENTS TO APA, SECTION 553

NON-"Major" Rulemaking.

Section 3 of S. 1080 revises Section 553 of the Administrative Procedure Act which governs informal, "notice-and-comment" rulemaking. Section 3 prescribes certain actions to be taken by the agency proposing a non-"major" regulation which are conducive to good rulemaking practice.

The proposed Section 553 expands the contents of the general notice of proposed rulemaking presently required under the APA. More specifically, S. 1080 requires that a notice of proposed rulemaking indicate, among other things, the specific statutory authority under which the rule is proposed; the specific congressional intent sought to be achieved; the need for and objectives of the rule; the information upon which the agency plans to rely in the rulemaking as well as the sources of such information; and the basis for concluding that the rule is not "major". In addition, the notice must indicate that the agency is seeking more effective or less burdensome alternatives to its proposals and that the agency is maintaining a rulemaking file.

At first glance, these additional notice requirements may be viewed as further encumbering the administrative process and lengthening the already overly-long Federal Register. However, the Washington Legal Foundation believes these requirements will serve the public interest by having two general effects; they will require more careful and thoughtful internal planning, evaluation and management of agency action and provide more informed public participation in the rulemaking process. The required statements on statutory authority, congressional intent, regulatory objectives, and sources of information will focus the agency's inquiry on the actual need, purpose and likely success of its proposal. Simultaneously, those statements will allow affected parties and the public to grasp the bases and intent of the agency's action and better formulate their support or

challenge to it. In essence, the requirements build controls into the regulatory process which are not present now.

The introduction of a rulemaking file requirement will particularly enhance the effectiveness of the rulemaking process. It allows affected parties to intelligently examine the documents upon which the agency relies and support or dispute the informational bases of agency action at a time in the rulemaking process when such support or opposition can be meaningfully taken into account. Under present practice, affected parties must attack or support an agency proposal from what amounts to a position of ignorance. Stated somewhat differently and by example, a party perceiving that its interests may be adversely affected by a notice of proposed rulemaking must attack all conceivable bases for the agency's action. S. 1080's requirement that sources of information be identified and kept in an accessible file will help to efficiently narrow the grounds for objecting to a proposal.

Moreover, an accessible rulemaking file has another practical advantage. I have been involved in several rulemakings and agency adjudications as a private sector attorney in which the documents or titles of documents relied upon by the agency were known to me. Still, attempts to obtain those documents within a reasonable period of time proved frustrating and, in many cases, futile. Phone calls to various agency departments resulted in unnumerable intra-agency transfers while request for copies took weeks or more to process. The time and expense of such private sector activity is an unnecessary waste that a rulemaking file will help to overcome by collecting the pertinent documents at the time an agency initiates its action.

The Washington Legal Foundation believes that the requirement that interested persons be given sixty days to comment on a proposed rule is also in the public interest. Presently, Section 553 of the APA fails to prescribe a minimum comment period and the common agency practice of allowing thirty days has often proven painfully insufficient.

The new Section 553 proposed by S. 1080 also amplifies the contents of the statement of basis and purpose which is to accompany publication of the final rule. Again, the added burdens imposed upon Federal agencies are justified in the Washington Legal Foundation's view even though they superficially appear to require more paperwork since each requirement coincides with the goal of principled agency decision-making.

For instance, it may be an added burden to require an agency to describe the alternatives to its action and why they were rejected, to explain how the factual conclusions upon which a rule is based are supported in the record, to summarize the assessment of the public comments, or to draft a legal memorandum supporting the agency's authority to promulgate the rule. Nonetheless, the Washington Legal Foundation finds it difficult to believe that an agency would propose a regulatory action without examining these points in the first place. Including the results of that examination in the Federal Register should merely require articulation of agency evaluations routinely made as a matter of sound practice as a number of courts have recognized.[1/]

"Major" Rulemaking

In addition to the requirements discussed above, Section 3 of S. 1080 prescribes further agency responsibilities in cases in which an agency proposes a "major" rule. The provision requires preparation and publication of a regulatory analysis at both the

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1/ See e.g., Automotive Parts & Accessories v. Boyd, 407 F.2d 330, 338 (1968), in which the court stated that agencies should not engage in "an overly literal reading of the statutory terms 'concise' and 'general'". It noted that the reviewing court should not be expected to "formulate in the first instance the significant issues faced by the agency and articulate the rationale of their resolution." While the agency was not required to respond to every point raised in the submissions, for the purposes of judicial review, the statement of basis and purpose should enable the court "to see what major issues of policy were ventilated by the informal proceedings and why the agency reacted to them as it did." See also, Portland Cement Association v. Ruckelshaus, 486 F.2d 375 (D.C. Cir. 1973), cert denied, 417 U.S. 921 (1974); Natl. Tour Brokers Ass'n v. U.S. 591 F.2d 896 (D.C. Cir. 1978).

commencement and conclusion of a rulemaking proceeding. The Washington Legal Foundation and its members believe that a regulatory analysis requirement is in the public interest. It provides an advance in the Federal regulatory process by requiring agencies to more carefully balance competing considerations before initiating a regulatory program with a major impact. The collective experience of WLF's staff in government, the private sector, and representing the public interest leads us to conclude that such an analysis will inevitably result in better agency performance.

The responsibilities imposed upon Federal agencies by S. 1080 in "major" rulemakings, like other provisions in the bill, also have the attraction of encouraging more informed public comment at an earlier stage of the proceedings. Since the initial analysis must be issued with the proposed rule, interested parties can offer comments which the agency must consider in drafting the final rule. Such a requirement forces an agency to indiciate in relatively precise terms the criteria upon which it acts. This should be an improvement over present practice. In many cases, comparison of the Federal Register notice for a proposed and final rule shows that an agency has merely inserted a brief capitulation of the public comment and boilerplate language that it was considered while the rest of the final rule notice is substantially the same as the proposal.

The Washington Legal Foundation believes that the "major" rulemaking requirements of Section 3 of this legislation are specific enough to help focus the inquiry of an agency in determining the efficacy of a rule, but flexible enough to permit wide discretion within that determination. Basically, the new Section 553 requires an agency proposing a major rule to conduct a cost/benefit analysis although not on a strictly mathematical basis. In addition, it requires that the agency explore less burdensome alternatives, justify the costs and adverse economic effects of a rule in relation to its benefits, and indicate why the proposal is likely to meet its objectives in a more cost-effective manner

than the alternatives to the proposed rule. Some frank discussion of cost/benefit analysis per se is useful within this context.

Typical practice requires that testimony on cost/benefit analysis begin with a statement of the methodology's shortcomings. Anyone who is aware of the nature of its use for policymaking purposes must admit that a rigid cost/benefit analysis has undesirable weaknesses. However, such an admission can distort an evaluation of its usefulness in our opinion.

It is undoubtedly difficult, and sometimes impossible, to place an estimated monetary value on costs and benefits - the repeatedly cited example is the "value of a human life." WLF appreciates the difficulty of attempting to place a value on human life. Nonetheless, a government agency should not avoid a proper evaluation of the need for and effect of its action because human life is involved. Product safety statutes, after all, are justified on the basis of economic losses attributable to injury and death from the risk addressed in the statute. The magnitude of the economic loss justifies Federal government intervention in the marketplace. Thus, every such decision to regulate places an implied value on human life.

Living involves risk and always will. The power of the United States government can do little to change that universal truth. Certainly, the government can act to reduce risks, but that is exactly the point - the regulation requires policymakers to make hard choices. The question is whether the government is imposing unreasonable burdens on business and the public in relation to the degree of risk it seeks to and is able to prevent.

The Washington Legal Foundation believes that cost/benefit analyses are a valuable tool for making the proper choices. A cost/benefit analysis provides a useful means of cataloguing all the costs and benefits, "direct" and "indirect", of a proposed regulation. This exercise in and of itself provides a framework for more principled decision-making since it at least sets up criteria to guide agency action and to judge cost-effectiveness. Based upon the recognition that we have limited resources to

prevent risk, logic dictates that we use our resources to maximize results.

For instance, an agency may demonstrate that a proposed rule can provide benefits totaling $1,000,000 a year at a cost of $500,000 per year. An alternative may be suggested which reaps similar benefits in the amount of $600,000, but at a cost of only $100,000. In such a situation, an agency's choice becomes much clearer.

WLF notes that this cost-effective approach would not sacrifice benefits of necessary legislation since S. 1080 provides that a cheaper alternative which is not the best public policy can be rejected. Under the bill, agencies may opt for a more costly regulatory approach if justification for such action is provided. Once again, regulating comes down to balancing the risk and severity of risk and the ability and cost of reducing risk against the benefits of doing so. The inclusion of that equation as part of the regulatory process in no way impairs the public health.

Proposed Section 553(d)(3) requires that an agency include the opportunity for oral presentation and, under certain circumstances, cross-examination during "major" rulemaking proceedings. The Washington Legal Foundation questions whether the opportunity for cross-examination will effectively explicate the issues or merely invite litigation.

In summary, the Washington Legal Foundation believes that the "major" rulemaking requirements of S. 1080 are soundly based and, for the most part, will lead to better, more thorough decision-making in the regulatory process. However, it is worth noting in passing that a danger exists that the agencies may exalt form over substance in an attempt to meet the requirements for the preparation of analyses, etc. in S. 1080. Thus, the ultimate success of these improvements will be determined by the attitude of the various agencies.

Judicial Review of Regulatory Analysis

A few comments are in order on the lack of judicial review

of the various statements and analyses required under Section 553. It seems likely that this Subcommittee will receive testimony supporting the inclusion of a provision which explicitly allows judicial review of an agency's regulatory analysis and the procedures and determination involved therein. It seems just as likely that testimony in support of the present preclusion of review provision will be forthcoming.

The Washington Legal Foundation however, questions whether an explicit prohibition on judicial review such as the proposed Section 553(f)(3) is advisable. As we read the legislation, it rightly intends to keep the courts out of the technical and policy realms of agency decision-making in which extremely difficult decisions have to be made. While, as a practical matter, courts are unlikely to remake or rethink the agency's decision on a cost/benefit analysis for instance, it seems unlikely that judges reviewing agency action under the standards of APA, Section 706 can avoid examining an agency's regulatory analysis to some degree. Any regulatory analysis prepared by an agency will become part of the rulemaking record which a court would consider as a whole in reviewing a rule. In practice, the regulatory analysis would be a factor to be considered by a court, which is not to say the court would substitute its conclusion for the agency's. Hence, WLF questions whether Section 553(f)(3) will unnecessarily confuse matters.

REGULATORY REVIEW

Section 4 of S. 1080 adds a new APA provision which would require agencies to periodically review over a ten year period their major rules as well as such other rules as the agency or the President may select. The currently widespread perception of the need for regulatory reform is correctly based upon the recognition that many regulations are unnecessary and others, albeit necessary, are ineffective. Hence, a re-evaluation procedure which will eliminate unnecessary regulations and revise inefficient ones is in the public interest.

JUDICIAL REVIEW

Section 5 of S. 1080 makes two changes in Section 706 of the APA. First, it adopts the so-called "modified Bumpers amendment" approach to judicial review which requires that a reviewing court "independently" decide all questions of law without according any presumption of validity to an agency's interpretation of its own statute. Second, it requires that "substantial support in the rulemaking file, viewed as a whole" support an agency's factual determinations.

The Washington Legal Foundation views these changes as a further attempt to control Federal agencies which have frustrated both Congress and the public by their lack of accoutability in recent years. As already noted, Congress delegates broad authority to Federal agencies to carry out its statutory mandates and the agencies have broad discretion in fulfilling their legislative roles. While the only practical check against excessive agency action at present is judicial review, the Washington Legal Foundation is wary of any legislative action which appears to invest further powers in the courts. Congress, and the public, can exercise greater control over administrative agencies than they can over the judiciary.

WLF believes that the proposed amendments to Section 706 should be carefully examined within that context to determine their impact on present standards of judicial review. In addition, we believe that this Subcommittee should consider whether the proposed changes do anything more than codify existing practice. If, in fact, they reflect existing practice, the proposals could have either of two effects; they could provide greater uniformity in judicial decision-making or they could simply confuse the issue and spawn litigation. Obviously, the latter is not in the public interest.

The examination of these issues is aided by first setting forth the applicable legal principles. The standards of review to be employed by the courts are embodied in the APA which distinguishes between review for questions of law and

questions of fact. Interpretations of law and its applicability, to which "modified Bumpers" is directed, lies with the courts. The courts, however, have traditionally considered and purportedly deferred to any agency's interpretation of its organic statute.2/

Nonetheless, the degree of deference accorded agency interpretations of law has varied from court to court and case to case. A 1979 report to the Committee on Judicial Review of the Administrative Conference of the United States noted that:

> the courts have proceeded over the years to develop criteria indicating where deference to any agency's construction of its governing statute is desirable and where it is not. Indeed, the principle of deference is not so much a "presumption" as a collection rules of statutory construction, any of which may be applicable depending upon the circumstances of the particular case. In this fashion, the case law has yielded a set of considerations designed to assure that no agency interpretation receives more deference than it deserves.3/

In determining whether an agency's view of the law should be upheld, courts have considered whether the interpretation was more of less contemporaneous with enactment of the statute,4/ the accuracy of the agency's interpretations in the past,5/ the agency's expertise and experience with respect to similar problems,6/ and the fairness of the agency's interpretation.7/

2/ See, Udall v. Tallman, 380 U.S. 1. (1965), in which the Supreme Court stated:

> "When faced with a problem of statutory construction, this Court shows great deference to the interpretation given the statute by the officers or agency charged with its administration. Id. at 16.

3/ Levin, "Judicial Review and the Bumpers Amendment" (Nov. 1979) p. 18.

4/ Udall v. Tallman, supra.

5/ See e.g., SEC v. Sloan, 436 U.S. 103 (1978); U.S. v. Imperial Irrigation District, 559 F.2d 509 (9th Cir. 1977).

6/ See e.g., Public Service Commission of State of N.Y. v. FERC, 589 F.2d 542 (D.C. Cir. 1978).

7/ See e.g., Intl. Board of Teamsters v. Daniel, 439 U.S. 551 (1979).

The courts have thus scrutinized agency interpretations of law in a manner which belies the lip service paid to the deference doctrine and have frequently found that the asserted rationale or authority for a particular rule is insufficient. As the Supreme Court stated in Citizens to Preserve Overton Park, the presumption of validity of agency action "does not shield this action from a thorough, probing, in-depth review."[8/] Instead, the courts take what the Court of Appeals for the D. C. Circuit termed a "hard look" at agency action:

> Its supervisory function calls on the court to intervene not merely in case of procedural inadequacies, or bypassing of the mandate in the legislative charter, but more broadly if the court becomes aware, especially from a combination of danger signals, that the agency has not really taken a "hard look" at the salient problems, and has not genuinely engaged in reasoned decision-making.[9/]

Basically, then, the modified "Bumpers" amendment does not propose a major change in the standard for judicial review of questions of law. Whether its enactment helps or hinders the effectiveness of judicial review remains to be seen.

Agency determinations of fact are reviewed by the courts under the APA by employing one of three tests, only two of which are pertinent here. Under present APA practice, a reviewing court may reverse an agency's factual findings if they are unsupported by substantial evidence only in cases involving agency adjudications. In addition, the courts may set aside agency findings in any case if they are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."

Proposed Section 706(2)(F) in S. 1080 requires that the substantial evidence test be used in reviewing agency rulemakings as well as in agency adjudications. The bill appropriately restricts the use of the test to "factual" as opposed to "policy or legal" determinations.

8/ Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 415-16 (1971).

9/ Greater Boston Television Corp. v. FCC, 444 F.2d 841 (D.C. Cir. 1970). The D. C. Circuit restated its "hard look" doctrine two weeks ago in Sierra Club v. Costle, ___ F.2d ___, No. 79-1565 (D.C. Cir. April 20, 1981), Slip Op. at 225-26.

The Washington Legal Foundation believes that this amendment may be in the public interest. First, it will not hamper agency discretion. The substantial evidence test permits reversal of an agency's findings only if the evidence in the record is inadequate to support the agency's conclusion.[10/] That a reviewing court would have arrived at a different conclusion on the rulemaking record is not sufficient for reversing the agency's determinations.[11/] Hence, the application of this test leaves the agencies with vast discretion while simultaneously assuring consideration of all conflicting factual aspects of the administrative record.

The impact of the proposal is uncertain, however. Some courts have found in reviewing rules that little, if any, difference exists between the arbitrary-and-capricious standard currently employed for rulemaking findings under the APA and the substantial evidence test as required by certain statutes.[12/] Under these decisions, the substantial evidence test is identical to the rational basis test embodied in the arbitrary-and-capricious standard and the proposed revision would have little effect on the scope of review.

Other courts, however, have found in a rulemaking context that the substantial evidence test is a more rigorous standard of review.[13/] In these cases, use of the test has proved troublesome for courts attempting to sort out factual and policy determinations,[14/]

10/ See e.g., Consolo v. FMC, 383 U.S. 607 (1966), Farmers & Merch. Bank of Las Cruces v. Board of Governors of FRS, 567 F.2d 1082 (D.C. Cir. 1977).

11/ Id.

12/ See e.g., Associated Industries of N.Y.S., Inc. v. U.S. Dept. of Labor, 487 F.2d 342 (2d Cir. 1973).

13/ See e.g., Industrial Union Dept., AFL-CIO v. Hodsgon, 499 F.2d 467 (D.C. Cir. 1974).

14/ See e.g., Weyerhauser Co. v. Costle, 590 F.2d 1011 (D.C. Cir. 1978).

... as one commentator noted, "may serve more to increase the ...cential for administrative confusion and judicial mischief than to offer a useful scope-of-review standard."[15/] Nonetheless, WLF believes that the proposed Section 706(2)(F), focused as it is on "factual" determinations, may provide a sounder basis of review of rulemaking proceedings.

VENUE

Section 6 of S. 1080 proposes changes in the "first filing" rule of 28 U.S.C. 2112(a) which would eliminate the "race-to-the-courthouse" problem for review of administrative actions. "That the 'race to the courthouse' has caused many problems is well known."[16/]

The "first filing" rule, enacted in 1958 to prevent agency forum shopping, has precipitated grossly expensive, "unseemly"[17/] races to preferred courts by other interested parties. Aside from the high cost to private litigants, such "races" spawn litigation over who won the race, detract from the perception of Federal courts as impartial and demean the image of lawyers as officers of the court. Thus, the Washington Legal Foundation believes that the ten day time period for filing petitions and the random selection feature for awarding jurisdiction in S. 1080 improve present practice.

15/ Verkuil, Judicial Review of Informal Rulemaking, 60 Va. L. Rev. 185, 226 (1974).

16/ International Union v. NLRB, 298 F.2d 297, 301 n.10 (D.C. Cir. 1961), cert. denied, 369 U.S. 843 (1962).

17/ Industrial Union Dept., AFL-CIO v. Bingham, 570 F.2d 965 n.9 (D.C. Cir. 1977).

REGULATORY AGENDA AND CALENDAR

The proposal in Section 7 of S. 1080 will require agencies to publish in April and October an agenda of the rules each agency expects to act upon in the following twelve months. The Washington Legal Foundation is convinced that this proposal serves the public interest in efficient regulatory activity.

The semi-annual agenda will help the agencies to set priorities and to coordinate their activities. Ideally, overlap and duplication so often encountered under present practice will be eliminated. In addition, the semi-annual agenda will, like other provisions proposed in S. 1080, provide the public an opportunity for earlier, more informed participation in regulatory decisions.

CONCLUSION

Overall, the "Regulatory Reform Act" addresses in reasonable fashion some of the problems which exist in the regulatory process. These changes provide a framework for agency decision-making which will result in more carefully planned, fully informed, and, ultimately, cost-effective regulation. Speaking for the Washington Legal Foundation's 80,000 members, I commend this Subcommittee's effort.

Senator SIMPSON. I must go and answer a rollcall vote. The staff will proceed with certain questions and will also proceed with the further witnesses. I thank you for your understanding as we go through the gyrations of this job that requires a clone but they will not issue us one.

I thank you for your testimony, and thank you to the previous panel for their testimony, which was most helpful. Thank you.

Mr. MANDELMAN [acting chairman]. Thank you.

One of the prior witnesses' statements referred to the fact that in their opinion an agency's determination that a rule was a major rule was only a managerial determination. Do you agree with that concept, or, in your view, is that sort of a determination really a policy decision when you get right down to it?

Mr. CALIO. The Washington Legal Foundation believes that it is, in a sense, a managerial decision—I would rephrase that: It is a factual determination.

The definition of a "major rule" is a factual determination that has a great deal of flexibility. The flexibility is provided by incorporating both economic and noneconomic factors into the required

determination. In that way, the agency retains a great deal of discretion, but the public interest is protected since the agency's decision must be based on facts and must be justified.

Mr. MANDELMAN. Thank you.

Mr. Momboisse?

Mr. MOMBOISSE. I think you have drawn the distinction in the bill between facts as such, which formed the basis for a rule. Policy is a totally dissimilar area, in that this is mainly a political decision, and therefore you would not expect to find facts supporting it.

The third category that has been distinguished in the bill is legal issues, which are basically for the courts to pass on. This seems to be a logical method of handling the review of it.

Mr. MANDELMAN. If we could follow up on that, based on your experience in litigating in this area would the bill's definition as it now stands of a major rule create an unnecessary or undue burden on Federal courts? And is that definition of major rule any more or less precise than similar types of standards in other regulatory legislation that has been previously enacted by Congress?

Mr. MOMBOISSE. I would say no. Look at NEPA. How do they define the triggering mechanism there? Significant effect—the same language that is used here. So I see no difficulty in that.

Mr. MANDELMAN. Mr. Calio?

Mr. CALIO. I also see no difficulty.

Unfortunately, as you well know, in drawing legislation, you need to be as specific as possible but also retain flexibility.

For instance, if you look at most of the public health and safety statutes, a determination of unreasonable risk is required to trigger certain agency action. That term is necessarily imprecise and sometimes subject to abuse, but necessary nonetheless.

Mr. MANDELMAN. Ms. Drabble, in her statement, made some reference to the problem of crosstown hypocrisy of one regulatory agency getting one set of data from a company and another regulatory agency getting conflicting data.

First of all, are you aware of any agency rules that might cause that problem to arise, or is this strictly a problem of corporate chicanery?

Mr. CALIO. I do not think I can answer that because I am not fully aware of the SEC rules, and that is the case to which she referred. I do think that reporting data is subject to chicanery, but then everything is, and I think that attempting to draw a bad guy/good guy image as far as business as opposed to consumers or individuals is concerned fails to further the present inquiry.

Such a generalization is the same as saying that all bureaucrats are going to make decisions based on what they want to do rather than what their enabling statute allows them to do.

Mr. MANDELMAN. Mr. Momboisse?

Mr. MOMBOISSE. I think one of the purposes that you are attempting to achieve with the changes in the bill is to force a logical sequence of planning and rulemaking in which you specify the areas that the agency must go into.

Your object here is to have the correct decision made and not to have some method of judicial review or oversight, but to force the action initially, which is obviously the most productive method.

Otherwise, you have the time delay of getting into the courts and getting a determination.

Mr. MANDELMAN. In this particular context, could you support a requirement that if a company furnishes data to one agency, if it is furnishing conflicting data to a second agency, that it be required to tell the second agency of the existence of the other data so that everybody is working from the same base, or if there is a conflict between the data that this can be reconciled in public rather than after the fact?

Mr. MOMBOISSE. Actually, what you have done here is to clarify what is now judicial decision as far as procedure goes. They have come up with requirements on notice, on the type of findings that will be had, but it has been done on an agency by agency basis.

Now what you have done in one bill is to establish the criteria for all agencies, with the exception of those that have specific criteria established by Congress. In those instances, the specific statute would control.

Mr. MANDELMAN. What I was driving at was this: Let us say United States Steel had furnished certain data to the Securities and Exchange Commission. If it was furnishing conflicting or different data to EPA on the same issue—say, cost of complying with environmental rules—it would be required to advise EPA that it had told the Securities and Exchange Commission something different.

Mr. MOMBOISSE. Is there a provision in here?

Mr. MANDELMAN. No. I am asking you if you would support inclusion of that concept in this legislation or in some other legislation in order to eliminate that problem of one agency hearing one thing and another agency being told something contradictory by the same company.

Mr. CALIO. I would answer that, if I may. Without commenting on whether the Washington Legal Foundation would find that kind of requirement in the public interest, we would have to see the proposal in writing, although I think I could say that we would support it in spirit. It is logical to require a company to justify its actions if it is giving different sets of information to different agencies.

I would also point out—and I think your previous point was particularly incisive—that there may be something about an agency's reporting rules which could cause some kind of skew in the reports. I am not trying to justify what one company did, however.

Mr. MANDELMAN. I think Mr. Cynkar has some questions on behalf of Senator Laxalt.

Mr. CYNKAR. Gentlemen, first of all, on behalf of Senator Laxalt, I want to apologize for his not being here. He had hoped to be here for your testimony. He is on the Senate floor right now and, hopefully, should be here soon. But failing his imminent arrival and considering our time constraints, I would like to ask you a few of his questions and then submit the rest of them to you in writing. I would also like to ask you, in that regard, if you could respond to those questions by next Wednesday, which is the timeframe the Senator has been asking of all the witnesses.

Both of you support, as I understand it, S. 1080's provisions for the assessment of the effects of a rule. Some of the witnesses today

have contended that, as a practical matter, any comparison of the tradeoffs of a rule—the benefits and costs of a proposed rule—requires quantification to be meaningful, requires some common language in order to compare, as it is contended, apples and oranges, or what-have-you; and that quantification of a range of different effects, as Mr. Danielson pointed out a few minutes ago, is really impossible, and therefore the whole enterprise is doomed to failure. What is your view on that point?

Mr. MOMBOISSE. I think you have spelled out in the proposed bill that a mathematical evaluation of cost and balance equating was not required.

By the very nature of risk and benefit, there is no way of reducing them to a similar term. They are dissimilar. It is then a policy judgment on the part of the person responsible for making the decision to put some quantity on this.

Mr. CYNKAR. Mr. Calio?

Mr. CALIO. Mr. Cynkar, I would add that the Washington Legal Foundation views the cost-benefit analysis as a means of imposing a necessary discipline upon the agencies.

To say that you cannot quantify every benefit or every cost of a regulation does not obscure the fact that it is a very valuable methodology for determining a range of alternatives to specific regulation.

The repeated example which is used to attack the usefulness of cost-benefit analyses is the difficulty of quantifying human life. Indeed, quantifying human life is difficult; in fact, almost impossible. But that should not serve as a shield for agencies to operate out of a position of ignorance.

Too often in the past, agencies have acted based upon what they feel is required without justifying their actions.

I would add, on behalf of WLF, that almost every public health and safety statute which is now on the books is justified on a commerce clause basis, which implies a "cost of life" evaluation because Government interference is the form of a health and safety statute is justified by the magnitude of the economic loss in terms of lives and injury from the risk which is addressed by the statute.

Mr. CYNKAR. Mr. Podesta has a question.

Mr. PODESTA. It is directed to Mr. Calio. We will have some questions from Senator Leahy to be submitted to both of you in writing, but I would like to ask you one question that was raised this morning.

You emphasized in your testimony this afternoon that some of the witnesses' criticism of making the major rule determination subject to judicial review is unfounded and will not cause delay because the determination cannot be reviewed until after the rulemaking has come to an end.

It seems to me that that sort of begs the point. Do you not think that agencies might designate more than the 150 to 250 rules each year which we have been talking about as being major rules, and go through the more elaborate cost-benefit analyses required by the statute in order to avoid a later judicial reversal after the process has been completed?

Mr. CALIO. Let me clarify one thing first. I addressed the delay question in the context of whether the rulemaking procedure

would be broken up by judicial reviews. I think there was a question of whether interlocutory appeal from the major rule determination would be available. Under the applicable legal principles, it would not be available on an interlocutory basis, in my opinion.

Second, if the agencies do go ahead and determine, for whatever reason, that a regulatory analysis is required, the Washington Legal Foundation believes that ultimately, down the line, society will benefit because the agencies are justifying their regulatory actions and focusing their inquiry on what is needed and how that need can be effectively met. So, if they do, I think there is an ultimate benefit.

In that regard, I would simply point out that viewing regulation over the last 12 to 15 years in totality indicates that the current system has not worked. WLF believes that public opinion very clearly reflects a consensus on the need to overhaul the present regulatory process. So, if the agencies engage in more regulatory analyses, WLF thinks the decisionmaking process will be improved.

Mr. PODESTA. If they had the resources available within the agencies to actually go ahead and do those analyses?

Mr. CALIO. Yes, if they did, and that, in fact, is part of the point of why they should do regulatory analysis. They have limited resources, and their resources should be directed in the most cost-effective manner.

Mr. PODESTA. We will submit further questions for the record.

Mr. CYNKAR [acting chairman]. Without objection, they will be included in the record.

Gentlemen, I thank you. The subcommittee will stand in recess for 10 minutes. We will reconvene at 2:30 with our next panel.

[Recess taken.]

Senator LAXALT. The subcommittee will be in order.

First of all, Senator Thurmond, who regrets that he will be unable to attend this afternoon's session because of prior commitments, has asked that I place in the record a copy of correspondence to him from you, Mr. Smith, transmitting a copy of the ABA's recommendation on agency compulsory process. Your letter indicates you are aware of his interest in this area, I assume?

Mr. SMITH. Yes, sir.

Senator LAXALT. Without objection, it will be included in the record.

He has also asked that you give a brief explanation of the need for taking action regarding agencies' adjudicatory and investigatory subpena authority. Without objection, it will also be included in the record at this point.

[Material supplied follows:]

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May 13, 1981

Honorable Strom Thurmond
Chairman, Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

I write to commend you for the statement you presented April 30 upon introduction of S.1080, the proposed "Regulatory Reform Act", and note with particular appreciation your enumeration of other needed reforms not included in this important legislation. Chairman Laxalt, you and the other cosponsors are to be complimented on crafting legislation which incorporates a reasonable number of needed improvements to our regulatory process.

The American Bar Association shares your interest in the "important issue of agencies' adjudicatory and investigatory subpoena authority", and looks forward to working with you on this subject when it becomes the focus of your Committee's consideration. In this regard, I enclose a copy of a resolution concerning compulsory process, adopted by our policy-making House of Delegates earlier this year, which is accompanied by a background report. Also enclosed is draft legislative language to implement our stated policy.

I hope the enclosed will be useful in your consideration of the need to improve federal administrative compulsory process authority.

Sincerely,

Richard B. Smith

Richard B. Smith

:km
Enclosures
cc: Honorable Paul Laxalt
Honorable Joseph Biden
Honorable Patrick Leahy

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AMERICAN BAR ASSOCIATION
SECTION OF CORPORATION, BANKING AND BUSINESS LAW
SECTION OF ADMINISTRATIVE LAW

RECOMMENDATION

BE IT RESOLVED, That the American Bar Association support enactment of legislative proposals to amend the Administrative Procedure Act (APA) with respect to compulsory process:

A. To establish uniform rules applicable to compulsory process in agency investigations, including the requirement that, except when the investigation is conducted pursuant to 5 U.S.C. § 554, before a compulsory process may be issued an order of investigation specifically defining the nature and purpose of the inquiry must be issued by the agency head or, in those investigations where the agency provides by rule, a senior official who is not responsible for the investigation.

B. To extend the power to issue compulsory process to all agencies that conduct proceedings pursuant to 5 U.S.C. § 554.

C. To establish procedures governing time periods and the manner of producing documents, answering written interrogatories, and providing oral testimony, provided that provision is made that the requirements may be modified by agreement of the parties or for good cause.

D. To provide that persons other than the recipient of process who are the principal targets of an investigation are provided notice when a process seeks documents directly relating to their affairs, and to grant such person standing to challenge the validity of the process.

E. To provide that agencies shall adopt rules by which any recipient of a process or any other person with standing may move the agency for an order to set aside or modify the process.

F. To provide that an agency may not seek enforcement of process unless it has issued a notice of default within a specified period, and to provide that the recipient of a process may not seek judicial review of the legality of a process until a notice of default has been issued except in extraordinary circumstances which would cause great and irreparable harm if such review were denied.

G. To establish venue provisions which would ensure, in most cases, that a recipient of process, or a third party with standing to challenge process, would be permitted to defend against enforcement or contest an agency process in a judicial district convenient to him, but which would also permit agencies dealing with numerous related cases in several judicial districts to file in one district as convenient as possible to all concerned.

H. To provide that a reviewing court shall sustain the process except to the extent it infringes a constitutional

or other legal right, is unduly burdensome or oppressive, or is otherwise not in accordance with law, and that the agency bears the burden of proving the validity of the process.

I. To permit agencies to impose sanctions for failure to comply with a process, but only after a court has determined its validity.

J. To provide greater protection for the confidentiality of information submitted pursuant to a compulsory process.

REPORT

The Section of Corporation, Banking and Business Law and the Section of Administrative Law have followed the many bills that were considered during the 96th Congress under the banner "regulatory reform", and both have been represented in this Association's Coordinating Group on Regulatory Reform which was an important participant in the negotiations regarding those bills.

A major concern of the Sections throughout this process has been the establishment of fair, balanced procedures pursuant to which a federal agency can compel a person to produce information and a person directed to furnish the information can protect his rights both before the agency and before the courts. When it became apparent that the 96th Congress was unlikely to enact any regulatory reform bill, the Sections undertook a comprehensive review of this area and developed some basic recommendations for amending the Administrative Procedure Act to provide uniform, regular procedures for issuing compulsory processes and maintaining the confidentiality of information gathered during agency investigations. The Sections believe the principles established in the attached resolution would be a beneficial reform of the administrative process that would help alleviate one of the major sources of tension between government agencies and the companies and individuals who are subject to their regulation.

The Need for Reform

The Administrative Procedure Act ("APA") itself provides only scant mention of subpoenas and other forms of compulsory process. See 5 U.S.C. § 555(c) and (d), § 556(d)(2). Indeed, even when they are mentioned, the APA fails to establish the nature of the procedures to be followed by an agency when issuing a subpoena or for challenging a subpoena before the agency itself; it fails to set standards for judicial review; and it does not grant any sort of protection against unwarranted disclosure of information. While the law has developed judicially over the years in these areas, many questions remain. A comprehensive legislative policy is therefore needed that balances the legitimate needs of agencies against the right of individuals and companies to be free from unwarranted intrusions into their affairs.

Many forms of compulsory processes are currently used in addition to the traditional subpoenas that are issued in

adjudicatory proceedings contemplated in the APA. For example, some agencies use general orders directed to all members of a particular industry, or special orders that apply to only a few. Agencies may use these forms of compulsory process as part of an adjudicatory proceeding, to investigate whether a company has violated the law, to investigate whether the agency should take some sort of action, such as enforcement or rulemaking, or to prepare a report to Congress. The procedures by which agencies issue these mandatory processes vary widely, as do the procedures by which an affected person can challenge the order. Most of the law that has developed involves adjudicatory subpoenas, yet the effect on the person who is directed to produce information -- in the form of documents or testimony -- is largely the same regardless of what the process is called or the purpose for which it is issued. Thus, the Sections believe the protections of the APA should extend to all forms of compulsory processes, irrespective of what they are called by the agency or whether the process is issued for an investigation or as part of an adjudicatory proceeding.

The lack of uniform procedures among the agencies also causes confusion by forcing respondents to examine the particular law applicable to the particular form of process issued by the particular agency before they may determine their rights. Moreover, non-uniformity inhibits the development of a consistent body of law that defines the respective rights of the agencies and the respondents. This in turn can lead to an agency's failure to define with care and specificity the reason it is issuing the process and the nature of the information needed. Additionally, vague standards promote undue contention and delay by those seeking to resist compulsory process.

The recommendation would provide a minimum set of uniform procedures believed to be fair and balanced. They would also clarify the nature of judicial review and provide for procedures that will facilitate that review. Finally, they provide for confidential treatment of information submitted during an investigation because companies are understandably reluctant to provide sensitive documents or testimony to an agency unless they can be assured that the information will be used only for legitimate agency purposes.

Investigatory Process

The recommendation provides that an agency may not issue compulsory process for purposes of an investigation, except in a proceeding subject to 5 U.S.C. § 554, until the head of the agency, or the majority of a collegial agency, has issued an order of investigation defining the nature of the proceeding. An agency may, however, define particular types of investigations in which a senior official who is not responsible for the investigation may issue the Order of investigation. The order must include a specific description of the area of inquiry, the objectives of the agency in conducting the investigation, and an explanation of the regulatory actions that the agency is considering. The order also must designate the officials in the agency who are authorized to issue compulsory process. The order may be treated as a non-public document.

This procedure extends to investigations the same protections that have traditionally been provided in agency

adjudications where the agency itself has established the proceeding, defined the issues, and appointed the official who can issue the compulsory process. Such an extension is appropriate because a compulsory process issued for purposes of an investigation can be enormously demanding, and traditional forms of judicial review are sometimes difficult to invoke. Virtually any inquiry, even those tangentially related to the agency's mission, can be judicially sustained because of a court's reluctance to second guess the agency. The mandated procedure would not be burdensome on the agency, but would force it to focus its inquiry and provide the respondent, and a reviewing court, with the reasons for the inquiry so that the reasonableness of the demands can be judged against the need for the information.

The recommendation contemplates that a compulsory process issued pursuant to an order of investigation must be accompanied by the order, and must: request only infomation relevant to the investigation as described in the order; be reasonable in scope and not unduly burdensome; and be signed by an authorized agency official. The availability of the information from other sources and its importance to the investigation must be taken into account when evaluating the reasonableness of the scope and burden of the process.

Adjudicatory Process

The recommendation provides that all agencies should have the power to issue compulsory process in adjudicatory proceedings subject to 5 U.S.C § 554. It is anticipated that the agency shall issue process in adjudicatory proceedings at the request of any party after a showing of the relevance and the reasonable scope of the information requested. The agency shall designate the presiding officer and any other appropriate officials to issue compulsory process in adjudicatory proceedings.

Process Requiring Records of Third Parties

The recommendation provides that whenever an agency requests documentary material, other than statistical records which do not identify individuals, relating directly to the business or personal affairs of a person or company other than the recipient of the process, that person is entitled to notice of that fact. In order to protect their interests, such persons are given standing to challenge the validity of the request.

This provision is addressed to the not infrequent situation in which an agency seeks documents, such as bank records, held by a third party concerning the target of its investigation. An investigative target is powerless to invoke his rights unless he knows of the demand, and the person on whom the process is served may not have a sufficient incentive to challenge the process or to notify the individual in question. This recommendation would give the investigative target the ability to protect himself.

This recommendation applies only to compulsory processes issued by an agency and not to any form of judicial process. The agency may, therefore, still use an appropriate

form of judicial process if it believes it is essential to secure records on an individual without providing notice to that individual. The Sections believe that the agency itself should not have the ability to secure such information without notice, and the requirement that the agency must convince a court of its need will provide an essential minimum of protection.

Procedures for Demands and for Compliance

The recommendation provides minimum procedures, akin to those for discovery, that govern the time periods for and the manner of producing documents, answering questions by means of written interrogatories, and providing live testimony. These time periods and procedures could be modified by agreement of the parties or for good cause.

Procedures to Modify Process

Each agency would be directed to establish procedures by which the recipient of compulsory process, or anyone else with standing, may move the agency for an order to modify or set aside the process. This provision is designed to provide a procedure by which the agency can consider objections concerning compulsory process and can take appropriate action to remedy legitimate concerns. However, a party should not be allowed to challenge compulsory process judicially without first taking advantage of this opportunity to confront the agency. Thus, a procedure would be established to narrow the controversy and ensure that the agency has an opportunity to remedy the alleged irregularity.

Judicial Review

An agency may petition a district court for enforcement of compulsory process, but only after issuing a notice of default within a specified period after the return date. The cut-off was believed necessary to prevent those situations in which compulsory process remains outstanding for a long period but no action is being taken on it, because it remains a cloud on its recipient. The requirement for notice of default is to provide the recipient with notice that the agency may seek an eforcement action, thereby affording the recipient a final chance to decide whether to comply or to press its contention in court. The recommendation also provides that the recipient of the process may not seek pre-enforcement review until a notice of default has been issued,*/ except in extraordinary circumstances that would result in great and irreparable harm if such review were denied. It is anticipated that this procedure will induce fruitful negotiation over the scope of the process because the recipient is not able to run to court immediately for preenforcement review. The deadline provides the parties with the opportunity to try to resolve their differences or submit the matter to the court for resolution.

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*/Under this procedure, the agency may select the venue because it could issue the notice and sue immediately.

The recommendation would ensure that venue would permit a recipient of process, or a third party with standing to challenge process, to defend or contest agency process in a judicial district convenient to him, but which also would permit agencies dealing with numerous related cases in several judicial districts to file in one district as convenient as possible to all concerned.

The reviewing court is directed to issue an order requiring compliance with compulsory process except to the extent that the process infringes a constitutional or other legal right, is unduly burdensome or oppressive, or is otherwise not in accordance with law. The burden of proving the validity of the compulsory process, like that for any order or rule, rests on its proponent -- the agency. Any contumacious disobedience of such an order is then punishable by contempt of court.

This section is designed to codify the developing law in this area. Because the courts play such a critical role in the enforcement of and challenges to compulsory processes issued by federal agencies, the standards for judicial review of agency process should be defined. The standard for review will also promote judicial uniformity and make it clear to the courts that their role involves more than a cursory examination of whether compulsory process is "reasonable" in the abstract, but requires instead balancing the actual needs of the agency, as defined in the order of investigation, against the legitimate rights of the recipient of the process.

Adverse Action for Refusal to Obey

An agency is authorized in an adjudicatory proceeding to take adverse action against a party who does not comply with a court order directing it to provide information sought by compulsory process. This remedy is akin to that provided by Rule 37(b) of the Federal Rules of Civil Procedure.

Protection of Confidential Information

Companies are understandably reluctant to provide to an agency information that could injure them competetively if it were released. While several of the exceptions of the Freedom of Information Act could be used by an agency to resist disclosure of information submitted by a company pursuant to compulsory process, the full reach of the exceptions is not always clear and the agency may not invoke them to resist a request for particular documents it believes are not covered. Thus, even when agencies enter into an agreement not to release the information, the submitter has no guarantee that a court will not require the agency to do so in a Freedom of Information Act suit. And, of course, the agency may decide that it is in its best interest to reveal the information, even without a FOIA request. The person or company submitting the information would then have to force the agency, through a judicial order, to preserve the confidentiality of the information, and that is a very difficult undertaking.

These concerns apply to anyone wo has submitted sensitive information to the Government, and for that reason,

the Sections believe a wholesale look at the Freedom of Information Act is warranted. But, the risk of disclosure is particularly unfair when the company is forced by compulsory process to disgorge the information. Moreover, the risk of exposure surely leads to companies' contesting some compulsory processes they would otherwise accept. To meet these concerns, the Sections recommend that the APA be amended to provide greater protections for the confidentiality of information submitted pursuant to a compulsory process.

Respectfully submitted,

A.A. Sommer, Jr., Chairman
Section of Corporation Banking
and Business Law

Willis B. Snell, Chairman
Section of Administrative Law

February 1981

AGENCY COMPULSORY PROCESS

Section 3. A new section 560 of title 5, United States Code, is inserted as follows:

§560 Compulsory Process.

(a) Applicability. This section applies to agency compulsory process. As used in this section --

(1) the term "compulsory process" or "process" means any directive issued by an agency, including a subpena, civil investigative demand, or general or special order, requiring production of documentary material, answers to written questions, oral testimony, or written reports which may be enforced through civil or criminal sanctions if its terms are not satisfied by its recipients; however, the term does not apply to a public information collection activity subject to review by the Director of the Office of Management and Budget pursuant to 45 U.S.C. §3507;

(2) the term "documentary material" includes the original or any copy of any book, record, report, memorandum, paper, communication, tabulation, chart, and other "writings", "recordings" or "photographs", as those terms are defined in Rule 1001 of the Federal Rules of Evidence; and

(3) the term "material" means documentary material, written reports, answers to questions, and records of oral testimony.

(b) Subpenas in Proceedings on the Record. (1) This subsection applies to proceedings subject to section 554 of this chapter.

(2) In any such proceeding, an agency may issue a subpena requiring a person to appear and testify or to appear and produce documentary material, or both, at a hearing or deposition at any reasonable time and place. Such a subpena shall be issued upon the request of any party and upon a statement or showing of general relevance and reasonable scope of the evidence sought.

(3) Each agency shall designate by rule the officers authorized to sign and issue a subpena in any such proceeding and shall include in such designation the presiding employee.

(4) Each agency shall establish by rule procedures with respect to disclosure of any information within the scope of subsection (b) of section 552 of this chapter, designated as such by the person from whom it was obtained. Such rule shall provide that parties to a proceeding may obtain access to such information to the extent that the interests of justice may require and subject to the terms of an appropriate protective order in accordance with subsection (h).

(5) In any case where a person fails to comply with an order of the court entered pursuant to subsection (f) within such period as may be prescribed by such order, the agency may take such measures, similar to those provided in Rule 37(b) of the Federal Rules of Civil Procedure (other than subparagraph (D) thereof), as may be just.

(c) Agency Investigations. (1) Applicability. This subsection applies to agency investigations. For purposes of this subsection --

(A) the term "agency investigation" or "investigation" means any inquiry in which compulsory process is authorized by law to be employed and which is conducted by an agency a purpose of which is:

(i) ascertaining whether any person is violating, has violated, or is about to violate a statute, rule, or order enforced by that agency;

(ii) compiling or gathering information; or

(iii) preparing reports to Congress; and

(B) the term "violation" means any act or omission in contravention of any statute, rule, or order which an agency is responsible for enforcing or carrying into effect.

(2) Order of Investigation. (A) Compulsory process may not be issued for purposes of an agency investigation unless the agency issues a written Order of Investigation. Such Order of Investigation may be issued only by the head of the Agency, or by a majority vote of its members, or by a senior official of the agency who is not responsible for the investigation and who is authorized by agency rule to issue such an Order.

(B) The Order of Investigation shall contain:

(i) a finding that the agency has reason to believe that a violation is occurring, has occurred, or will occur; a specific description of the nature

of the conduct constituting the alleged violation under investigation; and a statement of the provisions of law applicable to such violation; or

(ii) a specific description of the area of inquiry of the investigation, the objectives of which the agency seeks to achieve by the investigation, and possible regulatory alternatives under consideration by the agency; a specific statement of the statutory basis for the investigation; and an explanation of the importance of the information sought by the investigation to the objectives of the investigation.

(C)(i) An Order of Investigation shall designate a senior agency official or officials authorized to issue compulsory process pursuant to the Order.

(ii) An Order of Investigation shall also designate a custodian to receive on behalf of the agency, and to maintain custody of, all material provided pursuant to compulsory process or voluntarily in the course of the investigation. The Order of Investigation may also designate one or more individuals to serve as deputies to the custodian or may be amended from time to time for this purpose. The Order may also be amended

from time to time to designate a successor custodian

(D) An Order of Investigation shall expire two years after the date of its issuance, unless renewed for one year periods thereafter pursuant to the requirements of subparagraph (B).

(E) Whenever an agency investigation has expired, pursuant to subparagraph (D) or otherwise, the agency shall notify, by the same means used to serve the compulsory process, the persons under investigation of the expiration and the results of the investigation.

(F) Compulsory process issued pursuant to an Order of Investigation shall:

(i) be accompanied by a copy of the Order of Investigation;

(ii) request only information relevant to the investigation as described in the Order of Investigation;

(iii) be reasonable in scope and not unduly burdensome; and

(iv) be issued pursuant to an agency Order of Investigation and signed by an agency official authorized to do so by the Order of Investigation.

(G) For the purpose of evaluating the reasonableness of the scope of and burden of compulsory process, the availability of the requested information from other sources and the importance of the

information to the investigation as described in the Order of Investigation shall be considered.

(E) Any compulsory process issued pursuant to an Order of Investigation shall designate the custodian as the individual to whom material should be submitted or made available.

(3) Documentary Material. (A) Compulsory process seeking the production of documentary material shall:

(i) describe each class of documentary material to be produced with ~~such definiteness and certainty~~ reasonable particularity as to permit such material to be fairly identified; and

(ii) prescribe a return date or dates which will provide at least thirty (30) days after receipt of such process, or such longer period of time as is reasonable given the scope of the process, within which the material so demanded may be assembled and made available for inspection and copying or reproduction.

(B) If compulsory process requests documentary material, excluding statistical records which do not identify individual persons, directly relating to the business or personal transactions or affairs of a person other than the recipient of the process, and such person is a target of the investigation,

(i) a copy of the process shall be served on such person;

(ii) any notice of default, as described in subsection (f) shall be served on such person; and

(iii) such person shall have standing to challenge the validity of the process.

(4) Written Responses. Compulsory process seeking written reports or answers to written questions shall:

(A) propound with definiteness the reports to be produced or questions to be answered; and

(B) prescribe a return date or dates which will provide at least thirty (30) days after receipt of such process, or such longer period as is reasonable given the scope of the process, for the submission of the written reports or answers to questions.

(5) Oral Testimony. (A) Compulsory process seeking oral testimony shall:

(i) prescribe a date (at least ten (10) days after receipt of such process), time, and place at which oral testimony shall be commenced; and

(ii) identify the agency employee who shall conduct the oral inquiry and the individual to whom the record of such oral inquiry and testimony shall be submitted.

(B)(i) For the purposes of this subparagraph, the term "reporter" shall mean a person who records oral testimony and who is qualified

to administer oaths. Oral testimony shall be recorded by a reporter.

(ii) The person giving the testimony may request that all persons other than his attorney, the agency employees conducting or otherwise directly involved in the oral inquiry, and the reporter be excluded from the place where the testimony is to be taken. The agency shall make a good faith effort to accommodate such reasonable requests.

(iii) The oral testimony of any person taken pursuant to compulsory process shall be taken in the judicial district of the United States in which such person resides, or where such person's principal place of business is located, or in such other place as may be agreed upon by such person and by the agency employee conducting the oral inquiry.

(iv) Any person compelled to appear pursuant to compulsory process for oral testimony may be accompanied, represented, and advised by an attorney. The attorney may advise such person in confidence, either upon the request of such person or upon the initiative of the attorney, with respect to any question asked of such person. Such person or attorney may object on the record to any question, in whole or in part, and shall briefly state for the record the reason

for the objection. An objection may properly be made, received, and entered upon the record when it is claimed that such person is entitled to refuse to answer the question on grounds of any constitutional or other legal right or privilege, including the privilege against self-incrimination, or on grounds that it exceeds the scope of the of the Order of Investigation or compulsory process pursuant to which the testimony was requested. Such person shall not otherwise object to or refuse to answer any question. The agency may petition the district court of the United States for the district in which such testimony is to be taken, pursuant to this section for an order compelling such person to answer such question.

(v) The agency shall provide for a means of recording, preserving, and filing the oral testimony, by stenographic means or otherwise, and shall make such provisions as are appropriate to assure that the record of testimony will be accurate and trustworthy. The witness shall be given an opportunity to make corrections therein with a statement of the reasons for the corrections. The recorded testimony with the witness' corrections shall be delivered to the custodian by the reporter.

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(vi) A witness shall be entitled to obtain without charge a copy of the record of his testimony (in the form of a stenographic transcript or otherwise) unless the agency for good cause limits the witness to the right of inspection provided in subsection (g)(5).

(d) Witness Fees; Time Limits.

(1) Any witness appearing for the taking of oral testimony pursuant to compulsory process shall be entitled to the same fees and mileage which are paid to witnesses in the district courts of the United States. Where such process is issued a proceeding subject to section 554 of this chapter, such fees and mileage shall be paid by the party requesting issuance of the process; in all other cases the fees and mileage shall be paid by the agency.

(2) Any time limit prescribed in subsection (c) may be shortened by order of the agency on a written finding of good cause, or upon agreement of the parties.

(e) Motions to Set Aside or Modify Compulsory Process.

(1)(A) Each agency shall adopt rules providing for a procedure by which a recipient of compulsory process or any other person with standing may move the agency for an order setting aside or modifying the process. Such motions may be made on the ground that the process does not comply with the terms of this section, infringes a constitutional or other legal right or privilege, is unduly burdensome or oppressive, is otherwise not in accordance with law, or on any other appropriate ground.

(2)(A) The filing of a motion pursuant to paragraph (1) prior to the return date of the process at issue shall stay the return date of such process until five (5) days after the moving party receives notice of the agency's disposition of the motion.

(B) If such motion is filed by a third party with standing to challenge the validity of such process, the person to whom the process was issued shall not comply with such process until five (5) days after both parties receive notice of the agency's disposition of the motion.

(f) Judicial Actions with Respect to Compulsory Process.

(1) No action for enforcement of compulsory process may be brought unless the agency, within sixty (60) days after the date specified for compliance with the process, serves on the person to whom the process was issued a notice of default with respect to the process. If such a notice of default is not so served, the process shall cease to be valid at the end of that sixty (60)-day period.

(2) Whenever any person fails to comply with any compulsory process duly served upon him in accordance with a statute authorizing such process and a notice of default with respect to such process has been served, the agency, through such officers or attorneys authorized by law to represent the agency, may file an action in a district court of the United States for an order for enforcement of such process. Venue for such action shall lie in the district in which such person resides, in which such person's principal place of business is located or in which documents being sought are principally located.

(3) Any person who has been served with compulsory process, or any third party with standing to challenge the validity of such process, may file an action seeking to set aside or modify such process in the district court of the United States for either the District of Columbia, the district in which the agency is located, the district in which such person resides, the district in which such person's principal place of business is located, or the district in which documents being sought are principally located.

(4) Except in circumstances which would result in serious and irreparable harm if review were denied, in order to maintain an action filed pursuant to paragraph (3):

(A) the person to whom the process was issued must have been served with a notice of default with respect to the process, and must have exhausted the agency procedures promulgated in accordance with subsection (d); or

(B) any third party movant must have exhausted the agency procedures promulgated in accordance with subsection (d).

(5)(A) Any action instituted pursuant to paragraph (3) may, pursuant to the provisions of 28 U.S.C. §1404, be transferred to a court in which there is pending an action pursuant to paragraph (2) based on the same or substantially similar compulsory process pending at the time of the initiation of the action under paragraph (3).

(B) Whenever the venue provisions of paragraphs (2) or (3) may result in actions being filed in sev-

eral judicial districts regarding the same or similar subject matter, such actions may be filed in or transferred to a district where any one such action could be filed as to at least one person under paragraph (2) or (3) and which is convenient for the parties; but any party may in such event apply for a severance to a district court in a district which would be a proper venue pursuant to paragraph (2) or (3).

(6)(A) In an action under paragraph (2) or (3), the court shall issue an order requiring compliance with the compulsory process except to the extent that it does not comply with the terms of this section, infringes a constitutional or other legal right or privilege, is unduly burdensome or oppressive, or is otherwise not in accordance with law.

(B) In actions brought pursuant to either paragraph (2) or (3), the burden of proving the validity of the compulsory process shall be on the agency.

(C) The district courts shall provide for expedited consideration of actions brought pursuant to this section.

(D) Whenever any petition is filed in any district court of the United States as permitted by this section, such court shall have jurisdiction to hear and determine the matter so presented, and to enter such order or orders as may be required to carry into effect the provisions of this section. Any final order so entered shall be subject to appeal pursuant to section 1291 of title 28, United States Code.

Any contumacious disobedience of any final order entered under this section by any court may be punished as a contempt of such court.

(7) No civil penalty or other sanction for failure to comply with compulsory process shall be imposed on any person until thirty (30) days after a notice of default has been served on such person. The filing of an action under paragraph (3) or the assertion of a defense in an action under paragraph (2) shall stay the imposition and accumulation of any civil penalty or other sanction with respect to any period of non-compliance prior to the entry of a final order enforcing the subpena.

Senator LAXALT. Our next panel consists of four experts in the area of regulatory reform.

Lester Lave is a senior fellow at the Brookings Institution here in Washington. He is a prolific author and has had a diverse academic career, teaching economics at Northwestern and Carnegie Mellon where he was head of the department of economics. He has served as a consultant to EPA, HEW, the Department of Transportation, and the Department of Defense, among others.

We welcome you, Mr. Lave.

Mr. LAVE. Thank you, Mr. Chairman.

Senator LAXALT. Thomas Moore is a senior fellow at the Hoover Institution at Stanford University. He is the director of the domestic studies program there. Though his expertise is regulation of business generally, many of his writings have focused on energy and transportation regulation.

We welcome you, Mr. Moore.

Mr. MOORE. Thank you.

Senator LAXALT. Bruce Yandle is a professor of economics at Clemson University and an adjunct scholar of the American Enterprise Institute. He has written widely on many subjects dealing not only with regulation but with other economic matters.

We welcome you, Mr. Yandle.

Mr. YANDLE. Thank you, Mr. Chairman.

Senator LAXALT. Finally, Richard Smith, a New York attorney, is chairman of the American Bar Association's coordinating group on regulatory reform. He has had significant experience in Government, serving as a Commissioner of the Securities and Exchange Commission from 1967 to 1971 and as a member of the Council of the Administrative Conference of the United States from 1971 to 1974.

I am happy to welcome all of you here today. Without objection, your prepared statements are ordered inserted into the record. We are attempting to operate this within certain time constraints,

interrupted at times by rollcall votes from the floor. Your statements will be included in the record. You may proceed in any manner that you wish.

Whom may we hear from first?

Mr. MOORE. I will go first, if you wish.

Senator LAXALT. All right, Mr. Moore.

STATEMENT OF THOMAS GALE MOORE, SENIOR FELLOW, THE HOOVER INSTITUTION, STANFORD UNIVERSITY

Mr. MOORE. It is a great pleasure and honor to be here this afternoon. Basically, I endorse and heartily support the thrust of this bill.

I was listening earlier to some of the testimony, and people were questioning cost-benefit analysis, and I only want to say that all intelligent decisionmaking has to be based on some sort of implicit cost-benefit analysis.

Often, you cannot quantify the benefits or the costs, but you must think about what you are getting into in cost and benefit terms, and that is what this legislation is designed to do—to make the agencies think about that.

The problem that I have is that agencies are given a mission, and they go ahead and do it, and they go ahead and do it blindly, to excess. That is the problem that we have found with all Government agencies as well as regulatory agencies.

Other agencies in Government, when they spend money, have to come to the Congress and the OMB to get additional moneys. So there is a check. But there is very little check on an agency that wants to overregulate.

There is some experience with cost-benefit analysis in terms of other agencies such the Army Corps of Engineers and the Bureau of Reclamation, and they tend to overestimate benefits and often underestimate costs.

I think it is important that there be some check on what the agencies do—some review. I have brought to you an innovation from California, which has been described in my prepared testimony, and there is also attached to my prepared testimony a short piece from the magazine, Regulation, on this new Office of Administrative Law.

I also brought with me—I did not have it at the time I prepared my testimony—their latest, and I guess it is their first, report—it is called the third quarterly report—in which they report on what they have succeeded in doing.

Senator LAXALT. Without objection, it will be included in the record.

Mr. MOORE. This agency has the power to review all new regulations and force agencies to review past ones. The law, calls for them to draw up an agenda over a 5-year period—this is similar to the provisions you have in your bill—and then to make sure that the regulations conform with the criteria in the bill. Governor Brown has shortened that review process to a 2-year period.

In their 9 months of existence, there has been a 54-percent decline in new regulations issued in California compared to the previous years' 9 months, before the agency was in existence. That is a substantial reduction.

Most of that reduction occurred because agencies submitted less regulation. When they knew that they were going to be monitored, they submitted fewer regulations.

They have launched an evaluation of existing regulations, and they have just approved a master plan, which I have also brought with me—which is a thick document—in which they are going to go through all regulatory rules in California over the next 2 years.

Senator LAXALT. I missed the initial part of that, Mr. Moore. Is this through a legislative initiative, or did it come from within the administration itself?

Mr. MOORE. It is a new California law. It passed the California Legislature, and it was approved by Governor Brown in 1979 and became effective July 1, 1980. So it is a brand new agency. Governor Brown can veto their disapprovals of rules, but otherwise the agency is an independent agency to which all other agencies must send their proposed regulations for evaluation before they are implemented.

Senator LAXALT. Has there been any connection made with this 54-percent decline in the offering of regulations and the existence of the agency? Is there a connection? There has to be, I presume.

Mr. MOORE. Oh, yes. The 54 percent was the ones that went into effect. I have the figures here.

Senator LAXALT. I think you indicated, unless my notes are incorrect, that there was a 54-percent decline in offered regulations since the enactment of the bill.

Mr. MOORE. No, I am sorry, a 54-percent decline in new regulations approved.

Senator LAXALT. I see.

Mr. MOORE. Twenty-four percent of the offered regulations were disapproved, and there was a decline of—let me see. Agencies submitted 36 percent fewer regulations during this period, and the office disapproved 24 percent of those that were submitted, for a total decline of 54 percent.

I would recommend, therefore, that there be some sort of similar agency or perhaps giving this duty to OMB explicitly—they have done it in some cases in the past; the Council on Wage and Price Stability has reviewed other agencies' regulations in the past—but it should be formalized with new agency or with an existing agency of the Government that would give discipline to the regulatory agencies. They would know somebody is going to look over their shoulder to see whether they have reasonable costs and reasonable benefits.

The evidence from California is that it would reduce the number of regulations proposed and, in addition, there would be some check on what they did propose.

Senator LAXALT. Has the California experience since the enactment of the law resulted in much litigation?

Mr. MOORE. It is really too early to tell. I know of one agency that is protesting and one agency, the Department of Education, has refused to abide by the law and submit a list of its regulations and when it is going to evaluate them, and that is going to result in some bureaucratic infighting, I suspect.

Senator LAXALT. Have there been any assertions made politically or otherwise that this process has resulted in the diminution in the regulatory process of human values?

Mr. MOORE. None that I am aware of.

Senator LAXALT. Thank you very much, Mr. Moore. Without objection, your prepared statement will be included in the record at this point.

[Mr. Moore's prepared statement and responses to questions posed by Senator Laxalt follow:]

Prepared Statement of Thomas Gale Moore

It is a great privilege to be here today and to have the opportunity of discussing a very important initiative designed to control the explosive growth of regulation. As we all are aware, government agencies have been churning out regulations and rules at a runaway rate. While there is no accurate measure of the growth of regulation, we know that regulatory legislation has been escalating. For example, during President Carter's four years in office, pages in the Federal Register, an imprecise indicator of regulation but the best available, ballooned by over 50 percent.

There is no doubt that some regulation is desirable and necessary. We all appreciate its importance in preserving our environment. Regulation may also be useful in reducing accidents and physical injuries from unsafe products or work places, although the justification is weaker here than in the environmental area.

Nevertheless there are many instances of regulations that, while well-meaning, result in significantly higher costs for industry and the public with few if any discernible benefits. The legislation being considered is designed, therefore, to force agencies to evaluate the costs and benefits of new and existing regulations. This objective is highly desirable. Whether the legislation is strong enough to accomplish this goal is the issue upon which I would like to focus.

Requiring an agency to evaluate whether its proposed rules are worth their costs and are cost-effective will, at a minimum, make the agency think about alternatives and the costs of those requirements. However, agencies will be free to include in their calculations any and all "benefits" even if others might think that some are questionable. Cost estimates are also imprecise and provide opportunities for underestimating the effects of the

legislation. Typically, when government agencies have made cost estimates, they have been substantially lower than those provided by industry. While business has a tendancy to overestimate costs and to understate benefits, the regulatory agency has the opposite motivation.

For example, after much criticism of water and dam projects, Congress required in 1936 that the U.S. Army Corps of Engineers and the Bureau of Reclamation develop cost/benefit studies to justify proposed projects. These studies have often resulted in benefits significantly inflated and in underestimates of the costs of the projects. There have been projects, such as the Central Arizona Project, where by any objective measure there are no net benefits except to special interest groups, yet costs run in the billions of dollars.[1]

For example, Robert H. Haveman in a study for Resources for the Future, The Economic Performance of Public Investments: An Ex Post Evaluation of Water Resources Investments (John Hopkins Press, 1972) concluded that:

> In the case of naviagation benefits, for example, the evaluation procedures applied by the agency (as required by law) have little, if any, relationship to an efficiency concept of benefits or any other benefit concept that has economic meaning. In the empirical case studies presented, ex post estimates of benefits often showed little relationship to their ex ante counterparts. On the basis of the few cases and the a priori analysis presented here, one could conclude that there is a serious bias incorporated into agency ex ante evaluation procedures, resulting in persistent overstatement of expected benefits. Similarly, in the analysis of project construction costs, enormous variance was found among projects in the relationship between estimated and realized costs. (pp.110 - 111). (My italics.)

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1. The Central Arizona Project involves building an aqueduct to bring water from the Colorado River to central Arizona. Much of this water would be used to irrigate cotton. The Department of Agriculture purchases "excess" cotton for storage. The net effect of this project, therefore, is to increase or maintain the supply of a crop that is already in surplus. Thus, there are no real benefits to the economy from this project, although the farmers in central Arizona benefit.

While Haveman found no persistent cost estimate bias among recent projects, the same objectivity is unlikely in regulatory studies. The water projects that were evaluated were funded by the agency making the cost/benefit calculation. If the Corps of Engineers or Bureau of Reclamation persistently underestimated costs, they would be faced with asking for additional funds annually at appropriation time. On the other hand, there is no such self- revealing mechanism for benefits, hence the bias. Regulatory agencies do not normally bear the cost of the regulations that they impose on the private sector. Usually, they will not have to explain to OMB or Congress why they are requesting supplemental funds for projects previously estimated at much lower costs. The costs are hidden and borne by industry. Even ex post the costs of regulations are less easily discernible than are the costs of a flood-contol project. Nor are the benefits easily measured.

During its six years, the Council on Wage and Price Stability evaluated a number of proposed government regulations. In a January 1981 report, A Review of the Regulatory Interventions of the Council on Wage and Price Stability 1974-1980, it found that agencies often ignored social and consumer costs. The Council concluded, "OSHA frequently reduces its estimate of the costs of a regulation by subtracting workman's compensation premium savings and investment tax credits. This may reflect some policy concerns, such as the possible bankruptcy of firms, but it neglects full social costs." (p. 28)

Potentially, there are many ways to assure that agencies execute sensible, carefully-drawn cost/benefit analyses. One method that warrants consideration by the Congress is establishing a super regulatory commission to monitor the actions of the existing agencies. Alternatively, OMB or some other executive agency could be delegated the task of approving or rejecting the agency cost/ benefit studies.

Last year California legislated an innovation along these lines. The legislature established the Office of Administrative Law (OAL) whose purpose is to review all new regulations issued by state agencies before final publication to insure, among other things, "(a) Necessity. (b) Authority. (c) Clarity. and (d) Consistency with existing laws." It also has a mandate to review all existing regulations. The governor is authorized to veto any disapproval of a regulation, except in the case of emergency regulations. So far the OAL has used its authority to turn back several objectionable regulations.[2]

A federal agency that has the power of the OAL with additional authority to review agency cost/benefit analyses would be a check on the tendency to overestimate benefits and understate costs. Under previous administrations, the Council on Wage Price Stability and the Regulatory Analysis Review Group provided this function. It is my impression that the Office of Information and Regulatory Affairs headed by James C. Miller III in OMB will be performing this function in the Reagan administration.

A second problem with the legislation as currently drawn is that, while it will inhibit new regulation, it will also inhibit deregulation. In fact, it makes maintaining the status quo the easiest strategy for agencies to follow; a proposal to abolish a major regulation will also require a cost/benefit analysis. The benefits of returning to the market place may be very hard to document.

For example, the National Highway Traffic Safety Administration wants to postpone the rule that passive restraint devices will be required on large cars in 1982. Under this legislation, it would have to present a cost/benefit analysis of the postponement. If it wishes to abolish the bumper standard or any one of the other regulations it has imposed on the auto industry, it would have to measure the benefits of the deregulation against the costs.

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2. This agency is described in Regulation January/February 1981. A copy of the piece entitled "More Government Innovation from the Golden State" is attached.

The proposed Reform Act defines a "major rule as (A)...a rule...that causes, or is likely to cause...(iii) significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of enterprises ... to compete in domestic or export markets." A proposal to relax entry requirements into trucking, for example, such as the reforms of the last two years, would entail an evaluation of the costs and benefits of such a rule-making. The motor carrier industry would undoubtedly claim that the costs in terms of employment, investment, and the ability of "existing" enterprises to compete would be horrendous and that there are no real benefits. Yet most economists would agree that the benefits of freeing up entry would far exceed any costs.

It seems desirable, therefore, to amend this proposed bill to include a section exempting repeal of existing rules from the necessity of evaluating costs and benefits. The burden of proof for maintaining or expanding regulation should remain on those who wish to justify the rules, not on those who want to return to the market place. Otherwise this bill becomes a vehicle for freezing the status quo. Since the costs of existing regulations are very high, the emphasis should be on deregulation. Legislation that makes that goal more difficult is undesirable; nor do I believe that the sponsors of this bill intend to make deregulation more difficult.

With the two changes that I have recommended, a super regulatory agency to evaluate the costs and benefits of proposed new rules, and the exemption of the repeal of existing regulations, the "Regulatory Reform Act of 1981" would provide a solid piece of legislation limiting the growth of regulation to those areas where it is clearly beneficial. Had this legislation, suitably amended, been in effect over the last decade, I believe that today our rate of economic growth would be much higher, and the country would be in a far better competitive position in the world economy.

[From Regulation, January/February 1981]

More Governmental Innovation From the Golden State

On July 1, 1980, the California Office of Administrative Law came into existence. Its ominous mission (ominous, that is, for other state agencies) is suggested by the legislative finding that begins its enabling act: "The Legislature finds and declares as follows: . . . There has been an unprecedented growth in the number of administrative regulations in recent years."

OAL is an independent agency whose director is appointed by the governor of California for a term coextensive with his own. Its task is to review all new regulations issued by state agencies before final publication to ensure, among other things, "(a) Necessity. (b) Authority. (c) Clarity. [and] (d) Consistency [with existing laws]." Over the next six years, OAL will also get a chance to review all existing regulations. If a regulation is found wanting, it is returned to the agency for revision—or burial. The governor may veto OAL disapproval, except in the case of "emergency" regulations, where OAL's word is final.

Interestingly, while agencies must ask OAL's consent to add new regulations or amend old ones, they are free to repeal regulations whenever they want to. This feature, combined with the requirement for six-year review of all existing regulations, reduces the tendency of such a control device to "freeze" existing regulation (see Antonin Scalia, page 13, this issue). Moreover, to add insult to injury, other state agencies must reimburse OAL for the cost of its "services"—a requirement giving OAL some insulation against budget cuts by legislators sympathetic to frustrated regulators.

For some reason (perhaps the unprecedented growth in the number of statutes in recent years?), the new law and the new agency initially attracted little attention. But now the bureaucratic fur has started to fly. OAL has told the Fish and Game Commission that it cannot protect butterflies under the California Endangered Species Act (which does not cover insects) because, contrary to the view of the commission, insects are not fish under California law (honest!). It has found the State Athletic Commission's proposal for a disability insurance program for boxers badly worded and unclear. It has also found that the Board of Medical Quality Assurance had not adequately shown a need for new regulations governing licensed physical therapists. It has even rejected attempts by several agencies to avoid public hearing requirements by issuing regulations as "emergency" measures, a category that included a quarter of the California regulations adopted last year. As of the end of 1980 it had rejected, on one ground or another, one-fifth of all proposed new regulations.

The State Athletic Commission, appropriately the most pugnacious of the challenged agencies, went (so to speak) to the mat with OAL, charging it with "impudence" and with going beyond its assigned "housekeeping functions." The commission threatened to challenge OAL to the Ultimate Contest—in the courts—only to discover that OAL's enabling legislation forbids agencies to take it to court.

OAL may well be King of the Mountain. Think what President Carter's Regulatory Analysis Review Group would have given for the power to review and veto regulations on the basis of "necessity"! But, alas, the matter is not all that clear: The California law states that OAL should not "substitute its judgment for that of the rulemaking agency as expressed in the substantive content of adopted regulations." How one can disagree with the "necessity" for a proposed rule without performing such substitution is a mystery whose solution was once, presumably, known to the California legislature but now is known only to the courts.

For the time being, OAL seems inclined to follow a modest strategy, simply requiring that agency rulemakings be thoroughly documented and disallowing some of the more egregious regulatory examples. It claims to have found most state agencies cooperative. But, bureaucratic incentives being what they are, sooner or later an activist OAL is likely to test the legal limits of the "necessity" standard.

The concept of a Regulation Czar is, of course, somewhat scary—unless one views that as precisely the role which the elected chief executive (governor or president) is supposed to play. Such review "from the top"—outside of the special-interest confines of the issuing agency, and at a level where all the affected social interests can be taken into account—may be the only ultimate remedy for a government that, in the era of agency-made law, has as many unrepresentative mini-legislatures as it has letterheads. One would have thought it more appropriate to lodge the regulation-reviewing authority directly in the chief executive, rather than merely giving him veto control, as the California law specifies. Still, one should hope that OAL's

authority will be broadly interpreted. It will provide a good test, for other States and for the Federal government, of centralized executive review as a control device.

QUESTIONS POSED BY SENATOR LAXALT TO THOMAS MOORE

Question 1. Assuming that the President or his designee is given the authority to designate certain rules as "major," do you feel that the President or his designee should also have the power to waive regulatory analysis for certain major rules? If you support such waiver authority, please give specific examples (in addition to IRS rules) of rules for which such a waiver power would be needed. If you favor such waiver power, but with criteria set out in the statute, please elaborate on the details of such criteria. In addition, if you favor the addition of a waiver power, please explain why you do not feel that putting such discretion in the Executive inserts a major loophole in the requirements of S. 1080. Should the exercise of such a power be subject to judicial review?

Answer. I see no good reason why the President of his designate should have the power to waive regulatory analysis for certain major rules. There may be situations in which such power would be desirable, but I am doubtful. If a major rule cannot be justified on the grounds that the benefits exceed the costs and that no more cost-effective approach is available, then the rule should not be promulgated. Giving an exemption to the Administration would permit future administrations that were committed to strong ideology positions favoring regulation of a particular area to ignore the question of benefits and costs, and cost-effectiveness.

Question 2. Should the determination of what is a major rule be subject to some form of judicial review? If you believe that there should be some limited judicial review, please explain how such review should be limited.

Answer. I believe that a judicial review or a review by another agency is necessary to insure that regulatory agencies determine major rules in an appropriate manner. If this Act is amended, as I recommended in my formal testimony, to include review authority by either OMB or a new "super" agency, then judicial review would not be necessary. If the bill is not so amended then some judicial review is necessary as a check on the agencies.

Question 3. When considering the definition of a major rule, most witnesses addressed subparagraph (i), dealing with $100,000 million in compliance costs. Do you feel that subparagraphs (ii) and (iii) are too vague to be practically useful? Are these subparagraphs necessary?

Answer. (ii) is vague and appears to duplicate (i). However, (iii) does add another dimension to the issue. It states that if there are significant adverse effects on competition, etc., the rule will be considered a major rule. While significant adverse effect is vague, it could be strengthened with some language indicating that if employment, investments, etc., were affected by more than ten percent, it would be considered significantly adverse. Even as it stands, it is a useful complement to (i).

Question 4. Should a deregulatory rule making be subject to regulatory analysis?

Answer. As I indicated in my prepared testimony, I believe there should be a presumption in favor of the free market and deregulation. Hence, I would argue that a deregulatory rule should not be subject to regulatory analysis. If all rules including deregulation are subject to regulatory analysis, the effect is to make the status quo the preferred position and to make deregulation even more difficult.

Question 5. Many have said that regulatory analysis should not be the sole criterion of a rule making. What impact should regulatory analysis, as provided in S. 1080, have on a particular regulatory decision? What other criteria should be guiding a regulator in addition to the regulatory analysis?

Answer. I believe the regulatory analysis which includes cost-benefit analysis and cost-effectiveness analysis should be the basis of rule making. If a rule cannot be justified in terms of its benefits being more important than its costs, and in terms of its being the most cost-effective method of achieving the aims, it should not be established.

Question 6. Some have supported a requirement for agency descriptions of the effects of a rule, but have at the same time opposed any requirement for an agency determination concerning the relationship of those trade offs. Do you feel such a determination (as in S. 1080, the benefits "justify" the costs, and the rule is a "cost-effective" alternative) is necessary to make regulatory analysis worthwhile?

Answer. As I indicated in my answer to question 5, I do believe a determination that the benefits justify the costs and the rule is cost-effective is necessary. Making the agency provide such a finding will focus its attention on the question.

Question 7. Why not have a standard for rule making that a final rule should be the one that saves the most lives and avoids the most injuries, unless the agency offers an explanation to the contrary?

Answer. Putting the benefits simply in terms of the most lives saved and the most injuries avoided may not in all cases lead to the appropriate final rule. The cost to save the last few lives from some rule-making may be excessively high considering that funds could be spent in other endeavors which might save more lives. For example, one standard might save lives at the cost of $100,000 per life—clearly worthwhile—while the next tighter standard might save so few lives at such a cost as to make the proposed rule impractical. Thus, the rule-making should consider whether the specific benefits in terms of lives saved justify the costs being imposed.

Question 8. OMB or the Regulatory Relief Task Force operates without the procedural safeguards for fairness mandated by the Administrative Procedure Act. Is it wise to shape regulatory policy in a manner insulated from those procedures, through a mechanism like OMB or the Task Force?

Answer. Since the regulatory agencies must meet the Procedures Safety Guides for fairness mandated by the Administrative Procedures Act, it does not seem necessary or particularly desirable to impose these rules on what is essentially a review agency.

Senator LAXALT. Mr. Lave?

STATEMENT OF LESTER B. LAVE, SENIOR FELLOW, THE BROOKINGS INSTITUTION

Mr. LAVE. I would like to thank you for inviting me to testify.

I think the proposed bill makes a small but essential contribution to regulatory reform. It is a small contribution because getting the scientific facts straight and emphasizing the role of efficiency makes only a small contribution to a very complex process; but the contribution is an essential one.

It is important not to be naive about how much a systematic study of benefits and costs will contribute to the process. A benefit-cost analysis will not compel a particular decision; it will not tell us that there is only one right way. What it will do is to brush aside a host of alternatives which are not satisfactory.

There are a number of aspects of the bill and of the process that I think are highly salutary. One of them is giving more emphasis to the role of analysis and generally establishing a more contemplative approach to regulations.

Many of the Agencies, such as EPA or OSHA, were set up in the midst of what were perceived to be crises; they were given strict deadlines to accomplish difficult tasks. It is remarkable how good a job they did, given the amount of time that they had.

In the 1980's agencies must be more contemplative, concentrating on good regulations rather than many regulations.

It is also important not to be naive about the many conflicts, particularly value conflicts, inherent in regulation. Benefit-cost analysis can do little to resolve these conflicts. The value conflicts must be resolved by the Congress, which is the one body in our society created explicitly to decide such conflicts.

Senator LAXALT. On that point—and I think it is well taken—I think that probably this record does not reflect the fact that the Congress has to assume its rightful part of the blame in this whole process because a lot of these legislative enactments have been too general in nature, and they have literally kicked the ball downtown and let the bureaucrats do the dirty work, so to speak, by fleshing out rules and regulations. I do think that, as you say, this is a step in the right direction here, but I think that Congress has

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to assume its rightful role by way of far more specific legislation, and deciding in the value areas particularly. I think that point is well taken, Mr. Lave.

Mr. LAVE. Senator Laxalt, I have queried some Members of Congress about why they did not bite the bullet and resolve these conflicts. One Member of Congress remarked that he likes to get reelected.

There is nothing more controversial than coming down on one side in these areas of value conflicts.

Senator LAXALT. But if we do not, we have no real cause to complain if something comes from downtown that appears to be in conflict with what we intended either.

Mr. LAVE. I agree. The last body in society that one would like to have resolving these conflicts is a group of academics, like myself, appointed for some period of time, who are not subject to public control. The Congress must face up to those.

May I just make one more comment?

Senator LAXALT. Surely.

Mr. LAVE. That is, I have to twit my former colleague and friend—current friend, I hope—Tom Moore, on what he just said.

Whenever I advocate the creation of yet another layer of bureaucracy to discipline the bureaucracy below, my wife kicks me. That is the problem not the solution.

The important contribution of benefit-cost analysis is in helping the agency make better decisions and secondarily in helping the agency convince society that its decisions are proper. A new layer of bureaucracy is not necessary for that.

Senator LAXALT. That, essentially, is just going to have to come right from the White House itself at the outset. They are going to have to assume their rightful part of the responsibility, too, and the department heads on down are simply going to have to give some solid signals to the regulators. Is that not right?

Mr. LAVE. Yes, sir.

Senator LAXALT. Thank you. Without objection, your prepared text will be included at this point.

[The prepared statement of Lester B. Lave, additional material and responses to questions posed by Senators Laxalt and Leahy follow:]

Prepared Statement of Lester B. Lave

The crisis in regulation is not getting rid of government. People still give high priority to health, safety, and environmental issues.[1] Instead, the task is making regulation more efficient and effective.[2] Perhaps half the widespread disenchantment is with the costs, especially needless costs, imposed on businesses and individuals; the other half is disappointment that agencies have not lived up to the legislative rhetoric of "no discharges into navigable waterways by 1985" and "protecting workers over their entire working lives."

Regulator reform must separate the ideals of society from the reality of tradeoffs among social goals.[3] Deregulation, the preferred strategy for improving economic regulation, is not a viable alternative for most health, safety and environmental regulation.[4] The U.S. economy is basically competitive, and would be more so if government regulations were altered. But health, safety and environmental issues are externalities which the market cannot fix. In some areas, alternatives to regulation should be explored more assiduously since the cost of regulation is extremely high.[5] However, in the main, there is no alternative to the costly, time consuming process of regulation.

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1. Mitchell, R.C., "Silent Spring/Solid Majorities," Public Opinion, 1979.

2. Lave, L.B., The Strategy of Social Regulation, Brookings Institution, 1981; Lave, L.B., "Health, Safety and Environmental Regulation," in J. Pechman (Ed.), Setting National Priorities: Agenda for the 1980s, Brookings Institution, 1980.

3. For example, see Lave, L.B., "Conflicting Federal Regulation of the Automobile," Science, May 1981.

4. See references for Footnote 2.

5. Baram, M.S., Alternatives to Regulation for Managing Risks to Health, Safety, and Environment, Report to the Ford Foundation, 1980.

In particular, the difficulties and costs include: (1) setting concrete goals, (2) getting the science right, (3) setting effective regulations that recognize social costs and changes in the distribution of income, assets, and risks, and (4) implementing the regulations.

The market is a marvelous institution for resolving value conflicts. When the market cannot be used, society is left with government and similar institutions for resolving conflicts. Unfortunately, there is rarely agreement about concrete social goals, particularly in view of the costs and tradeoffs. Government can eventually resolve conflicts, but as the debates on abortion and busing exemplify, this is a tortuous process. Imagine the economy if government had to decide if automobiles should be big or small or products made to extremely high standards with high prices.

Getting the science right means (a) identifying risk, (b) identifying the causal agent or act, (c) determining the quantitative relationship between exposure and consequences, (d) determining who is at risk and at what levels, and (e) estimating the methods and costs of reduing risk.[6] These are complicated issues, filled with technical complexity, requiring highly competent analysis, and fraught with uncertainty. Even after the best minds have wrestled with these issues, the crucial regulatory issues will always be filled with uncertainty.[7] It is the rare exception when a substance is known to pose substantial risks to people at current levels; virtually in every

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6. Lave, L.B., "Quantitative Risk Assessment of Toxic Substances," Working paper, Brookings Institution, 1981.

7. Crandall, R. and Lave, L., The Scientific Basis of Health and Safety Regulation, Brookings Institution, 1981.

case the risks are theoretical, calculated on the basis of assumptions and extrapolations, as the regulation of saccharin showed.[8]

Some scientists contend that too little is currently known to permit quantitative risk assessment. If so, regulation must rest on base of hunches, which is unsatisfactory for decisions involving billions of dollars and thousands of lives. Even estimating the mechanisms and costs of reducing risk are fraught with uncertainty, demonstrated by regulating vinyl chloride.[9]

Regulation always reduces someone's current or future income, enriches some one else, and changes the value of people's assets and the amount of risk they must face.[10] Even a regulation which is clearly in the best interests of society will work to the detriment some group. Government seeks to placate those who are harmed most, particularly if they are articulate, politically powerful, and disadvantaged. Rarely is the regulation that would be best for soc the one that is implemented.

Any number of mechanisms are used to implement regulations, civil sanctions to criminal sanctions, fees, or moral suasion.[11] various mechanisms offer quite different advantages with respect t efficiency, equity, assurance of minimum compliance, treatment of uncertainty, and the amount of resources devoted to the process. as in general, the principal issue is the relative concern for ec

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8. National Academy of Sciences, Committee for a Study on Saccharin and Food Safety Policy, Food Safety Policy: Scientific Societal Considerations, 1979.

9. Doniger, D.D., The Law and Policy of Toxic Substances Control: A Case Study of Vinyl Chloride, Johns Hopkins Universit Press, 1978.

10. Wilson J.Q., The Politics of Regulation, Basic Books

11. Schultze, C., The Public Use of Private Interest, Br Institution, 1978.

efficiency as opposed to the other attributes, primarily due process and equity questions.

Resolving value conflicts is inherently difficult. In search for ways to accomodate all views, it is easy to devote inordinate amounts of time and resources to the process. In the limit, technological progress always holds out the hope of making the problem disappear. Uet there are times when the costs of delay and accomodation become inordinate. There are times when rhetoric palls and one must find and implement solutions despite the fact that values still conflict and further delay might smooth the conflict.

I support S. 1080 as a mechansim to bring sense into government regulation. The results of the analysis will inform regulators, the Congress, and the public so that more intelligent decisions can be made. By subtly emphasizing efficiency and effectiveness, it will help reduce unnecessary costs while moving more quickly to accomplish public goals. The bill recognizes and deals with some of the difficulties in the February 17, 1981 Executive Order requiring benefit-cost analysis. In particular, effects (benefits) cannot be estimated with confidence in each area. It makes no sense to bestow estimates of benefits and costs in each area with equal confidence. Instead, we need a more sensitive treatment of estimates that forces quantification but requires examination of the quality of each estimate and allows a general balancing of benefits and costs rather than requiring the alternative that maximizes net benefit or minimizes social cost. The vast majority of the value of the analysis is going through the process carefully and being forced to evaluate a host of alternatives. However, the process would be pernicious if we endowed the estimates with greater confidence than is warranted.

Finally, I must note a concern for the total resources required for this or any other proposal for analysis. There is no doubt that this requirement will mean additional resources for analysis and it is likely that it will slow the process of promulgating regulations. The latter is desirable, since we need better regulations, not hasty ones. But the additional resources for analysis present a serious question. For the most important social decisions, the additional resources would be well spent. However, there are a host of decisions where only the most rudimentary analysis is needed to suggest the preferred action. Ways must be found of relieving each agency of the burden of analysis that serves no purpose. Only in part should the criterion be the total resources affected. In addition, a requirement is needed that a first order analysis be prepared; when that analysis clearly demonstrates the superiority of one alternative, the agency should be permitted to stop at that point. Of course, the first order analysis ought to be published and subject to public comment.

Again, let me emphasize my support of S. 1080 and urge its passage.

From: Setting National Priorities: An Agenda for the 1980's, J. Pechman, ed. (Brookings, 1980)

CHAPTER FIVE

Health, Safety, and Environmental Regulations

LESTER B. LAVE

THE DECADE beginning in 1965 was a time for statements of purpose and for ringing rhetoric about health, safety, and environmental regulation. Congress passed legislation declaring that automobiles should be made safe, should be virtually emission-free, and should conserve fuel; that workers should be protected from accidents and exposure to hazardous substances; that consumers should be protected from dangerous products, and that steps should be taken for a cleaner environment.

This "social legislation" is qualitatively different from previous regulations. To be sure, clean air and clean water acts, acts to protect workers, and acts to protect consumers had been passed. With the possible exception of the Food, Drug and Cosmetic Act, however, none delegated such broad powers to the newly created regulatory agencies or such broad missions to solve social problems.

Despite recession, the hostility of business, plant closings, losses in productivity, and particular cases of consumer dissatisfaction, the fundamental goals have not changed; but there is growing dissatisfaction with the results and the high costs. Regulatory reform is a powerful slogan, but it is supported by people advocating repeal of all regu-

I thank Henry J. Aaron, Morton Corn, Robert W. Crandall, Michael Gough, Raphael Kasper, Roger G. Noll, Paul R. Portney, Louise B. Russell, Eugene P. Seskin, and Steven M. Swanson for their comments; Lewis S. Alexander for extraordinarily competent research assistance; and Val J. Harris for secretarial asristance.

lation at the one extreme and those wanting to increase the speed with which new regulations are enacted and enforced at the other. The dissatisfaction and opposing proposals for reform are the inevitable result of the previous failures to obtain agreement on short-term goals and to face the difficult trade-offs among noble social goals.

Costs of Social Regulation

Estimating the costs of social regulation is extremely complicated. For example, there is evidence that saccharin, a nonnutritive sweetener used principally in soft drinks, is a carcinogen, although the evidence is open to a wide range of interpretation, especially about its potency. What would be the social loss associated with banning saccharin and thus nonnutritive sweeteners? Some argue that the benefits would be zero because people do not *need* sweeteners; others contend that the public would be willing to pay billions of dollars a year to have the current array of sweetened foods. Cost estimates are tenuous. There is much to be learned by displaying the "hard" estimates of costs and then listing separately the most complete estimates.

Table 5-1 shows the 1978 budget allocations for health, safety, and environmental regulatory agencies. The list is incomplete because, for example, the Interstate Commerce Commission is excluded but has a social regulatory role.

More complete, and highly speculative, estimates of total costs were made by the Office of Management and Budget and then submitted for comment to the General Accounting Office and the staff of the Committee on Government Affairs. The estimates for total environmental regulation are $40–$60 billion a year, with a much smaller estimate of $14.4 billion in 1975 by the Council on Environmental Quality. Of this total, about $6 billion a year was the estimated cost of controlling automobile emissions. Safety regulation was made up of $500 million and $3.5 billion annually for automobile safety and occupational safety, respectively. Finally, the quality standards for food and drugs set by the Food and Drug Administration were estimated to cost just less than $500 million a year. Murray Weidenbaum and Robert De Fina estimate that health, safety, and environmental regulations cost about $20 billion in 1976. Although large in absolute terms, these costs represent a small proportion of gross national product—about 1 percent. If they were

Table 5-1. Costs of Social Regulation, 1978
Millions of dollars

Agency	*Budget allocation*
Consumer Product Safety Commission	$40.6
National Highway Traffic Safety Administration	54.6[a]
Federal Railroad Administration	7.3[b]
Federal Aviation Administration	203.7[c]
National Transportation Safety Board	15.4
Occupational Safety and Health Administration	136.6
Occupational Safety and Health Review Commission	7.2
Mine Safety and Health Administration	99.3
Department of Agriculture	206.5[d]
Food and Drug Administration	288.7
Nuclear Regulatory Commission	141.4[e]
Environmental Protection Agency	643.5[f]

Source: *Study on Federal Regulation*, vol. 6, *Framework for Regulation*, Senate Committee on Governmental Affairs (Committee Print) 95 Cong. 2 sess. (U.S. Government Printing Office, 1978), pp. 36 and 37.

a. Excludes research and state contracts.
b. Railroad safety only.
c. Administration of flight standards program only.
d. Meat and poultry inspection only.
e. Excludes research.
f. Excludes research and grants.

spread evenly across the entire economy, they would represent less than one year's increase in real income (at productivity increases prevailing before 1973); however, they are concentrated in a few industries or consumer products. For example, the costs of occupational health standards for cotton mills and coke ovens are estimated to be $688 million and from $241 million to $1,280 million, respectively. The costs of water pollution control must be borne primarily by industries such as paper; the costs of air pollution control by automobiles and steel.

Social Goals

A central paradox is that Americans are safer now than ever before, but at the same time they are more concerned about health and safety than ever before. There is a general perception that we are exposed to so many risks from toxic materials in the environment and from accidents that we are in the midst of a crisis. Certainly life-threatening risks abound, from new chemicals in the environment to new safety hazards, but no evidence exists that overall risks increased

in the recent past or will increase in the foreseeable future. Occupations such as coal mining and lumbering are hazardous, and further steps must be taken to reduce the rates of injury and chronic disease. But most agency attention has gone to regulating exposure to low concentrations of toxic substances. Progress in the biomedical sciences has shown some chemicals to be carcinogens in animals and has raised suspicion about others. Advances in analytical chemistry, which have shown these chemicals to be in minute concentrations in air, water, and food, have created public concern. Once aroused, the fears cannot be calmed because of the paucity of both data and accepted scientific models. This dearth of scientific evidence on the magnitude of risk has intensified the perception of *possible* risk that dominates public thinking.

Perhaps the best indicator of overall health is life expectancy at various ages, particularly at birth. All life-shortening risks from accidents and from disease are incorporated into this measure. Life expectancy rose rapidly during the early part of this century, and has continued to rise steadily, although slowly, during the second half.[1] Certainly there is room for improvement; compared with other nations, significant further enhancement is possible, and part may be attained through social regulation. Indeed, much has been accomplished in the battle to lower the overall risk, control emissions into the air and water, and reduce the exposure of workers.

How can such a wide discrepancy occur between this decreasing risk and the perception that more must be done to abate environmental pollution and prevent accidents? Is it irrational to demand that health, safety, and environmental regulations lower these risks further?

Since the turn of the century, real income per capita has quadrupled, and life expectancy at birth has almost doubled. Although no evidence exists that Americans have become sated with the products of the U.S. industrial economy, it is natural that they should want a

1. The life expectancy at birth in 1900 for a white male was 46.6 years and for a white female, 48.7 years; the figures in 1975 were 70.7 years and 77.7 years, respectively. Life expectancy at age forty for white males and females rose from 27.7 and 29.2 years to 33.4 and 39.8 years. After subtracting respiratory cancer (due principally to cigarette smoking), the data show that the overall cancer mortality rate has fallen steadily; the decline in cardiovascular mortality rates is even more dramatic. See U.S. Department of Health, Education, and Welfare, *Health United States, 1979* (U.S. Government Printing Office, 1980), pp. 144–45, 153, 157; and L. A. Fingerhut, R. W. Wilson, and J. J. Feldman, "Health and Disease in the United States," in Lester Breslow, Jonathan E. Fielding and Lester B. Lave, eds., *Annual Review of Public Health*, vol. 1 (1980).

more pleasant environment, lower risks associated with their products and work places, and general health improvements to accompany their increases in real income.

What appears to be a paradox is resolved by recognizing the rapidly increasing desire for lower risk. Short of economic disaster, the goals for a cleaner, safer environment are unlikely to change. Nothing is to be gained by questioning whether the goals are widely shared or considered important. Americans should proceed with the task of attaining the goals more efficiently.

Conflicts among Goals

But translating deeply felt human desires into worthwhile goals is difficult. In particular, at the most basic level, the goals conflict. To clean the environment, resources must be expended; those resources will not be available for hospitals, education, or private consumption. Implicit in each social goal must be some notion of priorities or balancing.

The automobile offers one of the best illustrations of contradictions among goals. In 1966 Congress declared that the automobile must be made safe; in 1970 it declared that its emissions must be reduced at least 90 percent; in 1975 it declared that automobiles must be fuel-efficient. A catalytic converter designed to reduce emissions also adds weight; furthermore, there is a physical relationship between combustion efficiency and emissions, particularly for nitrogen oxides. Curtailing emissions necessarily leads to a deterioration in fuel economy, other factors held constant.

It is possible to build automobiles that offer better protection to the occupants in a collision, have lower emissions, and achieve better fuel economy, but only at the cost of making an automobile that is less pleasant to drive, ride in, and look at—and is much more expensive. In general, one of the attributes can be enhanced only at the expense of others. These social goals would have been achieved more efficiently by considering all attributes simultaneously and thereby resolving the conflicts.

Public Perceptions

In 1965 few Americans thought that reducing air and water pollution were high-priority tasks. Within five years, however, environ-

mental concerns were rated as the second most important social problem (after reduction of crime).[2] The rapidity of this rise in public concern suggested a frivolous phenomenon that had caught the public attention, but would disappear from view. Opinion surveys, however, have continued to find that the environment is a major concern. People want a clean environment and give it high priority whether they are asked to identify major social problems or answer complicated questions about trade-offs between the environment and either inflation or unemployment.

For example, in a series of polls conducted between 1973 and 1978, people were asked to state which programs were not being supported adequately by the federal government; a little more than 60 percent of the respondents named the environment in 1973, while about 50 percent listed it in 1978, despite the greatly increased expenditures for such purposes during that period. People are in favor of slowing economic growth and of paying higher prices, if necessary, to protect the environment. Furthermore, most people think that progress to date has been too slow and that air and water pollution still will be serious problems in the year 2000.

Some polls indicate that only about one-quarter of Americans would choose a job in which they were exposed to dangerous substances, in contrast with a job that paid one-third less but was not associated with dangerous exposure.[3] Economic studies of jobs with such risks find that workers demand a wage premium of $200–$1,000 for each additional risk of one in one thousand that death will result from exposure.[4] More direct evidence of society's goals for health and safety is seen in the expenditures on health care, health research, and the environment itself. As the first children of the baby boom reach their forties in the mid-1980s, they will see some of their friends suffer from various chronic diseases such as cancer and, especially, cardiovascular disease. If anything, health concerns are likely to

2. Robert Cameron Mitchell, "Silent Spring/Solid Majorities," *Public Opinion*, vol. 2 (August–September 1979), pp. 16–20, 55.

3. Gene Pokorny, "Living Dangerously . . . Sometimes," *Public Opinion*, vol. 2 (June–July 1979), pp. 10–13.

4. Robert Stewart Smith, *The Occupational Safety and Health Act* (American Enterprise Institute for Policy Research, 1976), p. 91; Richard Thaler and Sherwin Rosen, "The Value of Saving a Life: Evidence From the Labor Market," in Nester E. Terleckyj, ed., *Household Production and Consumption* (National Bureau of Economic Research, 1976), pp. 265–98; and W. Kip Viscusi, "Employment Hazards: An Investigation of Market Performance" (Ph.D. dissertation, Harvard University, 1976), chap. 6.

increase as the demographic composition of the population shifts toward a greater proportion of older people.

History of Recent Legislation

The agencies created to administer the social legislation have far broader mandates and powers than previous agencies such as the Interstate Commerce Commission or the Federal Aviation Administration. Indeed, the evolution of this legislation over time has given even greater latitude to the agencies. Congress has reacted to past inadequacies both by setting specific regulations and by delegating even broader power. For example, Congress has retained the authority to set automobile emission standards by writing detailed standards into law; it ordered the Environmental Protection Agency to consider air pollution standards for areas that were currently clean, without ever defining what "currently clean" meant or what constituted "significant deterioration." By both the specificity and generality of legislation, Congress has muddied the role it traditionally gave to regulatory agencies: Congress defines a general goal and set of workable goals and charges the agency with carrying out the day-to-day operations. If the agency fails to behave according to congressional mandate, the mechanisms of oversight, appropriations hearings, the need for senate confirmation of the agency head, and special laws serve to discipline the agency. However, Congress has rarely defined workable goals for social legislation. It alternates between assigning the agencies problems it cannot solve (through legislation that states only the most general goals) and acting itself to set detailed goals.

Air Pollution

Although there have been federal acts regulating air pollution since 1955 and local regulations for more than half a century, a major change took place in the 1967 amendments to the Clean Air Act. Congress ordered the Secretary of Health, Education, and Welfare to define air quality control regions, set general goals for ambient air quality, and then to induce state and local governments to formulate detailed goals for air quality and plans to achieve them in each region. By 1969 it was apparent that not much progress had been made in defining these regions.[5] Even after designating a region, little

5. Of perhaps 300 regions, the Secretary had designated 20 regions, and 37 were in process.

cleanup took place because no government wanted to push out industry.

Congress realized that the 1967 amendments had not been successful and made sweeping changes in the 1970 amendments. It ordered the Environmental Protection Agency to define primary and secondary ambient air quality standards and emissions standards designed to achieve these objectives. Rather than make the effort entirely federal, detailed plans and enforcement policies were to be left to the states. The primary air quality standards were to protect the health of the population, even the most sensitive members with respiratory problems. The basic notion was that there was some threshold level of air pollution below which no one's health would be threatened.

Secondary standards were to protect property, vegetation, visibility, and other nonhealth values. Congress believed that achieving these more stringent standards would be more difficult, expensive, and time-consuming.

Automobiles were singled out for special attention in the 1970 amendments. Congress mandated a 90 percent reduction in emissions levels over 1970 models and a detailed timetable for implementation.[6] Congress, however, has found itself embroiled in this problem, with periodic reviews of the time schedule and standards.

Besides changes in the timing of the automobile standards, another set of major amendments was passed in 1977. These decreed that clean areas could not be allowed to suffer significant deterioration and that coal-fired electricity generator plants would need to have flue gas desulfurization, even if they met emissions standards. Among other changes, the amendments created a National Commission on Air Quality, which, under the aegis of the Congress, was to study air pollution goals and regulations. The creation of this commission was simply one additional step in a continuing review of air pollution regulations.[7]

6. Levels of hydrocarbon and carbon monoxide were to be reduced by 90 percent in 1975 models; levels of nitrogen oxides were also to drop by 90 percent, but 1971 levels were used as a base, with implementation in the 1976 models. None of these objectives was achieved on schedule, and the most stringent standard for nitrogen oxides still awaits implementation.

7. See David P. Rall, "Review of the Health Effects of Sulfur Oxides," *Environmental Health Perspectives*, vol. 8 (August 1974), pp. 97–121; and National Academy of Sciences, Commission on Natural Resources, "Perspectives on Technical Information for Environmental Protection," vol. 1, U.S. Environmental Protection

The 1977 amendments represented a major departure from a policy of deciding on desired air quality and then estimating the extent of emission control required. The administrator of the Environmental Protection Agency was ordered to determine a standard for removal of sulfur from coal that would apply, even when abatement was not required to meet ambient air standards and when little sulfur was being emitted—for example, when low-sulfur coal was burned. Requiring abatement equipment, without regard to protecting air quality, has its justification in political, not environmental, considerations. Surely attaining the goal of an enhanced environment is sufficiently difficult that it is folly to append unrelated political barriers.

Extensive hearings and major new amendments on air pollution control policy are likely in 1980–81. For example, the National Commission on Air Quality will make its report, and the automobile emissions regulations will require review. As energy policy emphasizes the role of coal, past compromises will require reexamination. There are also likely to be proposals for modifying the process by which standards are set, for example, using benefit-cost analysis; changing the implementation of abatement policy, for instance, effluent fees or transferable pollution rights (discussed below); and altering the nature of judicial, congressional, or executive branch review of regulations under the semblance of regulatory reform. Progress has been made in lowering emissions of sulfur oxides and particulates, but many cities have increasing photochemical smog resulting largely from automobile emissions. Major changes are likely.

Water Pollution

Important legislation governing water pollution was passed first in 1899, prohibiting the dumping of waste materials into navigable waters. Although the 1899 Rivers and Harbors Act exerted the most stringent controls until the Federal Water Pollution Control Act amendments of 1972, it was little used until 1970. The 1972 amendments provided that discharges were basically to be determined by the best available control technology rather than by goals for water

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Agency Analytical Studies Series (NAS, 1977), and other volumes in the series. The National Academy of Sciences has also published studies on stationary sources of air pollution, automobile emissions, and specific pollutants such as nitrogen oxides, ozone and other photochemical oxidants, sulfur oxides, and carbon monoxide.

quality. Industry was instructed to use the best practicable technology by mid-1977 and the best available technology by mid-1983. These steps were taken to protect fish, shellfish, and wildlife in waters, to provide for recreation by July 1983, and to eliminate all discharges of pollutants into navigable waterways by 1985. To ensure that these laws were being enforced, any citizen could sue polluters when they did not observe the standards or the government when it did not proceed expeditiously with the setting of standards. Although some industries complied, the deadlines were generally not met, and the Clean Water Act of 1977 delayed many of these deadlines.

The most important political aspect of these acts has been the allocation of major federal funds for sewage control and other projects to control water pollution. Congress used the goal of eliminating discharges by 1985 to justify large expenditures for local control projects—pork barrel. So powerful were the joint attractions of environmentalism and pork barrel that Congress overwhelmingly overrode President Nixon's veto of a bill whose price tag he described as "staggering, budget-wrecking."

Toxic Substances

The Toxic Substances Control Act, passed in 1976, was an attempt to deal comprehensively and on a prospective, rather than reactive, basis with the myriad chemicals to which Americans are exposed. Earlier legislation addressed toxins in foods, food additives, drugs, and cosmetics; air and water pollution; and exposures at the work place. The new act was an attempt to deal with chemical exposures comprehensively. In a radical departure from previous practice, Congress required a manufacturer to demonstrate that a chemical was safe before its introduction. Previously the regulatory agency was responsible for showing that the use of the chemical caused problems. Certainly Congress was facing a difficult problem and was providing more guidance on procedures and priorities than it had in the past. But it did not reckon with the complexity and size of the problem. Three years after passage, the basic procedural steps of the act still have not been taken, in part because Congress did not appropriate a sufficient budget or manpower.

Although there are thousands of toxic chemicals in use, regulation that would prohibit or significantly delay the introduction of new chemicals could slow both economic growth and the increase in real

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income. Congress required that authority under the act "should be exercised in such a manner as not to impede unduly or create unnecessary economic barriers to technological innovation while fulfilling the primary purpose of this Act to assure that such innovation and commerce in such chemical substances and mixtures do not present unreasonable risk of injury to health or the environment."

To accomplish this balancing, the Environmental Protection Agency is to establish standards and review them at least annually, establish a "most wanted" list of potentially dangerous chemicals and review these annually, and begin testing on the substances with highest priority. To prevent unnecessary risk, companies must give ninety days notice before manufacturing a new chemical or before any significant new use of an existing chemical. Finally, to ensure that the agency is properly administering the Toxic Substances Control Act, private citizens have the right to sue or petition for enforcement, amendments, or repeal of standards.

But no one anticipated the difficulty in formulating and implementing the rules and procedures associated with regulating chemicals. Furthermore, suits by private citizens have disrupted the ability to proceed systematically. To date, enforcement of this statute has hardly begun.[8]

The Resource Conservation and Recovery Act of 1976 ordered the Environmental Protection Agency to set criteria for the disposal of toxic wastes. Like the Toxic Substances Control Act, administration of the Resources Conservation and Recovery Act has hardly gotten started. One might doubt that the task is feasible. Are there any criteria for disposal of toxic wastes that will prove acceptable to local communities? Even if there were, the costs of a system that meets these criteria are likely to be greater than that which can be borne by the plants affected.

Occupational Safety and Health

Congress passed the Occupational Safety and Health Act in 1970 to guarantee that "Each employer—shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees." Congress emphasized that

8. John Walsh, "EPA and Toxic Substances Law: Dealing with Uncertainty," *Science*, vol. 202 (November 10, 1978), pp. 598–602.

this protection was to extend over the entire period of employment; thus workers were to be protected from exposures whose accumulation over forty or more years might cause harm.

To achieve these goals, Congress established an Occupational Safety and Health Administration within the U.S. Department of Labor. They began by adopting and promulgating about 7,000 voluntary or consensus standards published by industry groups. Many of the voluntary standards were never intended to be mandatory and hundreds had little relationship to health or safety.

The majority of the agency's efforts have been devoted to enforcement, with inspectors visiting places of employment to see that standards are being met and that no hazardous conditions exist. Most violations carry minimal fines, although "willful" violations can result in large fines or prison sentences. Only recently have violations been cited as willful, and a few fines have gone beyond a minimal level.[9]

The agency initially had 400 inspectors to cover almost 5 million places of employment; the chances were nil that a randomly chosen place of employment would be inspected. The largest firms have been the focus of attention because these employ about 50 percent of the work force; work places with ten or fewer employees receive only sporadic inspection. Furthermore, there are so many standards that it is inconceivable that an inspector can do more than look for a few obvious violations.

The standard-setting procedures have proved to be so time-consuming that only a handful of health standards have been set. Large amounts of personnel time are required to collect information, conduct hearings, distill that information, and revise a standard. In addition, virtually all standards are challenged in the courts, and so vast resources are devoted to litigation.

Recently 928 standards and parts of standards not pertaining to health and safety were eliminated. While this is to be commended, many more standards are irrelevant to health and safety (about 1,100 were initially identified for elimination by the agency).

The relationship between this regulatory agency and the National Institute of Occupational Safety and Health has not been a satisfactory one. The agency complains that the latter, a research agency, publishes superficial or untimely studies more rapidly than they can be used, and generally pursues a course unrelated to the requirement

9. Nicholas A. Ashford, *Crisis in the Workplace* (MIT Press, 1976), p. 260.

for regulation—a common complaint of regulatory agencies. More recent efforts at coordination may have alleviated some problems.

Progress in enhancing occupational health and safety to date is generally perceived to be unsatisfactory. The agency has failed to reduce accident rates significantly, even in industries that the agency selected for attention.[10] Only a few toxic substances have been regulated; many cases are still in litigation; and compliance is usually slow. The agency has not developed a comprehensive program or a set of priorities, although internal priority-setting exercises have been conducted. Congress, and probably the agency also, still does not appear to have made a realistic appraisal of the magnitude of the problems. Instead, the agency plods along, setting individual standards and sending inspectors to individual plants.[11] Ten years of experience show that the agency cannot promulgate more than a few standards a year, and its inspectors cannot possibly visit most work places or uncover most violations. Clearly, trying harder is not going to accomplish the goals set by Congress. More radical changes in procedure are necessary.

Highway Safety

In 1966 Congress passed the National Traffic and Motor Vehicle Safety Act to reduce the number of people being injured or killed on highways. The National Highway Transportation Safety Administration issued its first set of standards for 1968 model automobiles, with requirements such as seat belts (lap only). Subsequently, the agency has regulated the design of door handles and other objects that protrude into the interior of the vehicle, the crash-worthiness of bumpers, and so forth. Many of the safety standards would not disappear even if they were no longer required, both because of the increasing safety consciousness of purchasers and the automobile manufacturers' fears of product liability.

In 1975 Congress ordered the agency to regulate the fuel economy of automobiles: model 1978 vehicles were to achieve a fleet-weighted

10. Smith, *The Occupational Safety and Health Act*, pp. 67–70; and Aldona DiPietro, "An Analysis of the OSHA Inspection Program in Manufacturing Industries 1972–73," Draft Technical Analysis Paper (U.S. Department of Labor, August 1976).

11. A generic carcinogen standard was proposed in 1978, but compared with other agency regulations it was so unrealistic and contradictory that it has been delayed. A revised standard has been published, but it will undoubtedly be tied up in court for several years.

average of 18 miles per gallon; model 1985 vehicles, 27.5 miles per gallon. Interim standards for 1981–84 were to be set by the agency. The regulations have brought about large changes in design, virtually all of which would have occurred with some delay after the rise in gasoline prices.

Like other social regulation, highway safety regulation has been immersed in controversy since its inception. Perhaps the most controversial regulation was that requiring an interlock device that rendered vehicles inoperable if occupants were not wearing their seat belts. A combination of public resentment and problems with the technology led Congress to bar the requirement for this device. More recently the decision to require passive devices (ones that do not require action by the passenger to make them effective) has revived the controversy.

Compared with other social regulation, setting auto safety and interim fuel-efficiency standards has been easy; enforcement has been especially simple. The success stems from several factors. First, Congress was subjected to intense lobbying from the auto industry before enacting the legislation. Thus many of the controversies were settled by Congress, rather than delegated to the agency. Second, the public has supported both safety and fuel economy; the agency seemed to be codifying public desires, rather than serving a narrow constituency (for example, many of the 1968 safety requirements were introduced in 1964 to 1967 model automobiles). Third, the agency had only a few firms to deal with in setting and enforcing standards, in contrast to the agencies regulating occupational health and safety, consumer product safety, or environmental quality. A fourth factor is that enforcement consists of reviewing company procedures, rather than making visits to thousands of separate plants or testing thousands of products. Fifth, measuring the magnitude of the problem and progress is easy; the effects of highway accidents are immediately apparent and statistics are available for a long period of time—in contrast, for example, to lung cancer for which there are many causes, long intervals between initial exposure and diagnosis of the disease, and poor statistical records. Finally, the agency has collected data and performed analyses from its inception; it has a comparatively firm foundation for justifying its regulations. It is unfortunate that few of the factors that enabled this agency to be successful apply to other social regulatory agencies.

Consumer Products

The Consumer Product Safety Commission was created in 1972 as a focal agency for regulating products used by consumers. The commission is required to balance costs and benefits, and it bears the burden of proof when it seeks to ban a product. Its efforts to date have been largely ineffectual. For example, it required that children's sleepware meet flammability standards; this led to treating the fabrics with Tris (2,3-dibromopropyl), which was subsequently found to be a carcinogen that could be absorbed through the skin. The efforts of the agency to be open and fair led to charges by one commissioner that the public generally learned about staff activities before commissioners; that private negotiations with manufacturers would have resolved many of the initiatives that subsequently were litigated, delayed inordinately, and sometimes defeated; and that work was paralyzed by giving equal attention to all petitions. Although recent attempts have been made at improvement, the commission is often cited as an example of how good intentions, amorphous objectives, and poor leadership can make social regulation a fiasco.

Recent Controversies

It is difficult to formulate general policies in social regulation because of the unique circumstances associated with each case. In this section I attempt to draw out lessons from a series of recent controversies.

At the center of each controversy is the estimate of risk. Social regulation is designed to lower human risk or environmental damage. But quantifying the expected reduction in injury, illness, or death is inherently controversial; recent history rarely provides data sufficient for a satisfactory estimate. More often, risk is calculated from undertested theory or laboratory experiments with animals. There is general agreement that these estimates are subject to great uncertainty, and some scientists believe that the uncertainty precludes quantitative risk calculations.

But no matter how difficult or uncertain the results may be, there is no reasonable alternative to numerical estimates and their use in regulation. Without some notion of the magnitude of risk, society must rely either on the visceral reactions of a few individuals or must re-

gard all possible fears as being of equal concern. Clearly, I am more likely to be killed by an automobile than a meteorite, by cancer than by botulism. Regulations that cost society billions of dollars each year and result in bankruptcies, unemployment, and dislocation must be backed by more than the hunches of a few regulators. As the following cases illustrate, social regulation is inescapably embroiled in risk quantification and in using the uncertain estimates properly.

Occupational Exposure to Vinyl Chloride

Vinyl chloride, a gas, is the principal ingredient in the second most widely used plastic in the United States.[12] In 1974 the B.F. Goodrich Company reported that three workers died of angiosarcoma, an extremely rare cancer of the liver, and a fourth had died five years before. The workers had been exposed to vinyl chloride in concentrations of several hundred parts per million. Laboratory data showed that rats contracted angiosarcoma when exposed to 250 parts per million of vinyl chloride. Subsequent experiments produced tumors at much lower concentrations. As a result of the Goodrich announcement, and with consideration of the laboratory results, the Occupational Safety and Health Administration used an "emergency temporary" standard to lower the exposure ceiling for humans from 500 to 50 parts per million. In late 1974 a permanent standard of 1 part per million was set.

If the form of cancer (angiosarcoma) had not been extremely rare, it would have been impossible to associate four cancer deaths with exposure to vinyl chloride. Also crucial in this case was the laboratory result, which showed that vinyl chloride produced this same rare cancer in rats at exposures similar to those experienced by workers.

The question was whether to set a standard so low that it would prohibit use of vinyl chloride or one that might still subject workers to risk. The first alternative would have been extremely expensive and disruptive—temporarily costing tens or hundreds of thousands of workers their jobs, disrupting manufacturing processes in many fabrication industries for lack of raw material, and removing many products from the market. It could also have led to discovery of a safer substitute. Clearly, there was pressure to find an exposure level

12. David D. Doniger, *The Law and Policy of Toxic Substances Control* (Johns Hopkins University Press for Resources for the Future, 1979), p. 23.

that would protect workers, yet was technically and economically achievable.

Regulation generally proceeds by taking exposure levels found toxic in humans or in animals and then using a "safety factor" to arrive at a permissible exposure level or virtually safe dose. Human exposure data suggested that 250 parts per million of vinyl chloride was sufficient to cause angiosarcoma. Animal data showed this cancer at exposure levels of 50 parts per million, with some evidence of mammary tumors even at 1 part per million. This evidence suggests that the agency was balancing economic costs and jobs against the risks of cancer, and was not terribly conservative—at least if the objective was to prevent all cancer in workers exposed for forty years.

The feasibility of attaining a standard of 1 part per million was disputed by the industry, and the agency contractor agreed. Indeed, in its *Federal Register* notice of October 4, 1974, the agency stated: "There is virtually no dispute that most, if not all, fabricators are currently capable of reaching exposure levels of 1 ppm through engineering controls." But a paragraph below in the same document the agency added: "We agree that the PVC and VC establishments will not be able to attain a 1 ppm TWA level for all job classifications in the near future. We do believe, however, that they will, in time, be able to attain levels of 1 ppm TWA for most job classifications most of the time."

The Occupational Safety and Health Administration did not attempt to estimate the cost of meeting the standard because the feasibility was in doubt. The only cost estimate came from the Firestone Tire and Rubber Company: $450 million to $1 billion, with a best estimate of $750 million, but Firestone did not believe these expenditures would meet the standard. Even assuming the standard was feasible, the cost per incident of cancer avoided by lowering the standard from 50 to 1 parts per million would be in the hundreds of millions of dollars.

The agency regarded such a balancing to be inappropriate; three questions were relevant. Is the substance a carcinogen? Is control at the level of the standard technically feasible? Can these costs be borne by the industry? Affirmative answers were obtained to all three questions (although there was dispute concerning the second and third), and the agency promulgated the standard of one part per million.

When it became clear that the standard would actually have to be met, industry began research on how to do it cheaply. The result was the discovery and introduction of technology that made it possible to meet the standard for much less than the above estimate; indeed, current estimates are that the recovery of vinyl chloride previously wasted offsets much of the cost of control.

The vinyl chloride case is probably unique in two respects. The first is the confidence with which the ill effects of the substance could be identified and related to the amount of exposure. The second is the substantial progress in research and development that allowed the standard to be met at virtually no cost. Although research and development can be expected to result in some reduction in the cost of implementation of other regulatory standards, the extent of the reduction for vinyl chloride is unlikely to be typical, judging from the experience of other social regulation.

Occupational Exposure to Benzene

Occupational studies show that workers exposed to high levels of benzene (a ubiquitous chemical used by industry and an ingredient in products such as gasoline) develop leukemia and other blood abnormalities more frequently than workers not exposed.

In 1977 a proposal was made to lower worker exposure from a maximum of 10 to 1 parts per million of benzene. There is no epidemiological evidence to establish that benzene is a carcinogen at 10 parts per million or even at levels many times higher. However, the Occupational Safety and Health Administration established in its hearings that experts could not ensure that no cases of leukemia were caused at 10 parts per million of benzene, nor that any level of exposure was safe. A level of 1 part per million was shown to be technologically feasible to achieve in most industrial applications. Accordingly, there was a presumption that lowering exposures would lower leukemia rates and that the costs would not serve to bankrupt the industry. Therefore the standard was promulgated.

The American Petroleum Institute headed a group of plaintiffs in bringing suit against the government. The United States Court of Appeals for the Fifth Circuit suspended the regulation on the grounds that the benefits of the regulation did not bear a reasonable relationship to costs and that the agency had failed to quantify the benefits of lowering the concentration of benzene from 10 to 1 parts per million.

The case was heard by the United States Supreme Court in October 1979. The government argued that it was impossible to quantify the benefits with confidence, and that such a requirement would paralyze the agency.

Although the agency has been in existence for almost a decade, there have been no previous Supreme Court rulings on its procedures for setting regulations; and there are no relevant decisions regarding other health, safety, and environmental agencies. Thus the decision of the Court is likely to have wide ramifications for social agencies setting regulations. Benzene is particularly important because more complete evidence exists on the effects on humans than will be found for most other cases concerning toxic substances in the work place or in the environment generally. If this evidence is deemed insufficient for quantifying risk, the regulatory agencies will be directed to give little weight to scientific evidence in assessing the absolute and relative risks of each toxic substance.

To quantify risk, one must estimate the expected ill effects on workers of amounts of exposure much lower than those found to be carcinogenic in previous studies (or, for most substances, from laboratory experiments on animals).[13] Three difficulties arise. The first is extrapolating from the effects on rats to those on humans. The second is extrapolating from high to low amounts of exposure. And the third is extrapolating from one human environment, or a laboratory environment under carefully controlled conditions, to countless human environments and genetically heterogeneous persons having different personal habits and experience and multiple low-level exposures to toxic substances. Benzene exemplifies these difficulties since different biological and statistical models produce differing estimates of the incidence of leukemia at 10 and 1 parts per million.

The fundamental question in the benzene case is whether scientific information can be used to do more than suggest the existence of risk. If not, regulations must proceed on the basis of arbitrary judgments, and all toxic substances must be reduced to levels as low as is feasible

13. Interagency Regulatory Liaison Group, "Work Group on Risk Assessment, Scientific Bases for Identifying Potential Carcinogens and Estimating Their Risks" (Interagency Regulatory Liaison Group, 1979), pp. 33–35, 72; "Identification, Characterization and Control of Potential Human Carcinogens: A Framework for Federal Decision Making," Staff Paper (Executive Office of the President, Office of Science and Technology, 1979), pp. 8–9; and Lester B. Lave, "Interagency Working Group on State II Assessments of Food Additives," Working Paper (Brookings Institution, forthcoming).

or they must be banned altogether. Furthermore, agencies could not set priorities and find levels at which benefits are commensurate with costs.

This is a political, rather than a scientific, question. If the agencies are instructed not to estimate risks (as they were in the Delaney Clause), or choose not to collect data and perform analyses, quantitative risk estimates will not be available to decisionmakers.[14] Congress must instruct the agencies to quantify risks to the extent feasible and weigh benefits against costs, as it did when creating the Toxic Substances Control Act and the Consumer Product Safety Commission, among others.

Sulfur Oxides Emissions

A host of acute air pollution episodes, such as the 1952 London Fog, made it evident that high concentrations of air pollution have grave health effects.[15] A large literature of laboratory and epidemiological studies has helped to narrow the uncertainty about which pollutants cause the problem and the nature of the resulting health effects. Sulfur oxides and suspended particulates, separately and in combination, are the air pollutants responsible for the greatest health effects in the United States. Accordingly, the Environmental Protection Agency has embarked on a program of curtailing emissions of these pollutants to improve air quality.

If pollution abatement were inexpensive, the matter would be closed. There are health effects, and it is prudent to lower emissions and reap these benefits. But pollution control, particularly for sulfur oxides, is expensive. Furthermore, stringent control could result in the prohibition of technologies such as direct burning of coal and reduced use of such fuels as high sulfur coal. Thus there have been repeated reevaluations of the health effects of sulfur oxides. The fundamental issues to decide are: What are the health effects of sulfur

14. The Delaney Clause, part of the Food Additives Amendment of 1958, instructs the Food and Drug Administration that no substance shown to be a carcinogen in laboratory animals can be added to foods, even in minute quantities with a minimal or nonexistent risk.

15. Benjamin G. Ferris, "Sulfur Dioxides and Particulates: Human Exposure-Response Relationships," in Robert W. Crandall and Lester B. Lave, eds., *The Scientific Basis for Environmental and Health Safety Regulation* (Brookings Institution, forthcoming); John R. Goldsmith and Lars T. Friberg, "Effects on Health," in Arthur C. Stern, ed., *Air Pollution*, 3d ed. (Academic Press, 1977), pp. 458–610; and Lester B. Lave and Eugene P. Seskin, *Air Pollution and Human Health* (Johns Hopkins University Press for Resources for the Future, 1977), p. 9.

dioxide and other sulfur oxides? How far are these sulfur oxides transported from the source of emission? What abatement techniques will serve to reduce emissions and the consequent health effects? What other effects, such as reduced visibility and acid rain, are important and how can they be controlled?

Sulfur dioxide is relatively easy to measure, and its control does not pose serious technological problems. The Environmental Protection Agency has set emissions and ambient air standards for sulfur dioxide. But both laboratory and epidemiological work indicates that sulfur dioxide may not be the primary culprit affecting health, at least not at the concentrations occurring in urban areas. In contrast, sulfates, particularly acid sulfates, are harmful to health. However, they are difficult to measure and result from chemical transformation of sulfur dioxide in the atmosphere. Accordingly, it is not easy to determine whether ambient air quality is "satisfactory"; emissions regulations on these pollutants would be irrelevant.

A major difficulty has resulted because sulfur dioxide is regulated, but is not terribly harmful, while acid sulfates are harmful but unregulated. This has led the agency to be unresponsive to the issues raised by its critics, and vice versa.

Although it has not been *proved* that sulfates are harmful in the concentrations that occur in urban areas, analysis of groups exposed to different pollution levels demonstrates a statistical association between sulfates and mortality rates that persists even after adjusting for the principal factors that might vitiate the relationship.[16] However, there are contradictions in the epidemiological evidence.[17] For a number of reasons, laboratory experimentation sheds little light on the issue of harm at these levels.[18]

The underlying uncertainties are the focus of industry's arguments

16. For example, see Lave and Seskin, *Air Pollution and Human Health*, pp. 237–44; and Lester B. Lave and Eugene P. Seskin, "Epidemiology, Causality, and Public Policy," *American Scientist*, vol. 67 (March–April 1979), pp. 178–86.

17. F. W. Lipfert, "The Association of Human Mortality with Air Pollution: Statistical Analyses by Region, by Age and by Cause of Death" (Ph.D. dissertation, Union Graduate School, Yellow Springs, Ohio, 1978); and Thomas D. Crocker and others, *Methods Development for Assessing Air Pollution Control Benefits*, vol. 1, *Experiments in the Economics of Air Pollution Epidemiology* (U.S. Environmental Protection Agency, February 1979).

18. Lave and Seskin, *Air Pollution and Human Health*, pp. 14–15; and Eugene P. Seskin and Lester B. Lave, "Enhancing the Contributions of Science and Technology in Environmental, Health, and Safety Regulations," Working Paper (National Science Foundation, 1979), pp. 26–29.

because they must bear the cost of sulfur dioxide emissions regulations. Industry points to the billions of dollars of annual control costs and asks whether these are worthwhile, given the uncertainties.

Visibility, the concentration of fine particulates in the atmosphere, is also a problem.[19] A large proportion of the particulates are sulfate aerosols.[20] Another consequence of sulfur emissions is acid rain, which has become much more of a concern as measured levels of acidity have worsened.[21] Although neither reduced visibility nor acid rain has the emotional quality of life-endangering air pollution, they are important. Who would visit the Grand Canyon if the other side could not be seen? What would happen if acid rain made many lakes in the northeast biologically dead, as appears to have occurred in Scandanavia?

Thus the costs of abating sulfur dioxide have served to intensify the debate. It is not sufficient to point to vague evidence of health, aesthetic, and environmental effects to justify the expenditure of billions of dollars each year on control and the resulting dislocation of persons, plants, and products. The adverse health consequences of highly polluted air are evident and appear to exist for less polluted air, but proving causality is difficult. Complicating the discussion is agency regulation of sulfur dioxide, which is not as harmful as acid sulfates, but is easier to regulate. There are sufficient uncertainties and questionable policies to preclude consensus on sulfur oxides emissions policy.

Research in a Policy Agency

In 1967 the Community Health and Environmental Surveillance System was inaugurated by the Environmental Protection Agency to study the effects of air pollution on health.[22] In an elaborate program that was conducted over a decade, many millions of dollars were ex-

19. Environmental Protection Agency, Strategies and Air Standards Division, "Protecting Visibility," Report to Congress (Research Triangle Park, North Carolina: EPA, Office of Air Quality Planning and Standards, 1979), pp. 2-12 to 2-44.

20. David P. Rall, "Review of the Health Effects of Sulfur Oxides."

21. *Air Quality and Stationary Source Emission Control*, prepared by the National Academy of Sciences and National Research Council for the Senate Committee on Public Works, 94 Cong. 1 sess. (GPO, 1975), pp. 4–13.

22. *The Environmental Protection Agency's Research Program, with Primary Emphasis on the Community Health and Environmental Surveillance System (CHESS): An Investigative Report*, prepared for the House Committee on Science and Technology, 94 Cong. 2 sess. (GPO, 1976), p. 5.

pended. But the resulting work has been largely discredited and is not used by the scientific community.

In view of the commitment of funds and personnel, it is important to consider what went wrong and how the mistakes can be avoided in the future. The main issue is the conduct of basic research by a regulatory agency; subsidiary issues are the planning, pace, and reporting of research that takes place in this setting.

A major difficulty with previous epidemiological work, which was to be rectified in this work, was improved measurement of the amount of exposure to air pollution that people received. This measurement required better instruments for calculating ambient air quality, beginning with the development of reliable instruments in the laboratory; more problematic was finding methods that worked in the field under extremes of temperature, humidity, sunlight, and wind, which were maintained and observed by semitrained technicians, with delays in analyzing samples. At the inception of the research, proven field instruments neither measured the desired pollutants nor had the required sensitivity. Because time constraints precluded waiting for the development and testing of new instruments, the researchers decided to utilize instruments previously used only in laboratories. The result was aerometric data of deplorable quality, with large errors of observation.

Time constraints also created problems in the analysis and in writing up the conclusions.[23] Usual scientific procedures were not followed in reporting the results; for example, there were allegations that the conclusions were changed to reflect the viewpoint of the agency. Further, the work was not reviewed by peers before it was published by the agency. These problems led epidemiologists to reject the results; parts of the research that did have a firm scientific basis also tended to be rejected. The conduct of this project wasted vast resources and time and damaged the reputation of the Environmental Protection Agency.

These problems are the extremes of those that occur in every agency. Regulatory agencies are under pressure, and it is inevitable that they demand quick results from researchers. Moreover, research results from a regulatory agency are inherently suspect. Employees

23. *Conduct of the EPA's Community Health and Environmental Surveillance Systems (CHESS) Studies*, Hearings before the House Committee on Science and Technology, 94 Cong. 2 sess. (GPO, 1976), and W. B. Rood, "EPA Study—The Findings Got Changed," *Los Angeles Times*, February 29, 1976.

are likely to believe in the mission of their agency. It is natural for them to seek to prove what they believe; the more subtle the analysis and interpretation, the more danger that the research conclusions will reflect the agency's mission, especially if researchers must justify each conclusion when they report to agency administrators.

The alternative to the regulatory agency undertaking its own research is to give that mission to a separate agency and attempt to establish a cooperative arrangement between the two agencies. The Environmental Protection Agency and the National Institute of Environmental Health Sciences have used this method, as have the Occupational Safety and Health Administration and the National Institute of Occupational Health. However, as the histories of these pairs of agencies have shown, each develops its own constituency and agenda; each is responsible to different executives. Cooperation is difficult to achieve under those conditions. Even within one agency, the regulatory officials often charge that the research officials are working on irrelevant matters and not delivering reports on time or in a form that is suitable.

A number of procedures can be adopted to lessen these problems. For example, researchers can be given sole responsibility for a project and the organization structured to protect them from time constraints or pressures to find the desired results. A scientific advisory board with stature could remind researchers and administrators of scientific standards and act as an impartial arbiter in disagreements about timing, research design, and the interpretation of results. However, some of the pressures must inevitably be faced by the researcher.

Steel Industry Emissions

According to the steel industry:[24]

By their very nature, steelmaking processes incidentally generate large volumes of pollutants. The American steel industry has already spent huge sums and implemented far-reaching and effective programs to protect the environment and reduce hazards. Although environmental benefits have been obtained, these expenditures have diverted capital from income-producing and cost-reduction applications. Meeting environmental standards has also had an inflationary impact by significantly increasing operating costs of producing steel.

24. American Iron and Steel Institute, *Steel at the Crossroads: The American Steel Industry in the 1980's* (AISI, 1980), p. 3.

David M. Roderick, chairman of the U.S. Steel Corporation, testified "that the steel industry is being involuntarily liquidated."[25]

As the industry asserts, environmental and health regulations have imposed heavy costs on steel production. The steel industry spends more on air and water pollution abatement than any other industry except electricity generation.[26] The acts governing air, water, and related environmental problems have had major impacts on the processes by which steel is made because air and water are used to carry off much of the effluent.

The steel industry estimates that complying with environmental and occupational safety laws will cost approximately $800 million a year (initial investment plus operating costs).[27] The cost of steel will be increased by an estimated $5 to $8 per ton, or less than 3 percent. However, the investment in abatement technology could represent about 25 percent of the total funds available for investment over the next several years.[28] The steel industry claims that the funds are needed to modernize plant and equipment if the industry is to be viable at a time of fierce international competition.

The investment requirements for the steel industry undoubtedly will be large. Certainly, investing 25 percent of new capital in environmental and safety control is a much heavier than average burden. And there is no doubt about the intensity of foreign competition and the need to modernize plant and reduce costs. However, the increased costs are a tiny proportion of the cost of making steel. If the industry were robust and profitable, sufficient funds could easily be secured to cover mandated investments and the small increases in cost would have little effect on sales. The scarcity of investment funds stems from the unattractiveness of the industry to new investors; low rates of return to investment have resulted from foreign competition, the rapid rise in wages and, to a small extent, social regulations.

Thus the lesson is that the steel industry is in a difficult position because of its low profitability, compounded by its failure in the past

25. Testimony before the Subcommittee on Environmental Pollution of the Senate Committee on Environment and Public Works, 96 Cong. 1 sess. (May 23, 1979).

26. Environmental Protection Agency, *The Cost of Clean Air and Water*, Report to Congress (EPA, 1979), p. vii.

27. American Iron and Steel Institute, *Steel at the Crossroads*, pp. 69–71.

28. Council on Wage and Price Stability, *Report to the President on Prices and Costs in the United States Steel Industry* (GPO, 1977), p. 35; and American Iron and Steel Institute, *Steel at the Crossroads*, pp. 39–41.

to control emissions. If conditions are created that make the industry viable, health and safety regulations will not stand in the way. If conditions do not change, these regulations will not be the cause of the industry's reduction in capacity. The steel industry's dilemma is a social and economic problem, not one of environment and safety.

Automobile Regulation

The automobile has done more to shape American society than any other modern innovation. In addition to transporting most of us to work, school, and other destinations quickly and cheaply, it is a symbol of adulthood and status. The unpleasant consequences of the automobile include 50,000 people killed in highway accidents each year, 2 million people injured, and the emissions that produce photochemical smog and other air pollution. About one-quarter of the petroleum used in the United States is consumed by automobiles.

As noted above, Congress has attempted to regulate safety, emissions, and fuel economy, but the conflicts among regulations and with consumer desires has impeded progress. It was evident that the 1960 model automobile could be improved in design to reduce injuries to pedestrians and occupants and to prevent some accidents. In its initial actions in 1967, the National Highway Transportation Safety Administration required the installation of seat belts on all cars, together with energy-absorbing steering columns, dual braking systems, and other safety features, some of which had been introduced voluntarily by automobile manufacturers. The General Accounting Office estimates that 1966–68 models were safer, resulting in a 15–25 percent reduction in serious injuries and fatalities compared to pre-1966 models (1971–73 models were equivalent to 1969–70 models).[29] If the entire fleet of automobiles were as safe as the 1969–70 models, 12,000 fewer people would have been killed in 1978 than if all cars were as safe as the pre-1966 models. If all people actually buckled their seat belts (only about 10 percent currently do), an additional 7,000 fatalities a year would be averted.[30]

Debates have focused on the role of government in protecting in-

29. U.S. General Accounting Office, *Effectiveness, Benefits, and Costs of Federal Safety Standards for Protection of Passenger Car Occupants*, report to the Senate Committee on Commerce (GAO, 1976), p. 17.

30. Donald F. Huelke and James O'Day, "The National Highway Traffic Safety Administration Passive Restraint Systems—A Scientist's Viewpoint," in Crandall and Lave, eds., *The Scientific Basis for Environmental and Health Safety Regulation.*

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dividuals from risks they accept voluntarily. Should the role of the government be limited to providing consumers with information and ensuring that safe vehicles are available to be purchased? Should the government require people to fasten their seat belts? Protect people unwilling to use seat belts by requiring passive protection devices?[31] If passive seat belts or air bags are required on 1982 models, as currently mandated, people who now buckle up will find themselves paying more (seat belts cost about $80, passive belts about $130, and air bags about $300) for passive restraint systems that are less effective than *buckled* lap-shoulder belts. Is this paternalism necessary? Is it desirable?

Automobile safety policy is being made under the assumption that Americans cannot be trusted to look after their own welfare and will not use safety devices that are even slightly inconvenient. Policy based on this assumption boosts the price of automobiles, but allows people to disconnect "inconvenient" safety features. If safety is to have top priority, the agency must enforce the use of mandated safety features.

Automobile emissions is another problem area, as mentioned above. No individual driver can have an appreciable effect on the air pollution in an area; pollution results from the emissions of all automobiles. Consequently, there is a strong case to be made for some sort of governmental intervention. In the Clear Air Act Amendments of 1970, Congress showed its distrust of the executive branch by setting the detailed emissions regulations and timetables noted above, rather than delegating these tasks. Congress refused to believe that it was impossible to invent and install the required technology in the time allowed.[32] There seemed to be a judgment that only when under pressure would the automobile industry try to find new technologies and then install them. The legislation was therefore designed to be "technology forcing."

The result was an increase in research expenditures and many new discoveries, although the original timetable was not met. However,

31. Glenn Blomquist and Sam Peltzman, "Mandatory Passive Restraint Systems and Social Welfare," Huelke and O'Day, "The National Highway Traffic Safety Administration Passive Restraint Systems," and Carl E. Nash, "The Science and Policy of Automatic Crash Protection," in Crandall and Lave, eds., *The Scientific Basis for Environmental and Health Safety Regulations.*

32. Charles O. Jones, *Clean Air: The Policies and Politics of Pollution Control* (Pittsburgh University Press, 1975), pp. 195–201.

hastily conceived technologies were developed in the early years (with automobiles that had poor fuel economy and were difficult to start and drive), and there was a premium on technologies that were certain to work, at the expense of more promising technologies that entailed more risk.[33] Although the catalytic converter solved some problems, it created new ones. The catalyst is poisoned by small amounts of lead in the gasoline. An estimated 10–20 percent of catalysts have been poisoned and are no longer functioning to abate emissions.[34] More energy must be put into refining unleaded gasoline to obtain the required octane. The catalyst also created a problem in retailing because a new grade of gasoline—unleaded—must be sold by each station. Finally, emissions goals would prohibit diesel engines and require new, more complicated technologies, such as three-way catalysts.

As a result of emissions regulations, fuel economy had fallen to 14.2 miles per gallon in the 1974 model. Smaller, fuel-efficient cars sold well in 1974, but lost popularity as the oil embargo crisis receded; gasoline was readily available and not much more expensive than it had been in 1973. By early 1979 the fuel-economy standards were subjected to intense criticism as automobile manufacturers had to reduce the size of vehicles and substitute other materials for steel, thereby increasing the price. But a new oil crisis and higher gasoline prices shifted demand toward fuel-efficient automobiles in mid-1979.

Automobile purchasers responded to both the price and availability of fuel in 1974 and 1979. Certainly higher gasoline prices will be required to sustain the demand for fuel-efficient automobiles. But higher gasoline prices strike a raw nerve. Lobbyists for the poor, teamsters, suburban homeowners, and many other groups seek relief for their clients, even when they recognize the need to conserve gasoline. With the exception of rationing, no other proposal will sustain and enhance the demand for fuel-efficient automobiles.

33. Eugene P. Seskin, "Automobile Air Pollution Policy," in Paul R. Portney, ed., *Current Issues in U.S. Environmental Policy* (Johns Hopkins Press for Resources for the Future, 1978), pp. 68–104.

34. Charles A. Lave and Lester B. Lave, "Curbing 'Lead Poisoning' by Drivers," *New York Times*, February 2, 1979; and Sobotka and Company, Inc., "An Analysis of the Factors Leading to the Use of Leaded Gasoline in Automobiles Requiring Unleaded Gasoline," report prepared for the Environmental Protection Agency (EPA, September 29, 1978), pp. 3–5.

Lessons from the Controversies and Possible Solutions

The above controversies demonstrate that setting standards is both time-consuming and cumbersome, that often the wrong substances are regulated, and that implementation and enforcement are expensive and inadequate. Moreover, there are contradictions among regulations—perhaps because of a general failure to step back to look at the complete picture. Although social regulation has brought society closer to achieving its desired goals, the last decade and a half has revealed major flaws. Regulatory reform is desirable; indeed, it is necessary. But regulatory reform is confronted with diverse proposals that must be sharpened to deal with the underlying problems. It is important to understand the sources of the current difficulties in order to arrive at some notion of what reforms are necessary and likely to work.

Both the praise and blame for social regulation to date rests primarily with Congress. It writes the legislation, oversees it, amends it, sets appeal mechanisms and budgets, and confirms the regulators. To its credit, Congress quickly understood the problems and the public's desire for improvement. The initial legislation drafted to deal with these problems was less praiseworthy because Congress succumbed to rhetoric rather than trying to deal with those problems. Even worse, Congress failed to perceive the inadequacies in the legislation and correct them. Congress has not solved the difficult problems associated with giving the agencies practical goals, resolving conflicts among legislation, and finding workable mechanisms for implementation. Certainly there are no easy or obvious solutions, as demonstrated by the welter of proposals for reform. But there are some problems that only Congress can handle.

Much of the responsibility for the current situation belongs to the regulators themselves. It is not a sufficient qualification for agency administrators to know the law (or the science, the engineering, or even the economics) and have a true desire to protect the environment (or workers or consumers). The achievement of a goal—even one supported by the majority of people and written into law—by means of setting and enforcing standards requires all these disciplines in addition to good sense and political judgment.

The views of the standard-setting and enforcement process that are often expressed by regulators are "it is all politics"; "science speaks for itself"; and "our hands are tied." The first view is that, because the electorate wants a clean environment, any progress toward this goal is desirable—as long as political forces support it. Thus scientific evidence and analysis, the weighing of costs and benefits, or even engineering feasibility are viewed as either irrelevant or as tools for gathering support. But how long will popular and congressional support persist for hasty, ill-conceived regulations and implementation plans? Congressional disciplining of the Federal Trade Commission and the Consumer Product Safety Commission (at least until recently) provides one answer.

The second view is that the scientific facts speak for themselves and determine each decision. Unfortunately, this evidence is rarely clear or unequivocal. The laboratory studies find that animals react to a particular toxic substance at high levels of exposure; an extrapolation is necessary to estimate the effects at low levels (for example, in the case of vinyl chloride). Generally there are no data on human effects. Scientific analysis will, at best, provide a range of estimated effects and help identify a number of possible exposure levels that might be chosen. However, other considerations will be necessary to choose a particular exposure level. If quantitative analysis is not used to identify the proper range and nature of uncertainties, the result is likely to be decisions that waste resources and fail to protect—decisions that can be challenged in court or before Congress.

The third view is expressed by regulators when explaining why they cannot accommodate a reasonable request or why they are spending time on secondary problems when first-order problems are neglected. Their unsatisfactory performance resulted, they say, because of the restrictions of the statutes; there was no reason to muster the best scientific evidence, to sponsor research that would improve the evidence, to perform analysis, or to monitor the successes and failures of past regulations and implementation techniques. Indeed, anything except what they did seems to have been prohibited by Congress or the courts. Yet as solicitors and regulators have changed and as the courts have had a chance to rule, it has become evident that the legislation is sufficiently broad to support diverse interpretations. There is no excuse for being carried away by current crises and failing to engage in systematic thinking.

Improvements in Legislation

The fundamental problems cannot be solved until Congress confronts the task of setting workable goals for each agency and reconciling conflicts among the goals.

Instructing one agency to protect the environment, another to protect workers, and a third to protect consumers invites chaos. Each agency must be instructed on priorities and what to do when conflicts emerge. For example, it is not sufficient to order an agency to make the environment sufficiently clean to protect health. Who is to be protected (for example, cigarette smokers with emphysema, persons who suffer from eye irritation)? What margins for safety are needed? How should conflicts such as that between electricity costs and clean air be resolved? These are questions of values; although they are difficult to resolve, Congress is the body that must do so.

But Congress should not attempt to set detailed regulations, as it did for the automobile. It does not have the time or technical knowledge to write standards and is not organized to negotiate compromises. Instead, it must set workable goals and then oversee the agency to ensure that the emerging implementation is consistent with congressional intent.

Better Data and Analysis

Better collection and analysis of scientific and technical data is fundamental to better social regulation. If the Environmental Protection Agency had undertaken such research in 1970, much better answers could now be given to the issues of which specific pollutants affect health and which risks are associated with alternative levels of air quality. Data collection and analysis are of utmost importance in formulating policy on toxic substances.

Analysis is needed to identify the implications of decisions and contradictions among them and to clarify the trade-offs among various goals. Although the analysis cannot be expected to anticipate all problems, much can be done to foresee and take account of contradictions and trade-offs that arise, such as those discussed above for the automobile. Better data collection and analysis will occur only if the agency and Congress jointly recognize the need and provide the resources.

Reconciling Conflicting Goals

Better analysis cannot resolve the inherent differences in goals among the various participants in the process. Environmentalists have goals that differ from those of industrialists, and no amount of data gathering or analysis will make their views coincide. But, somehow, a set of workable goals and priorities must be developed.

Agencies themselves are incapable of developing goals. Professionals join agencies whose missions they believe to be important; an agency's political constituency believes the mission is important. Thus the agency is not and cannot be a neutral party. The role of setting workable goals and priorities belong to Congress.

Improving Implementation

Even supposing that Congress and the agencies make changes that will result in better regulations, there is still the problem of implementation. It is literally impossible to have detailed checking and supervision of all polluters or work places. Economists assert that improving implementation requires restructuring incentives so that polluters are motivated to abate pollution rather than to circumvent the law. This is best done with monetary incentives rather than legal standards.[35]

Current enforcement procedures begin with identification of a violator. The inevitable response of the violator is that technology does not exist to abate pollution in the particular case. After being shown that technology is available, the response is that it is so costly that the firm will be severely penalized or even bankrupted. Even after resolving all these difficulties, the polluter is motivated financially to delay ordering, installing, and operating the abatement equipment. Perhaps the best evidence of the time and resources re-

35. Edwin S. Mills, *The Economics of Environmental Quality* (Norton and Company, 1978), pp. 91–96; Larry E. Ruff, "Federal Environmental Regulation," in *Study on Federal Regulation*, Senate Committee on Governmental Affairs, vol. 6, appendix, 95 Cong. 2 sess. (GPO, 1978), pp. 251–347; Edwin S. Mills and Lawrence J. White, "Government Policies toward Automatic Emissions Control," in Ann F. Friedlander, ed., *Approaches to Controlling Air Pollution* (MIT Press, 1978), pp. 348–409; Allen V. Kneese and Charles L. Schultze, *Pollution, Prices, and Public Policy* (Brookings Institution, 1975), pp. 98–104; Martin L. Weitzman, "Prices versus Quantities," *Review of Economic Studies*, vol. 41 (October 1974), pp. 477–91; and Marc J. Roberts and Michael Spence, "Effluent Charges and Licenses Under Uncertainty," *Journal of Public Economics*, vol. 5 (April–May 1976), pp. 193–208.

quired to go through these steps is all the missed deadlines in the air and water pollution abatement programs.

One proposed solution to this lack of progress is to expedite the process by removing the appeals mechanisms, by increasing fines, or even by imposing criminal penalties. For example, "willful violation" of occupational safety standards can entail criminal convictions and imprisonment. But it seems a safe prediction that increased fines will rarely be levied or that executives will be sent to jail. Fines are rarely collected now because a company can argue that the money will be better spent on abatement equipment.

The legal mechanisms underlying current implementation procedures are a major part of the problem. Attention has been shifting to economic incentives such as the experiment of the Environmental Protection Agency with a "noncompliance charge," a fine that aims to remove the financial incentive to delay acquiring and installing abatement equipment. Economists argue that the whole procedure could be improved by levying effluent charges and letting each polluter decide how much to emit. Levying a charge based on the general damage to the environment would remove any necessity for the government to ascertain that technology was available at a feasible cost. Instead, each polluter could decide when to order the equipment and to what extent it will be used. Rather than being motivated to circumvent the law, each polluter would be motivated to curtail emissions in order to lower cost.

One major objection to effluent fees is that they are regarded by many as "a license to pollute": more affluent polluters could pour out their emissions with impunity or pass along the costs to their customers. However, although some enterprises have a sufficient profit cushion that they would not be bankrupted by paying effluent fees (in contrast to abating pollution), the fees would nonetheless shrink their profits. Certainly, it is implausible that a profit-making firm would willingly throw away its profits because it was too lazy to abate pollution. Even a public utility could not engage in paying the fee and polluting the environment because its rates are subject to regulation, and it seems unlikely that the rate-setting authority would allow these costs to be passed through quickly and completely to consumers. Furthermore, one of the favorite devices of government is using tax policy to accomplish social goals: providing investment tax credits stimulates investment, while deducting interest payments stimulates

ownership of homes. Is it possible that economic incentives can be regarded as powerful stimuli in tax policy but ineffective in health, safety, and environmental regulations?

A second major objection to effluent fees is that they require voluminous data—too much information—to set properly. As Edwin Mills points out, setting effluent fees in a theoretically correct manner requires precisely the same information that is needed to set emissions standards or to use any other abatement mechanism.[36] In practice, this detail is never available. Thus the question is whether partial information allows better attainment of environmental goals through effluent fees or emissions standards. Emissions standards inevitably result in litigation and administrative procedures listing the problems with each facility and the specific technology required for abatement. Effluent fees require estimates of both the cost of abating pollution from each source and the cost of the harm caused to society. The estimates can be erroneous for individual polluters and still lead to an improvement. Furthermore, the regulatory agency need not investigate and certify abatement technologies in detail.[37]

Transferable pollution rights have also been suggested as a way of creating economic incentives to control pollution. Such a right would give its owner authority to emit, say, one pound of sulfur dioxide into the air. Regulators would create the number of rights corresponding to desired air quality and either give them to existing polluters or sell them at auctions. Polluters exceeding their rights would be fined. This proposal has the advantage of fixing total emissions, with the price of a right being determined in the market. In contrast, effluent fees fix the price and let the quantity of emissions be determined in the market.

In addition, economic incentives have been suggested to control occupational injury.[38] The current approach is to set standards that will protect workers from injury or chronic disease. This requires detailed examination of current processes and equipment. An agency is required to regulate at the most detailed level—for example, safety

36. Mills, *The Economics of Environmental Quality*, p. 93.

37. A major series of studies has been carried out by Resources for the Future. See Allen V. Kneese and Blair T. Bower, *Environmental Quality and Residuals Management: Report of a Research Program on Economic, Technological and Institutional Aspects* (Johns Hopkins University Press for Resources for the Future, 1979). They specify existing abatement technologies, estimate the cost of abatement, and calculate some of the benefits.

38. *Economic Report of the President*, 1977, pp. 154–56.

equipment for each machine. There is no realistic possibility that a regulatory agency could ever have the professional personnel to set such standards and enforce them. One proposed alternative is to levy a fine on employers for each injury, for instance, $500 for every workday lost to an accident and $500,000 for each accidental death. The notion is that these fines would serve to motivate employers to find safety problems in their operations and correct them; the regulator would need accident reports but would not have to know the problem or preventive measures. There is some limited evidence that workers' compensation premiums have led employers to take steps to lower accident rates.

An issue that inevitably arises in discussions of effluent fees is the use to be made of the resulting revenues.[39] Should they be used to abate pollution? To compensate victims? Or should they simply act as a tax to raise revenue? The answer to this question is not crucial; additional tax revenues could hardly be an embarrassment to the government. Economists have learned to be suspicious of clever plans to tailor fee revenues to abating pollution or compensating victims. Such plans are inevitably filled with loopholes. Even worse, as circumstances gradually change, these programs continue after having lost their justification. One would want to be careful about paying the heirs of a worker killed in an accident $500,000 or paying an injured worker $500 per day lost from work. Both sums are large enough to give rise to fraudulent behavior.

The point is not that effluent fees, transferable pollution rights, or economic incentives generally are simple to implement and are free of problems. Certainly they would involve litigation and have faults. Rather, the notion is that they emphasize efficiency of implementation while legal mechanisms stress equity. Experience to date suggests that more emphasis on efficiency of implementation is required and that the economic incentives are worth trying. Indeed, the Environmental Protection Agency employs limited versions of the transferable rights mechanisms in its "bubble" and "offset" concepts; the former allows a firm to trade off one emission source for another, as long as total plant emissions are within permitted levels, while the

39. Frederick R. Anderson and others, *Environmental Improvement Through Economic Incentives* (Johns Hopkins University Press for Resources for the Future, 1977), pp. 45–46.

latter permits new plants to be opened in a polluted area if they reduce emissions by more than they will add (through controlling or shutting down existing polluters).

Enhanced Enforcement

As the preceding discussion shows, enforcement of current regulations is negligent. One possible solution is to increase greatly the resources devoted to enforcing regulations. For example, the number of environmental or occupational inspectors could be increased tenfold and given a daily quota of inspections. Such a change would certainly reveal more violators, raise more revenue from fines, and perhaps even enhance abatement and safety. However, it would first highlight the problems in the current standards. Many, perhaps most, of the major work places in the nation could be shut down by strict enforcement of the health and safety regulations. Such expanded enforcement would certainly lead to resentment of the regulations and demands for reform or even elimination of them.

Changes in Agency Rulemaking

The Administrative Procedure Act, passed in 1946, calls for a sequence of steps from notice of proposed rulemaking to hearings; the final regulation must be based on evidence in the hearing. Following these steps requires thousands of days of professional time and results in long delays in setting standards. One proposal is to change these steps so that new regulations can be issued quickly. However, the Environmental Protection Agency now goes through the entire process, even though it is not a requirement. It believes that there is so much to learn about the costs and benefits of abatement, the difficulties of compliance, and the nature of the uncertainties that the time is well spent. Furthermore, it is difficult to imagine that the nation would tolerate the setting of rules imposing costs of billions of dollars on various groups without an elaborate process in which all viewpoints were heard.

Indeed, a proposal has also been made to enhance the comments process by funding groups that would otherwise not be able to participate. For example, the Food and Drug Administration has embarked on a program to pay the travel and legal fees of consumers who want to testify. Extending the proceeding in this way will cost

time and money. However, it is hoped that the extended procedure will result in better regulations and that, after all interested parties have had the opportunity to make their views known, there will be less litigation after the standard is set.

Agency frustration with delays in rulemaking is understandable, and the enormous effort required to gather information, study opposing views, and sort through contrary scientific evidence is both time-consuming and expensive. Yet too many regulations have been promulgated without sufficient exploration of their scientific, economic, and political implications. Hearings are especially important because Congress generally has not resolved value conflicts. If the agency also fails to air and to try to resolve these conflicts, resistance is likely to go far beyond litigation. Social regulation will work better if the quality of regulations is improved and conflicts are anticipated.

Mechanisms for Immediate Improvements

Many of the above proposals would require either changes in legislation or long delays before social regulation is improved. But one step that would require no legislation and could be taken by agencies immediately is listing and publishing their priorities. Although agencies have gone through internal priority-setting exercises—indeed, zero-base budgeting requires such an exercise—rarely have they published criteria for this priority setting and the resulting priorities. (An exception is the Consumer Product Safety Commission, which published criteria in 1977 and has published detailed priorities annually since then.) The public and Congress are unaware of the priorities of each agency and have no basis on which to approve their goals or their allocation of resources among research, standard setting, and implementation, or among various programs. The information contained in an agency's budget is generally aggregated and sketchy; priorities are difficult to discern.

If agencies gave more attention to priority setting and then discussed the priorities with Congress and the public, much would be done to clarify public goals and the conflicts among those goals. Developing and publishing such information would not be a radical change in current procedures. Some of this information is developed in the budget process; publishing it should enhance the care with which the information is developed. The Regulatory Council could set guidelines for publication of the information. Congress could

use this information in oversight and budget hearings to obtain more insight into goals and efficiency.

One other step that would help rationalize environmental policy would be to utilize the materials balance framework and estimate in an integrated way the amount of exposure to toxins that people receive.[40] Boundaries drawn for media, locations, and type of emissions are artificial—for example, setting rules for work-related exposure in isolation from other exposures. As more is learned about the toxicity of various chemical compounds and about how the combination of environmental problems affects people, the need for this integration will be even greater.

The creative phase of social regulation has been completed. Public desires for a clean, safe environment will prevent any general retreat for our current ambitious goals. The next phase must improve the legislation and the regulatory frameworks for setting and enforcing standards; Congress must debate and settle some of the crucial conflicts among values. The lessons of the first decade and a half of social regulation have much to contribute in shaping this change. Making social regulation work is difficult, but the rewards are better health and safety, an enhanced environment, and more economic growth.

40. The framework recognizes that matter is neither created nor destroyed in the economy, but merely changed in location and chemical form. For example, the sulfur in coal must be emitted into the air or water, placed in the ground, or used as a raw ingredient in another process.

Questions Posed by Senator Laxalt to Mr. Lave

Question 1. Assuming that the President or his designee is given the authority to designate certain rules as "major," do you feel that the President or his designee should also have the power to waive regulatory analysis for certain major rules? If you support such waiver authority, please give specific examples (in addition to IRS rules) of rules for which such a waiver power would be needed. If you favor such waiver power, but with criteria set out in the statute, please elaborate on the details of such criteria. In addition, if you favor the addition of a waiver power, please explain why you do not feel that putting such discretion in the Executive inserts a major loophole in the requirements of S. 1080. Should the exercise of such a power be subject to judicial review?

Answer. Regulation is too pervasive and complicated for any simple rule to be universally useful, including one as sensible as requiring benefit-cost analysis. Unless there is a waiver provision, some absurd, inapplicable analyses will result. I believe that a waiver provision is necessary, but feel that Congress, rather than the courts, ought to police it. The waiver authority should be for one year at a time; it should contain a discussion of steps being taken to allow the fruitful application of benefit-cost analysis in the future; and it should present a candid discussion of why this area should be waived at present, given the Congress' determination that regulations be analyzed. These documents would provide a basis for Congressional oversight. Individuals who felt that the analysis could be applied or that the agency was not making an attempt to resolve the difficulties standing in the way of applying the analysis could comment to Congress. Federal judges do not have the expertise to evaluate these arguments.

One should not assume that the President or agency heads will try to flout the will of Congress. It is important that the statute be clear and that Congress reinforce its desire with oversight hearings.

Question 2. Should the determination of what is a major rule be subject to some form of judicial review? If you believe that there should be some limited judicial review, please explain how such review should be limited.

Answer. Again, as in the first question, I believe that the Congress rather than the courts ought to determine whether each agency is adhering to Congressional intent (through the mechanism of oversight hearings). Nothing is more dysfunctional than having prolonged litigation over subtle interpretations of the statute. Instead, Congress should be at the focus of the struggle to ensure that its desires are being met.

Question 3. When considering the definiton of a major rule, most witnesses addressed subparagraph (i), dealing with $100,000 million in compliance costs. Do you feel that subparagraphs (ii) and (iii) are too vague to be practically useful? Are these subparagraphs necessary?

Answer. No agency will willingly increase its workload by going through an analysis that seems to hinder rather than help in making and defending a decision. Thus, insofar as agencies regard the regulatory analysis as unproductive, they will seek to avoid it where possible. If so, sections (ii) and (iii) are sufficiently vague to give them a chance to conclude that no rule that escapes section (i) would result in "significant" effects under (ii) and (iii).

However, the purpose of the analysis is to inform agency decision making and help defend and implement decisions by convincing interested parties, the public, and Congress. If the role is fulfilled, agencies will find it is in their interest to do such analyses, with greater data collection and elaborate analysis for major decisions and less data and analysis for minor decisions.

Although these sections are vague, I think they have a point. The major disservice would occur if there were judicial review of an agency decision not to perform an analysis. If so, vast time and resources would be wasted in litigation over the precise meaning of these two sections. Thus, I believe that the two sections should be left in, but only if policing the agency is done by Congressional oversight rather than judicial review.

Question 4. Should a deregulatory rule making be subject to regulatory analysis?

Answer. All rules should be subject to analysis since the discipline is beneficial to all decisions, whether imposing a new regulation or getting rid of an old one. However, since the bill calls for periodic review, I presume that an existing rule would be removed unless analysis found that benefits exceeded costs and that the existing regulation generally satisfied the criteria in the bill. Thus, getting rid of rules would be easier than imposing new ones and, over the review period, unsatisfactory regulations would be dropped. The most objectional regulations could be subjected to an analysis immediately and removed without much trouble. It would be a mistake to begin tossing out existing regulations with little analysis.

Question 5. Many have said that regulatory analysis should not be the sole criterion of a rule making. What impact should regulatory analysis, as provided in S. 1080, have on a particular regulatory decision? What other criteria should be guiding a regulatory in addition to the regulatory analysis?

Answer. The regulatory analysis will give an incomplete picture, at best, of the efficiency properties of a regulation. It will not address equity or political issues directly. These issues are important in governing and must enter into agency and Congressional decisions. If they could be quantified in detail, then the regulatory analysis could be complete and decisive. However, it is hopeless to attempt to state these criteria in detail in order to incorporate them into an explicit analysis. It is unwise to do more than ensure that the efficiency implications of a proposed regulation are analyzed and that the conclusions of the analysis are an input to the decision.

Question 6. Some have supported a requirement for agency description of the effects of a rule, but have at the same time opposed any requirement for an agency determination concerning the relationship of those tradeoffs. Do you feel such a determination (as in S. 1080, the benefits "justify" the costs, and the rule is a "cost-effective" alternative) is necessary to make regulatory analysis worthwhile?

Answer. Benefit-cost analysis is decisive in cases where the benefits clearly outweigh the costs or vice versa. Then the only question is which alternative best satisfies the public interest. In most cases, there is sufficient ambiguity in quantification or valuation that one set of assumptions leads to benefits exceeding costs and another set leads to the opposite. It is worthwhile to clarify the assumptions and their implications, but little is gained by precise language that marginal benefits must equal marginal costs or that benefits must exceed costs. More productive would be a less specific statement that benefits must be commensurate with costs. I would prefer that the bill clarify Congress intent by going on to state that economic efficiency is a primary consideration—if Congress agrees with that statement.

Question 7. Why not have a standard for rule making that a final rule should be the one that saves the most lives and avoids the most injuries, unless the agency offers an explanation to the contrary?

Answer. The objective of health and safety regulation is not to save the most lives; rather it is to save the most lives for the level of resources society is willing to spend. This statement of objective is in the question equivalent to attempting to eliminate risk, something that cannot be done and which makes no sense to attempt.

Question 8. OMB or the Regulatory Relief Task Force operates without the procedural safeguards for fairness mandated by the Administrative Procedure Act. Is it wise to shape regulatory policy in a manner insulated from those procedures, through a mechanism like OMB or the Task Force?

Answer. All aspects of all decisions can be reviewed in an open public manner by all parties, but only at the cost of considerable delay and resources. To what extent is society willing to relax some procedural safeguards in order to get decisions more expeditiously and at lower cost? There is no doubt that closed review by OMB could lead to abuse. However, there is review via congressional oversight or even through the courts if the actions are particularly arbitrary. I would be willing to tolerate some possible abuse in order to expedite regulatory review and decision making.

Questions Posed by Senator Leahy to Mr. Lave

Question 9. You mention difficulties in the President's February 17, 1981 Executive Order requiring cost-benefit analysis. Could you expand a little on what those difficulties are?

Does S. 1080 adequately describe the "host of decisions where only the most rudimentary analysis is needed to suggest the preferred action"?

Answer. The February 17 Executive Order overstates the possible contribution of benefit-cost analysis and ignores factors that current benefit-cost analysis does not treat, such as equity issues involving who pays and who benefits. For virtually all of the relevant regulatory decisions, there is important uncertainty concerning the magnitude of effects. For example, in analyzing the effects of saccharin on bladder cancer, the National Academy of Sciences reports that alternative models give estimates of the predicted incidence of badder cancer that differ by a factor of ten million. In all of the recent decisions regarding health and safety there have been major uncertainties as to the number of injuries or deaths that would be averted by the proposed standard. The analysis cannot ignore these uncertainties. Often the decision makers can be given no more than a clear statement of the uncertainties and their implications. By insisting that benefits must exceed costs and that the alternative chosen be the one that imposes least cost on society, the Executive Order ignores these uncertainties and requires the tool to do something which cannot be done with confidence.

S. 1080 does not adequately describe which decisions should not be subject to a full scale analysis. However, I do not believe that any current document could do so. Some general criteria can be stated, such as singling out decisions that impose more than $100 million in compliance costs, but these will necessarily be incomplete. There is no alternative to designating some individual or agency to pass on individual cases and to report to Congress regarding the criteria employed. For regulatory analysis to work, it is essential that both the President and Congress consider this task important and regard its input as crucial. Part of this concern should be overseeing the question of which decisions should be analyzed and examining whether the analysis is being done well and is being used in the decision making. Without this Congressional over-sight, the proposal cannot succeed; with the oversight, judicial and other review is unnecessary.

Question 10. You have stated that some scientists contend that too little is currently known to permit quantitative risk assessment. You gave the example of the saccharin regulation. Do a significant number of scientists share this view, and if they are right, could we be building our regualtory house on sand rather than bedrock? Are there reliable ways to identify where quantitative risk assessment will be inherently reliable and where it will not be?

Answer. This question is the most crucial one for determining whether S. 1080 is a good idea or just additional red tape. Its answer is far from obvious. One book on the subject is about to appear (The Strategy of Social Regulation) and a second one is in press. Substantial reservations about the possibility of quantitative risk assessment were expressed by Arthur Upton, when he was head of NCI, as well as by a number of other scientists. When one understands the nature of assumptions that are necessary and the amount of uncertainty, there can be no doubt of the seriousness of these objections. But the question is, what is the alternative to such analy-

sis? These decisions involve billions of dollars in compliance costs and thousands of lives. It is inconceivable that society would tolerate arbitrary and capricious decisions based on a regulator's visceral reactions or pressure from some interest group. What is required is to get the best scientific information and conduct a careful analysis which clarifies what is known, what is uncertain, and the implications of each uncertainty. That is a foundation of bedrock. At the same time one must acknowledge that the regulators will often feel that the analysis has not justified a particular action but only limited the range of reasonable decisions and clarified the implications of the uncertainty. This is precisely why the February 17 Executive Order is not helpful; it asks more from the analysis than it can deliver. But the analysis can deliver something useful. The greater the theoretical understanding of the phenomenon of interest and the more data are available, the more reliable and helpful will be the analysis.

Question 11. In your testimony, Mr. Lave, you say that in some areas, alternatives to regulation should be explored more assiduously, since the cost of regulation is extremely high. Could you indicate which areas you have in mind?

Answer. Deregulation of air transport is an exemplary case where both carriers and the public were helped by less regulation. For other transport modes, the pubic will benefit, but carriers or workers may suffer some losses. In general, more reliance on the market place and less on regulation regarding economic activities would benefit the nation.

In contrast, the market cannot regulate health and safety decisions satisfactorily; there is need for some countervailing force. One early alternative to regulation was Worker's Compensation, which helped to increase safety in workplaces during this century. I believe that an improved worker's compensation plan could virtually displace all of federal and state regulation of safety in the workplace. Economists have long advocated that effluent fees or marketable discharge rights replace the current system of emission standards for air and water pollution. I believe the result would be ehancement of environmental quality with the expenditure of fewer resources; the recent experience with EPA's bubble concept provides some evidence for this opinion. Charles Schultze in "The Public Use of Private Incentives" and Michael Baram in "Alternatives to Regulation" give more detail on these ideas.

Senator LAXALT. Mr. Yandle?

STATEMENT OF BRUCE YANDLE, PROFESSOR OF ECONOMICS, CLEMSON UNIVERSITY

Mr. YANDLE. Thank you, Senator. It is a pleasure to be here this afternoon.

When a society of people sets out to redress all kinds of social problems—perceived social problems—and to allocate economic resources in certain areas by means of regulation, it only seems reasonable to me that that society would hold accountable the regulators for the consequences of their actions.

I see this proposed bill as an important step in that direction in that, as Tom Moore has indicated, it requires regulators to make explicit the logic of choice used in arriving at final regulations.

It is a timely proposal, I think. It is not an abrupt one. It is not sudden in that it is a part of an evolutionary process which we have observed as regulatory analyses and cost-benefit analyses have entered into the regulatory process now for a number of years.

Its requirements are practical. A benefit-cost analysis of its many forms, while not perfect, is exceedingly useful.

The requirements as spelled out in your proposal are sufficiently flexible to allow almost every form of weighing benefits and costs to be used in some kind of an evaluative process.

While, as mentioned earlier by a previous witness, I have indicated in my prepared remarks that some areas of regulation almost defy the application of cost effectiveness or benefit-cost analysis, even in the crudest forms, I go on by example to illustrate what I

mean by "almost"—that is, there is still an avenue open where one can do some weighing of benefits and costs since decisions will be made on one basis or another.

Finally, I feel that the proposed bill, if implemented, will generate regulations that are more efficient and more effective in reaching the goals that were contemplated by the legislation which spawned the regulatory actions.

Thank you.

Senator LAXALT. Thank you very much, Mr. Yandle. Without objection, your prepared text will be included at this point.

[Mr. Yandle's prepared statement, additional material, and responses to questions posed by Senators Laxalt and Leahy follow:]

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Prepared Statement of Bruce Yandle

1. OVERVIEW

Logical Step in Evolutionary Process

The Regulatory Reform Act of 1981 is a logical and timely step in the evolution of a rational regulatory process. Since 1974, when President Ford convened a national conference on the state of the economy, explicit steps have been taken in the Executive Branch to reduce the burden of regulation. The steps taken to maximize the net benefits of government regulation have included:

- Formation of a section within the staff of the Council on Wage and Price Stability whose chief function was to interact in the regulatory process, emphasizing the economic consequences of federal regulation.
- Promulgation of Executive Orders (under the Ford, Carter and Reagan administrations) requiring economic analysis and justification of regulations issued by Executive Branch agencies.
- Formation of a Regulatory Analysis Review Group and U.S. Regulatory Council (during the Carter Administration) to provide in-depth analyses of major regulations and to arbitrate differences in views held by Executive Branch agencies regarding the regulatory analyses.
- Organization of a program for regulatory relief by the Reagan Administration accompanied by an Executive Order requiring benefit-cost analysis of regulations issued by Executive Branch agencies and with operations centered in the Office of Management and Budget.

While each of these steps represents progress toward developing a process for managing the review and improvement of the economic consequences of regulations, the major thrust of these actions has been aimed necessarily at Executive Branch agencies. Lying outside the direct reach of these management systems are the independent agencies and commissions. Thus, if the regulatory process in the United States is to become subject to careful scrutiny so that all regulations yield positive net benefits, all agencies must of necessity become subject to a process that requires such scrutiny. The proposed Act accomplishes that task for newly formulated regulations and more: It reaches back and calls for the review of existing regulations.

Extends Economic Analysis to Existing Rules

Recent steps taken by the Reagan Administration have led to an examination of existing rules, as well as to an additional review of rules in the final stages of development (Executive Order 12291). The proposed Act allows for such selective review and goes farther. It institutionalizes a process that requires re-examination of all major rules on a specified schedule. This step adds the benefit of ex post analysis to the ex ante requirements that apply to new rules. As a result, the proposed Act closes an important circle: All regulatory actions, new and old, will be exposed to the light of economic analysis. This provides a crucial opportunity to adjust existing regulations to account for changes in the conditions that existed at the time the rules were developed. Furthermore, rules no longer applicable--or no longer enforced--can be deleted in a routine, but specified, manner.

Benefit-Cost Analysis

The requirement for benefit-cost analysis, including the identification of alternative approaches, is clearly described in the proposal. Indeed, the requirement that all source material used in the development of benefit-cost analyses be identified along with the cost of the analyses allows for a future benefit cost analysis of the proposed Act itself.

A common objection to the use of benefit-cost analysis raises the point that some benefits and costs are just not quantifiable. Therefore, no economic analysis is feasible. The proposed Act brings comfort to those who would like to perform analyses that might yield improved regulation but have had difficulty quantifying the elements of an analysis. Such individuals will be allowed to list benefits and costs in words--to do a qualitative analysis of proposed or existing rules. This enlarges significantly the opportunity for useful analysis.

When government decision makers are required to make explicit the process used in arriving at decisions, they become engaged with the problem, gain a greater perception of the potential costs and benefits, and have an added incentive to offer improved rules, or regulations that provide greater benefits

at lower costs. Furthermore, the confrontation with analysis sometimes causes the decision maker to back away, to recognize that the problem in its present state is less costly than the alternative orginally contemplated by the regulator. The Act's requirement for a full and open rulemaking record, with the names of analysts and reports used to arrive at a final proposal introduces an element of utmost good faith to the rulemaking process. Since the affected agencies must show clearly the basis for conclusions and write a summary of findings yielded by the benefit-cost analysis, those interested in the procedure will be assured that they can replicate the summary.

Identification of Affected Groups

Going beyond the requirement for weighing benefits against costs and comparing alternative approaches to particular regulatory goals, the proposed Act reaches to an important dimension of regulatory analysis by requiring an identification of the groups who will bear the costs or gain the benefits of a regulation. These distributional effects often escape the attention of analysts, yet are precisely the concerns that foster some regulations and make others impossible to enforce.

It is clear, for example, that some groups gain from regulation and thus become proponents for it. Just as clearly, some individuals or groups lose from regulation. But, what is often not recognized is the losers and gainers may be members of the same group. For example, firms in an industry can be affected differently when stiff environmental rules are imposed, especially if a technology-based standard is adopted. Some firms may be well situated geographically. They have no problem. Others may have economies of scale of pollution control. Still others may hold patents on a mandated control technology. As a result, the well-situated firms gain a relative cost advantage, even though their absolute production costs may rise. In similar situations, barriers to entry may be obtained in the form of regulations that bear heavier on new plants than on old ones. The gainers are obviously the firms already in business. The losers are the unidentifiable firms that would enter the industry, but for the strict standard. Although an analyst will have difficulty identifying the firms that might have been and quantifying the social cost of less competition, those factors can be

listed. This provides an opportunity for public comment and might reduce the incentive to seek regulation as a substitute for competition.

In other situations, the identification of losers and gainers may reveal the anticipated losers just cannot afford to lose again. Along these lines, it would be useful for agencies to maintain running totals of regulatory costs they impose on particular industries and groups. An industry or group may be so burdened with regulatory and other costs that further action would capsize them. This kind of information is clearly relevant to the regulatory process and should be made public.

Attention to Exempted Rules

While the proposed Act closes an important circle in the regulatory process so that all agencies may benefit from the use of economic analysis, the Act does not address a very important component of new and existing rules: Those fostered by legislation that precludes consideration of costs or benefits. Certain major legislative elements such as those associated with OSHA and EPA rulemaking fall into that category.

Requiring that Congressional committee be notified when less effective or efficient rules are being announced than could be the case provides useful information to the Legislative Branch. As the social gains associated with more carefully constructed rules become recognized, those who write laws and revise them will have an incentive to re-examine previous positions that led to restrictions on economic analysis.

2. IS THE PROPOSED LEGISLATION PRACTICAL?

Requirements for the application of benefit-cost analysis to federal regulation can be spelled out in fine detail and offered optimistically as a major improvement, if not the ultimate safeguard, to limit the number of costly, ineffective regulations. Indeed, such are the theoretical prospects. If every decision maker, each author of a new regulation, applied benefit-cost analysis, monumental potential savings would be generated. At least that is the result advocates of such analysis anticipate. In truth, however, the staunchest advocates of benefit-cost analysis recognize

there are hurdles to be encountered before benefit-cost analysis is applied, during its application and afterwards.

A first hurdle relates to what seems to be an almost instinctive resistance to the application of objective analysis to certain areas of rulemaking. Those responsible for constructing social regulations--rules regarding safety, health and the environment--sometimes seem convinced that anything they do is by definition cost-beneficial. These individuals consider their chosen problem areas in such need of improvement that no cost should be spared when regulating. To suggest otherwise carries a risk of being labeled callous and immoral.

The second hurdle is sometimes hit by those slightly more sympathetic to the usefulness of analysis. These individuals, while accepting the theoretical usefulness of benefit-cost analysis, appeal to the difficulty faced by analysts in certain areas. Sure, the analytical tool is nice, but how does one quantify benefits when human health is the goal to be achieved?

A third hurdle stands between the completed benefit-cost analysis and its application to final rules and regulations. Yes, carefully constructed analyses can be prepared. Cost-effective alternatives can be identified. But will the regulator choose the cost-beneficial approach, or will agency momentum carry forward a more burdensome regulation? Benefit-cost analysis can become an end in itself. To be socially beneficial the findings of the analyst must be applied to regulation as it is being constructed.

Three Levels of Analysis: Jumping the First Two Hurdles

A Benefit-Cost Ledger

As a practical matter, benefit-cost analysis can be as simple as listing the benefits of an action in one column on a page, the costs in another, all in words. 1/ That is a beginning, and even that can be useful. Upon

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1/ For background discussion on this see the Appendix for Benefit-Cost Analyses of Social Regulation, ed. by James C. Miller III and Bruce Yandle, Washington: American Enterprise Institute, 1979, Chpt. One, and the same authors, "Benefit/Cost Analysis: New Thermostat for the Regulatory Cauldron" Business, March-April 1980.

writing such a list, an imaginative analyst, one who truly wishes to produce more benefits at the same cost, or the same benefits at a lower cost, often begins to see how to carry the work a step farther.

That next step generally involves cost-effectiveness analysis. Simply stated, the analysts attempt to achieve the goal of the regulation at the lowest possible cost. Cost-effectiveness analysis is sometimes the only approach that can be taken to some regulatory problmes. Since costs can usually be estimated with greater precision than benefits, especially where social goals are involved, one attacks the cost side of the ledger, assigns dollar costs to different levels of improvement and then expresses the gain achieved by the regulation in terms of unit costs. Alternative approaches to a given regulation, or degrees of control, can also be priced so that comparisons can be made among the alternatives.

For example, if one is considering steps to reduce the risk of loss of hearing from exposure to occupational noise, one may be able to determine the risk reduced for each dollar spent, or for different sorts of regulatory actions, but not be able to estimate the dollar value of hearing. By knowing how additional benefits in terms of reduced risk relate to dollars spent, the decision maker can better determine just how much progress may be made. Furthermore, a cost-effectiveness analysis can identify combinations of regulatory approaches that minimize the total cost of accomplishing a goal. Once the cost of achieving various levels of control are identified and one level specified, the regulators themselves will have revealed their own benefit-cost judgment regarding the problem. That is, by selecting a cut-off point, the regulators will have suggested that the benefits there are at least equal to the costs.

Cost-effectiveness analysis has been applied to a wide variety of proposed regulations including such things as U.S. Environmental Protection Agency (EPA) effluent guidelines, that agency's "bubble" concept, the Occupational Safey and Health Administration's (OSHA's) noise, cotton dust and certain carcinogen standards, the Consumer Product Safety Commission's (CPSC's)

matchbook and lawnmower standards, and the Department of Energy's (DOE's) appliance efficiency standards. 2/

Benefit-Cost Estimates

Further probing of a benefit-cost problem can open up avenues which enable an analyst to go beyond cost-efffectiveness and construct a true benefit-cost analysis, at least for major elements in a problem. This step obviously requires that benefits and costs be measured in commensurable terms, most generally in dollars of real purchasing power. Ideally, the dollar value estimates of benefits will be based on a willingness to pay as exhibited by market determined prices. As in any economic analysis, the assumptions used must be made explicit so that a later analyst will be able to reconstruct the analysis and estimate changes in the results when an underlying assumption is no longer met. Two examples may illustrate this approach: The former Department of Health, Education and Welfare's (HEW's) regulation on education accessibility for handicapped and the National Highway Traffic Safety Administration's (NHTSA's) fuel efficiency standard for the U.S. auto fleet. 3/

In preparing its regulation to assure accessibility for the handicapped, HEW developed an economic analysis that contained the elements of a benefit-cost analysis. Estimating the costs of constructing ramps, elevators and other facilitating equipment was relatively easy, at least when compared to estimating benefits. To do that, the analysts made the assumption that the earnings gap between handicapped and non-handicapped people would be closed if access to education was achieved as contemplated by the regulators. With estimates of that earning's differential and the size of the handicapped population, HEW's analysts quantified the gap and assigned the increase in earnings to the benefit column.

2/ See Appendix for selected reports on these taken from Benefit-Cost Analyses of Social Regulation, op. cit. and from M.T. Maloney and Bruce Yandle, "Bubbles and Efficiency," Regulation, May/June 1980.

3/ HEW's analysis was prepared by an outside contractor. See David M. O'Neill, Discrimination Against Handicapped Persons, Washington: Public Research Institute, 1976. With regard to the NHTSA regulation, see Appendix for Bruce Yandle, "Fuel Efficiency by Government Mandate," Policy Analysis, Vol. 6, No. 3, Summer 1980.

Even with those benefits assigned, however, the proposed regulation was not cost-beneficial. Either some unquantified benefits remained to be identified or the benefits were just less than the costs. HEW's analysts recognized this and indicated the value of psychic benefits needed to balance benefits and costs. The analysis was explicit; assumptions were identified; benefits and costs quantified or named. That approach to an admittedly difficult area of analysis provided an opportunity for interested parties to consider the consequences of the proposal and to compare those with other actions desired by HEW and other government agencies.

NHTSA's fuel efficiency standard was developed under the assumption that Congress intended to minimize the standard's impact on the United States auto industry. That is, NHTSA attorneys reviewing the legislative history of the regulation interpreted it to mean that Congress did not intend the social costs of the regulation to be minimized unless that goal accorded with minimizing the impact on the auto industry. An additional constraint coming from the legislation involved a requirement that NHTSA specify precise miles-per-gallon standards for specific years, instead of allowing a target to be hit by the end of so many years. The agency was therefore required to analyze a range of efficiencies for each of several years.

NHTSA economists constructed a background study that contained many of the elements needed to develop a benefit-cost analysis, though they did not develop an analysis themselves. They had estimated the annual costs of several alternative fuel efficiency standards along with estimates of the of the price and operating cost effects of the alternatives. The latter estimates were based on demand relationships which in turn reflected a willingness to pay.

With the data developed by NHTSA, a benefit-cost analysis was constructed. 4/ Major assumptions supporting the analysis were specified, and unquantified items were identified. For example, there was no estimate of the change

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4/ See Appendix for Bruce Yandle, "Fuel Efficiency by Government Mandate: A Cost-Benefit Analysis," Policy Analysis, Vol. 6, No. 3, Summer 1980.

in the number of fatalities associated with accidents involving the smaller care fleet, which was expected to increase when the regulation went into effect. Even so, an explicit, though clearly imperfect, benefit-cost analysis was developed, one based on the social benefits and costs of the regulation.

The Use of Pure Theory

Some areas of regulation almost defy the application of cost-effectiveness or benefit-cost analysis even in the crudest form. In those situations, something may be gained by considering economic theory and what it teaches about markets, firms and consumers. By reviewing those concepts, one can sometimes arrive at useful, though, tentative, benefit cost conclusions.

An example of this approach is found in the consumer information area. What are the benefits and costs of requiring package inserts in prescription drugs, specific warnings on labels or madated phrases in all advertisements? Are there alternative approaches to the underlying problems that might be more effective and less burdensome? Of course, one can list "better information" as a benefit, but what does that mean? Better than what? How much better?

In these cases, the analyst can consider the market in which the products are sold and describe how those markets work. What is the normal incentive for the production and dissemination of information in these markets? Are there barriers--legal and otherwise--that limit or preclude provising the sort of information the regulator desires?

Would the contemplated rule ride upon normal market forces or work against them? In other words, would the regulation make things worse? Which party--buyer or seller--has the greater advantage and faces the lower cost in getting and providing information?

The Federal Trade Commission's (FTC's) proposed regulation of advertising for over-the-counter (OTC) drugs falls into this category.5 / The

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5/ For background see Bruce Yandle, Regulated Advertising and the Process of Self-Medication, Washington: The Proprietary Association, 1978.

commission's proposal was to require all OTC advertisements to use the exact words as found on labels of OTC products when making any health claims. Obviously, the range of terms and phrases was very restricted and quite technical.

Upon considering the theory of consumer market behavior and describing the theoretical components of consumer search for information, the analysts in this case determined that label language served one useful purpose in that process, and advertising served another purpose, quite distinct from that of the more technical label. By writing out the arguments, the analysts performed a kind of benefit-cost analysis which led to the conclusion that the proposed rule would create more costs than benefits. In other words, the consumer's search for information, while imperfect without regulation, would be less perfect with it.

Improving Regulation: The Final Hurdle

Although various forms of benefit-cost analysis can be, have been, and will be applied to regulation, a serious question remains. Will the benefits of the analysis--the implied improvements in the regulations themselves--really be obtained? This is the point: Benefit-cost analysis may reveal alternatives that are superior to the one initially chosen by the regulator; indeed, such analyses may suggest that no regulation is needed, but unless the regulator has an incentive to apply what is learned through analysis, nothing of real value will be obtained by analyzing.

The proposed Act introduces the necessary incentive for analytical gains by requiring regualtory agencies to perform and report their analyses prior to the publication of their rules and to justify those rules in terms of their analyses. With the proposed mechanism in place, regulators will have no choice but to consider carefully the consequences of major rules. Benefit-cost analysis, whatever its form, will become a guiding force in the regulatory process.

In addition to the incentive provided by the proposed Act's requirement for analysis, the provision for open rule making adds an incentive to

improve the quality and assure the application of benefit-cost analysis. The allowance for public comment and testimony with cross examination brings competitive information to bear in the rule making procedure. Those activities promote beneficial conflict between truth and error and thus enhance the possibilities for the promulgation of cost-beneficial regulation.

3. AN INDIRECT EFFECT

While the proposed Act expands the range of opportunities to apply benefit-cost analysis to regulations being formulated, its requirement for that analysis could have an interesting side effect. In the forms already described, benefit-cost analysis seems best suited when applied to regulations that offer specific approaches to some regulatory goal. In other words, an analyst can quantify costs when specific technology is being considered. It is more difficult to do that when a performance standard is being devised. However, progress toward the use of performance standards generally occurs after the benefits and costs of technical standards have been considered. Hence, a requirement for an analysis of regulation could lead regulators to discover the merits of performance standards.

If one, for example, is concerned about controlling the level of some specific pollutant, one can identify alternative technologies that will reduce the pollution at each source. The costs of the technologies can then be used in a cost-effectiveness analysis, if not in a benefit-cost analysis. But if the regulator simply identifies the maximum level of pollution alowable, without describing how to attain that level, there will be no agreed upon basis for estimating costs. Indeed, the possible approaches to meeting the standard may be as diverse as the number of polluters who face the problem, which is after all the advantage of performance standards.

Under the requirements of the proposed Act, the regulator might use benefit-cost analysis in selecting the level of allowable pollution. In effect, the performance standard would be developed after the completion of a benefit-cost analysis of the alternatives. Those affected by the ultimate regulation would then have the opportunity to consider the technical alternatives as well as any other approach available to them for meeting

the goal of the standard. The efficiency generating attributes of performance standards would then be combined with an identified cost-beneficial approach to the problem.

The proposed Act does not speak directly to this aspect of regulation, although the rule making process outlined by it does. It would be anticipated that those commenting on an agency's benefit-cost analysis would often recommend a performance standard, assuming that approach could be enforced, and ask the agency to respond to that recommendation. While the regulator might have thought his analysis of technical alternatives satisfied the requirements of the proposed Act, he would likely learn that his benefit-cost analysis was yet one step away from an even more efficient approach to dealing with the subject of the proposed regulation. The regulator would then have one last alternative to compare with the previously identified optimal approach.

4. SUMMARY

So what are the expected benefits of all this? Will a requirement for benefit-cost analysis itself be cost-beneficial? Of course, the last question cannot be answered in advance of information regarding the administrative costs associated with the analytical requirement. So perhaps the question might be phrased differently: Is it wise to promulgate 10,000 rules each year, yet require no evaluation of them in terms of social benefits and costs? Would any one support such an approach?

It seems inconceivable that a group of people determined to deal with problems by means of regulation would even consider allowing their appointed regulators to act without accounting for the consequences of their actions. Perhaps they might allow some apparently trivial matters to be regulated without an evaluation. But as regulations became more complex and more numerous, the time would surely come when the public would demand accountability.

It is out such an experience that we consider the Regulatory Reform Act

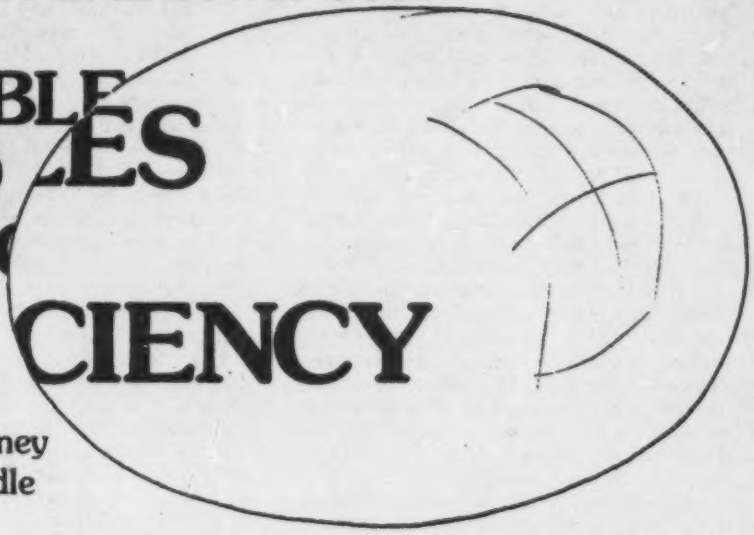
of 1981. Spawned by the hope of improving almost every dimension of life, numerous regulations have been written. We have learned about their benefits, their costs and their inefficiencies. We have now come face-to-face with the need to make tradeoffs. Scarcity compells us to become better stewards, to provide greater benefits at lower costs. Benefit-cost analysis is a tool that can help us when tradeoffs have to be made. It is not the grand solution to the problems enumerated here, but neither is regulation the final solution to the problem it addresses.

When we as a people choose regulation as a device to redress social problems, we deny ourselves access to the information of the marketplace where hundreds of millions of purposeful people make their own benefit-cost judgments and register them. Benefit-cost analysis is a substitute for social information that may be lost when regulations are being implemented. But to the extent that such analysis is thoughtfully applied, to the extent that differences regarding the analysis are aired and issues surrounding ventilated, to that extent we may be able to introduce the realities of a world where scarce resources are to be allocated by regulatory action.

Generally speaking, we can say confidently that for every benefit obtained in life there is a cost. But when we become efficient in what we are already doing, it is possible to obtain additional benefits and reduce costs. That is the challenge--indeed the opportunity--provided by this proposed legislation.

Cleaner Air at Lower Cost

BUBBLES AND EFFICIENCY



M. T. Maloney
Bruce Yandle

THE REGULATION of air pollution has followed a perplexing path. Theorists have long urged the Environmental Protection Agency (EPA) to adopt principles that would lead to the most efficient ways of achieving cleaner air. The regulators, however, have insisted upon a seemingly more straightforward scheme: if the goal is to improve air quality by, say, 10 percent, the obvious thing to do is to require the use of pollution controls that reduce emissions at each and every source by 10 percent. This approach has formed the basis for national air quality policy for almost a decade. Thus, in accordance with the mandate of the Clean Air Act of 1970, EPA established national standards for six pollutants and required the states to impose so-called technology-based standards to be met uniformly at every smokestack or other emission source, no matter how many of these sources a given facility had.

Finally, EPA came to recognize the inefficiency of the source-standards approach. In December 1979, one year after endorsing an experimental "bubble" policy (see "Blowing Bubbles at EPA," *Regulation*, March/April 1979), the agency announced two new options for reducing air pollution. For a particular pollutant, (1) the agency will focus on an entire plant—rather than individual sources in the plant—and allow management to meet an overall plant standard in any way it might choose, or (2) the agency will consider a regional grouping of plants and develop a process whereby these plants adjust their emissions so as to achieve the regional goal. In either case, according to the final rule issued by EPA on December 11, 1979:

> Sources will have the opportunity to come forward with alternative abatement strategies that would result in the same air quality impact but at less expense by placing relatively more control on emission points with a low marginal cost of control and less on emission points with a high cost. (44 *Federal Register* 71781)

EPA's new cost-effectiveness or "bubble" approach is simple enough to understand when applied to a single plant. If the cost of removing an additional unit of a given pollutant (the incremental or marginal cost) is higher for some sources than for others, the manager can reduce the plant's total cost of achieving the desired air quality by shifting emission control

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from the higher-cost to the lower-cost sources until the point is reached at which incremental cost becomes the same at each source. At that point, the total cost of meeting the plant standard is minimized. The practical problems are a bit more complex when this approach is applied to a collection of plants, but the principle is the same. The plant manager whose incremental costs of emission reduction are high will look for opportunities to realize savings by paying neighbors whose costs are low to cut their emissions by the needed amounts.

Given that the theoretical case for the cost-effective bubble approach is simple and compelling, why did EPA take so long? There are many reasons, no doubt—including bureaucratic caution, uncertainty about the monitoring technology that would be needed to police the system and, perhaps most important, the fact that the theory was not solidly buttressed by cost estimates of alternative emission control situations. In the absence of such estimates, decision makers were left to wonder about the extent to which incremental cost really mattered. Were the savings to be gained significant? Were they large enough to offset the possibly higher monitoring costs that might be involved?

The Du Pont and Maloney-Yandle Studies

In the summer of 1979, we carried out a research project that bears upon these questions. The raw material for our work came from a study conducted in 1976 by T. A. Kittleman and R. B. Akell, two engineers of the E. I. du Pont Company, in which they estimated the costs of achieving an 85 percent reduction in hydrocarbon emissions at each source in all of the Du Pont plants within the United States. From their investigation, Kittleman and Akell learned that the differences in average reduction costs among sources were monumental. In short, they found significant economies of scale in the control of hydrocarbon emissions—which is to say, the cost of reducing an additional unit of emissions from a large source (one emitting a large volume of hydrocarbons) was lower than for a small source. Kittleman and Akell did not determine the incremental cost of control on a source-by-source basis, and therefore could not compare the costs of alternative approaches for reducing hydrocarbon emissions. That is what we set out to do.

Du Pont provided us with its data base and support for our investigation. Our objective was to develop a procedure for calculating costs at different levels of control, so as to be able to estimate the cost of achieving a given reduction in hydrocarbon emissions under three different regulatory approaches. They were defined as follows:

Source-by-source standards—in which emissions from each source of a given size (defined as sources emitting more than three pounds an hour or fifteen pounds a day) are reduced 85 percent.

Plant-by-plant standards—in which each plant reduces its overall emission level by 85 percent, with managements being free to determine the degree of reduction at each source.

Multi-plant standards (trade-offs among plants)—in which total emissions in a hypothetical region (composed of all the plants qualifying for our sample) are reduced by 85 percent, with plants being permitted to exchange emission permits.

The first approach is theoretically the most costly, since the percentage reduction is the same at each source, no matter how high or how low the cost of achieving it. Under this approach, cost-effectiveness is swapped for regulatory convenience. The second approach parallels EPA's new plant bubble concept, in which total emissions from a plant are monitored, but variation in percentage reductions from individual sources is permissible. Costs are predicted to be lower here, since emission reduction can be concentrated on sources where it is less costly. Under the third approach, the plant bubble is stretched to cover an entire region and trade-offs are permitted among plants so as to make possible larger reductions in emissions where costs are lower, again within the limitation of the same overall percentage reduction in emissions. From society's standpoint, this approach predictably yields the greatest amount of clean air (emission reduction) at the lowest control cost, since the scope for possible cost-saving adjustments among emission sources is greatest.

In the Du Pont data made available to us there were fifty-two plants having a total of 548 sources of hydrocarbon emissions. The variation in the size of the sources—both within and among plants—suggested significant

possibilities for exploiting economies of scale in emission control. In our econometric analysis, first we estimated the relationships between the costs of emission control and the operating characteristics of the control equipment for each of the 548 sources. From this, we estimated the incremental cost of emission control at each source. Next, we minimized the control costs for an 85 percent reduction in overall emissions, using first a plant bubble and then a multi-plant or regional bubble. This gave us estimates for those two approaches, which we compared with the figures for source standards taken directly from the Du Pont study.

Cleaner Air at Lower Costs

The results of our analysis were dramatic enough to startle even the true believers (see table). Under source standards, the annual total cost of an 85 percent reduction in emissions for all fifty-two plants, as shown in Du Pont's data, was $105.7 million. When each plant was placed under a bubble and allowed to adjust emission control among sources within the plant, the annual cost for the same reduction in pollution fell to $42.6 million. In other words, the shift from source to plant standards produced the same amount of clean air at a saving of 60 percent. As would be expected, the savings were greater for some plants than for others—ranging, in fact, from a high of 92 percent to a low of zero. This is explained by the fact that some plants had large emission sources with low incremental control costs, whereas others lacked large sources and other opportunities for cost saving as well.

For the purpose of analyzing trade-offs among plants, we treated all the plants in our sample as if they were located in the same (hypothetical) region. When the fifty-two plants were placed under one so-called regional bubble, annual emission control costs were found to be only $14.6 million, 86 percent lower than the costs imposed by source standards.

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Taking the regional bubble concept one step further, we estimated the costs that would be associated with hydrocarbon reduction standards higher than the 85 percent assumed above. Here we learned that overall emissions of the plants in question could be reduced by 99 percent at an annual cost of $92.4 million. In other words, the regional bubble yielded significantly more clean air than source standards and still generated cost savings of considerable size.

EMISSION CONTROL COSTS UNDER THREE APPROACHES

Approach	Millions of 1975 Dollars	
	Annual cost	Savings over source standards*
Source standards	105.7	—
Plant standards	42.6	63.1
Multi-plant standards	14.6	91.1

*Assuming 85 percent reduction in hydrocarbons.

Some Final Thoughts

Despite the dramatic savings reported here, one should be cautious about lambasting EPA for not having moved years ago toward cost-effective pollution control. Clearly it would not be in the interests of either the polluters or those demanding environmental quality for regulators to rush into schemes whose advantages have not been demonstrated. In the case of the bubble, there were—until quite recently—too many uncertainties. Evidence to indicate the magnitude of the potential savings was largely a matter of conjecture. Moreover, monitoring difficulties, an issue stressed repeatedly by opponents of plant and regional standards, threatened to be a real problem. Whereas technology-based standards have avoided this problem (because they mandate the use of equipment that achieves the required degree of control), under the bubble the emissions themselves become the target and therefore a reliable monitoring capability becomes crucial. Indeed, it probably was the practical appeal of technology-based standards, plus ignorance of how costly they would be, that caused the concept of performance standards, which was central to the Clean Air Act of 1967, to be rejected. For the same reasons, the move to technology-

based standards in the 1970 Clean Air Act was heralded as a major breakthrough in pollution control. After all, if the equipment is in place and working, pollution is being regulated, though probably in a very costly manner.

In the years since 1970, as control technologies have been developed and applied on a fixed percentage-reduction basis, industry, government, and private scholars have generated information about control costs, especially incremental costs. Monitoring techniques have also been improved as experience has brought a better understanding of pollutants and how they move when discharged. This learning process, though slow and haphazard, has ultimately filled much of the knowledge gap and led to a growing recognition of the possibilities for more cost-effective regulation.

Two questions remain to be answered. First, while it is clear from the evidence presented here that the savings from plant and regional bubbles are very large, are these savings large enough—in all situations, or some—to offset additional monitoring and administrative costs and still generate net social benefits? What is mostly needed here are specific cost data on the monitoring task. Second, will EPA pursue the new regulatory approaches suggested by the accumulating evidence—will it, in other words, facilitate the development of an emerging market in emission rights—or will it stand in the way? In this connection, the agency's first action on a petition from a state for bubble-approving authority presents cause for concern. On March 11 the EPA rejected New Jersey's request that authority to approve plant bubbles be included in its state implementation plan. Given the nation's urgent need to lower the cost of cleaner air, it is to be hoped that the bubble is an idea that cannot be denied much longer. ■

Selected References

T. A. Kittleman and R. B. Akell, "The Cost of Controlling Organic Emissions," *Chemical Engineering Progress*, April 1978.

M. T. Maloney and Bruce Yandle, "The Estimated Cost of Air Pollution Control under Various Regulatory Approaches," a report to the Du Pont Company from the Department of Economics, Clemson University, July 1979.

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Diesel Automobiles

(*Continued from page 14*)

Apart from the question of how diesel particulate-reductions are to be achieved, there is the even more basic question of whether, and to what extent, such reductions are medically, rather than merely aesthetically, desirable. The actual health effects of the diesel are by no means clear. EPA's "White Paper" states:

> Extensive research into the health effects [of chemical substances absorbed by diesel particulates] is underway. Many undoubtedly are toxic. Others, such as polynuclear aromatic hydrocarbons, are known to cause cancer in animals and produce mutations in bacteria. Although it is too early to draw definite conclusions . . ., available data suggests that serious concern is warranted.

The automobile industry, on the other hand, points out that work-place exposure studies have failed to find significant negative long-term health effects, even though diesels have been in use for a long time.

In light of the possible health risks, one is inclined to be more sympathetic to EPA's stringent position on permissible overall particulate levels than to its reticence in adopting fleet averaging to achieve those levels. The averaging approach is demonstrably more efficient and has been applied effectively in other regulatory fields. Of EPA's reasons for further study, one suspects that the reason carrying the heaviest weight is the political difficulty of determining what method of averaging to employ, given the widely varying effects of different methods upon particular firms. Yet surely a flat emission level, as contrasted with any of the various averaging approaches, also has a differential effect. That is to say, some companies will be more affected than others by a uniform limit applicable to all diesel vehicles—so evenhandedness is hardly a rational justification for that approach. At most, one can say that the force of established regulatory habit makes the across-the-board limit *appear* less preferential, or makes EPA *appear* to be avoiding the inevitable preferential choice. On an issue that bears appreciably upon our major problems of inflation and energy, concern with appearances is a luxury we can ill afford.

QUESTIONS POSED BY SENATOR LAXALT AND SENATOR LEAHY TO MR. YANDLE

Question 1. Assuming that the President or his designee is given the authority to designate certain rules as "major," do you feel that the President or his designee should also have the power to waive regulatory analysis for certain major rules? If you support such waiver authority, please give specific examples (in addition to IRS rules) or rules for which such a waiver power would be needed. If you favor such waiver power, but with criteria set out in the statute, please elaborate on the details of such criteria. In addition, if you favor the addition of a waiver power, please explain why you do not feel that putting such discretion in the Executive inserts a major loophole in the requirements of S. 1080. Should the exercise of such a power be subject to judicial review?

Answer. Yes, I favor waiver authority. In some instances a waiver would be desirable to move an important regulation forward, almost as if it were an emergency situation, but lacking a straight-forward explanation for emergency designation. For example, HEW's regulation on non-discrimination on the basis of handicap lingered for several years within the agency. It finally came forward accompanied by an analysis. However, there were weaknesses in the regulation and the analysis—improvements which could be made. The pressures of delay and from the intended beneficiaries of the regulation considered together made it unreasonable to slow the process further. Such instances will occur again.

Other situations come to mind where waivers would be desirable: EPA regulations dealing with the approval of state implementation plans and certain economic regulations from CAB, FCC and ICC. Any one of these could trigger an objective "major" criteria but still offer little prospect for improvement by further analysis. In other situations, an agency could be overburdened with analytical requirements. Some judgement should be left with the designated authority to waive analytical requirements in order to maximize the use of analytical resources within the agencies. The waiver decision should not be subject to judicial review, and though the provision might be termed a loophole, it is actually a provision for managerial flexibility.

Question 2. Should the determination of what is a major rule be subject to some form of judicial review? If you believe that there should be some limited judicial review, please explain how such review should be limited.

Answer. No. If the only reason for contesting the designation is to avoid the requirement that regulations maximize net social benefits and that final rules be accompanied by a benefit-cost justification, judicial review would be counterproductive. There would be no social gain provided by the review. On the other hand, if a rule is not defined as major and that decision is contested, one could argue that a potential social gain could await a careful benefit-cost analysis. However, by giving the responsibility for making the determination to the President or his designee within the Executive branch, the latter possibility would tend to be minimized. In that case, an aggrieved party would be able to communicate concern to the appointed authority. Furthermore, by requiring the monitoring authority in the Executive branch to report annually to the Senate Committee, activities regarding the designation of major and problems related to those activities could be reviewed and modified.

Question 3. When considering the definition of a major rule, most witnesses addressed subparagraph (i), dealing with $100 million in compliance costs. Do you feel that subparagraphs (ii) and (iii) are too vague to be practically useful? Are these subparagraphs necessary?

Answer. In general, the criteria for major are too vague to be applied consistently across agencies, or to a single agency through time. However, I see no statutory solution to the problem posed here. I suggest that the language be kept, but that the President or his designee within the Executive branch be given the responsibility of establishing agency criteria on an annual basis, using the statute's language as guidance. I would expect leeway to be maintained by the designated authority so that any regulation could be designated major by the authority, thus bringing closer scrutiny to a particularly sensitive regulation. Once the criteria for major have been established on an agency-by-agency basis, the resulting guidelines should be published in the Federal Register. Again, the designated authority should also report annually to the appropriate Senate oversight committee.

Question 4. Should a deregulatory rule making be subject to regulatory analysis?

Answer. No. That is, if there were a true deregulatory rule, one that unfetters completely all regulatory attachments. However, what is called "deregulation" is practically always "reregulation." The form of regulation is sometimes relaxed, e.g., trucking, airline and financial institution reform, but regulation survives. The complexities of regulatory reform and the surviving regulations should be scrutinized. If

the major criteria is triggered, those actions should be subject to an analysis. However, if the deregulation is thoroughgoing, an action which returns to the private sector an activity taken from it, then no regulatory analysis should be required.

Question 5. Many have said that regulatory analysis should not be the sole criterion of a rule making. What impact should regulatory analysis, as provided in S. 1080, have on a particular regulatory decision? What other criteria should be guiding a regulator in addition to the regulatory analysis?

Answer. Ideally, regulatory, analysis should be the principal guiding force in rule making. In other words, we should always seek to have rules that maximize net social benefits. To the extent that analysis is imperfect—the inability to provide quantification of benefits and costs in commensurable terms—the regulator must "fill in the blanks" with compelling arguments. The arguments will be generated by the regulatory analysis and depending on their force could tilt the benefit-cost scale in either direction. As a consequence, the arguments related to the analysis, which are indeed a part of the analysis, become the other criteria for guiding regulatory decision makers.

Question 6. Some have supported a requirement for agency descriptions of the effects of a rule, but have at the same time opposed any requirement for an agency determination concerning the relationship of those tradeoffs. Do you feel such a determination (as in S. 1080 the benefits "justify" the costs, and the rule is a "cost-effective alternative) is necessary to make regulatory analysis worthwhile?

Answer. Yes. S. 1080 allows sufficient latitude and flexibility in its regulatory analysis requirements to enable regulators to say their rules are "justified" by the analysis presented, or that their proposals are "cost-effective" on the basis of the comparisons reported. Such pronouncements are made in the light of the analysis chosen by the agency and reported with its findings. If the regulator does not feel the benefits of a rule are greater than the costs, he should certainly not propose the rule. To do so would be irresponsible. Thus, regulators always implicitly act as though their rules are "justified." They may not always act as though their rules are "cost-effective," however. Nonetheless, the use of the two terms merely indicates that according to the analytical framework used and reported, the final regulation chosen has those characteristics.

Question 7. Why not have a standard for rule making that a final rule should be the one that saves the most lives and avoids the most injuries, unless the agency offers an explanation to the contrary?

Answer. Cost must be considered here. However, if costs are held constant, then a rule that follows the logic of the question—saves the most lives—would be the cost-effective alternative and therefore the logical choice. Still, all costs must be considered in making the cost-effective selection. For example, monitoring and enforcement costs are to be considered here.

Question 8. OMB or the Regulatory Relief Task Force operates without the procedural safeguards for fairness mandated by the Administrative Procedure Act. Is it wise to shape regulatory policy in a manner insulated from those procedures, through a mechanism like OMB or the Task Force?

Answer. It is clearly possible that OMB or the Task Force could make mistakes and act "unfairly" in the absence of the statutory safeguard. However, that risk is present in any procedure. There is, however, political risk associated with unfair behavior. In other words, there is a cost associated with arbitrary and discrminatory actions. While OMB could move too quickly in its effort to bring cost consciousness to regulatory agencies, other groups could use judicial review as a means to move too slowly in the same direction. There is risk either way.

Given the Constitutional provision that the President "take care that the laws be faithfully executed" and the fact that heads of Executive branch agencies serve at the pleasure of the President, it seems reasonable and certainly not unwise to allow the President to empower OMB and the Task Force to operate as he has.

Question 9. Dr. Yandle, I was interested in your discussion of pure economic theory as a substitute for conventional benefit-cost analysis in the areas that defy analysis. Could our agencies use this approach within the framework of the present bill?

Answer. Yes. In fact they have, as indicated by the example I gave (the FTC action regarding the regulation of advertising). Pure theory is itself a kind of benefit-cost analysis and forms the foundation for the empirical approach we generally think about when we hear the words "benefit-cost analysis." Where quantification is not possible—or exceedingly costly—one can consider the theoretical properties of the market within which regulation is to be applied. By reviewing the logic of the market and consumer behavior—or the behavior of firms, one can identify conceptually the benefits and costs of a regulation. Economic theory is a powerful

device for analyzing regulations. Its use helps the analyst to organize thoughts and to present logical statements about the effects of a regulation.

Question 10. Dr. Yandle, I am glad to see that you place a high value on the benefit and cost analysis, even where benefits and costs are not readily quantifiable. Would you still hold the benefit and cost analysis approach to be valuable even if it turned out in the future that most regulations included some nonquantifiable costs?

Answer. Yes. There will always be some nonquantified costs and benefits, either because of oversight or measurement difficulties. Still, the benefit-cost exercise raises important questions that beg to be answered. The analysis uncovers unexpected benefits and costs, sometimes in nonquantifiable areas. That result is itself valuable in that guidance is given toward the most effective regulation, rather than away from it.

Benefit-cost analysis brings the regulator closer to the world of scarcity, the one in which the final rule will be implemented. The confrontation with scarcity is useful in that realism enters the decision making process and brings balance to the idealism that might otherwise prevail.

Ultimately, no regulation is a good regulation unless it can be implemented in an efficient and effective fashion. Benefit-cost analysis, even where certain things are not quantified, assists in the identification of regulations that may work. No benefits will be generated by "ideal" regulation which are inoperative.

Question 11. You point out in your statement that benefit-cost analysis can become an end in itself and that the findings of the analyst need to be applied. This is a major worry to me even though I support the benefit-cost approach. Though my question may go more to human dynamics than economics, what can we do to insure that the benefit-cost requirement is not simply papered over in time, just as stock forms have come to replace substance in many regulatory areas?

Answer. This is a key concern to me. Some monitoring agency must follow up to see that the results of the analysis influence the regulatory outcome. I suggest that the President or his designee within the Executive branch be given the responsibility of monitoring the regulatory process, assessing the effectiveness of the proposed amendment and reporting annually on the related activities. My thoughts on this are conditioned by my experience as an economist in the Government Operations Research division of the Council on Wage and Price Stability in 1976–77 and the summer of 1978. That experience and my research on regulation before and since indicate that excellent analyses are frequently performed by regulatory agencies, yet the final regulation appears as if the analyses were never done. Simply put, one could monitor the agencies to see that analysis is done, but still have no impact on final rules.

The proposed amendment steps beyond this, of course. Its requirement that the analysis be reported and the rule be justified in terms of the analysis closes the circle. Still, I believe it will be necessary to have a monitoring agency. Benefit-cost analysis often stops short of the most efficient approach to a problem. The monitoring agency could push for the final step. In other words, I believe we all work more effectively when we know someone is watching us, observing the quality and quantity of our work not just checking off items on a list to indicate that we did certain mechanical things while on the job.

Senator LAXALT. Mr. Smith?

STATEMENT OF RICHARD B. SMITH, CHAIRMAN, COORDINATING GROUP ON REGULATORY REFORM, AMERICAN BAR ASSOCIATION

Mr. SMITH. Thank you, Senator Laxalt.

May I first express my appreciation at having been the only lawyer to be asked to appear with three economists. I am one of those members of my profession who greatly admire economists and am a former regulator who felt, from the day he entered office, that there is far too little economic analysis that has been input to regulatory decisions.

Because of my often-expressed attitude back in those days before this type of legislation, I think I was the first lawyer ever to have been asked to speak to a gathering of the National Bureau of Economic Research. Unfortunately, I do not know how well I did, I am not sure they have asked a lawyer back since.

But I very much welcome the input of economists, I think regulation will be infused a great deal more with economic analysis and that this bill will promote that. I think that is all to the good.

I am not best witness as to appropriate methodologies or techniques for cost-benefit or cost-effectiveness analysis, except to recognize the benefits that the economist's discipline brings to that process. It should be there, and it should be required. So we are very supportive of that requirement, as expressed in the bill.

We have some suggestions about improving the bill—and I want to preface that with our expression of sympathy with its general objectives.

It is the process with respect to regulatory analysis to which I would like to speak. We have a great deal of concern about resorting to the court system as the disciplining mechanism for the imposition of the regulatory analysis requirement. As to how to measure costs, what methodology to apply, when to determine what is a major rule, how to determine it—we think that those are questions which, if vested in the judiciary, will delay and encumber the very process that the bill wishes to have carried out.

Largely for that reason, as well as for an additional reason, we would urge you instead to, assign a supervisory or monitoring role to the Office of the President or his delegate.

It is a methodology that is in an early stage. The practical judgment that will need to be made—at what point obtaining additional cost data and benefit data becomes an unreasonable exercise because the incremental value of the information is not worth the additional costs—is something that one feels uncomfortable with leaving to the individual agency. We feel equally uncomfortable with having a court attempt to make that determination 2 years later.

We think, for real time monitoring and for practical judgments to be brought to bear in looking at the Government and its national economic policies as a whole, that the Presidency is the likely place, through the mechanism of OMB and the Regulatory Relief Task Force, to be disciplining that process.

Senator LAXALT. Were you here this morning, Mr. Smith?

Mr. SMITH. I was not, sir, but I was present on Tuesday morning when the three administration witnesses testified, and I have also read Mr. Miller's statement.

I might say that we each independently arrived at those views without consultation, one with another.

Senator LAXALT. They made the point this morning, and you have indicated the same, that perhaps OMB would be the proper oversight vehicle. Do you agree with that?

Mr. SMITH. Yes, I think it is the managerial side of the Government. I think, at this stage, that regulatory analysis is really a governmental managerial tool to help and make comparable and uniform the standards by which agencies apply regulations to the economy.

At some point in the future, it is quite possible that the methodology and the standards of measurement of costs—balancing, analysis of cost-benefits—may become so fixed and accepted that there is an authoritative doctrine about it. Then judicial review could be undertaken. But we do not think that stage is yet.

Senator LAXALT. Let me see if I understand. You would have OMB, then, exercising the oversight function in a quasi-judicial capacity—I guess a judicial capacity, really, within the the administration. Would that decision of OMB be reviewable?

Mr. SMITH. No. There was a question asked earlier, I think by Senator Simpson. The contrast we would make is between that of a manager and that of a judge, and we think at this stage it is really a managerial function.

We would like to see the Regulatory Relief Task Force or OMB—the President's delegate—be able to make a determination that something is or is not a major rule, whether or not the agency has so decided—to review that decision by an agency, to help to establish some uniformity in the methodology for analysis, to review reg-analyses from different agencies. It is quite possible that some agencies will be superb at it and others quite inept. We are going to have to try to bring the Government to a general standard at some point in time.

Courts are just not equipped. We oftentimes, I think, ask the court system to do too much, and this is something, I think, that a governmental manager is better equipped to do than a judicial reviewer.

Senator LAXALT. You were downtown for quite a while. Do you think this basic concept is practical?

Mr. SMITH. I do.

Senator LAXALT. Do you think it will work if they will make it work?

Mr. SMITH. I think it will work if the courts do not supervise it. If the courts were to be drawn into this to supervise it, I think it would fall of its own weight. I feel that strongly about it.

With proper Presidential supervision it will add enormously to governmental decisionmaking, but flexibility, I think, is essential for the process to work. I think there should be some form of waiver authority. Also, some ability to say: "Go this far, but you are not to go any further" and some ability to say: "You haven't done enough."

And each agency's areas will be quite different. To apply cost-benefit analysis, for instance, to the Securities and Exchange Commission, to the Office of the Comptroller of the Currency, to the Environmental Protection Agency, are three very different things to think about, even with what might seem like a fairly fine test—$100 million of costs.

"Cost" is defined to include indirect social costs and benefits, which is a very large concept. How you apply that to requests to the Office of the Comptroller of the Currency as to whether banks are eligible to underwrite a $200 million bond issue, to the SEC in requiring certain kinds of compliance by companies with billions of dollars of securities outstanding, to EPA—that is requiring people to put in some sort of additional equipment to control pollution—these are very different questions, We are here, in one statute, attempting to cover very different areas and modes of governmental interventions in the economy.

Senator LAXALT. Are you saying we ought to develop some classifications here?

Mr. SMITH. I fear that would be difficult and a mistake, and would impede the progress of the legislation, for Congress to attempt to do that at this point. It will naturally come with experience as this process goes on. It can be managed, and developed, and guided in a productive way if OMB is involved in the process.

I would think that it would be very useful for Congress to keep a close eye on what goes on as this program proceeds, so that it is fully informed as to what sort of waivers and what sorts of determinations are being made by OMB. You can form your own judgment as to the quality of the experience—what results it is producing.

Senator LAXALT. Thank you very much, Mr. Smith. Without objection, your prepared text will be included in the record at this point.

[Mr. Smith's prepared statement with attachments and the response to questions posed by Senator Laxalt follow:]

Prepared Statement of Richard B. Smith

Mr. Chairman and Members of the Subcommittee:

My name is Richard B. Smith. I am a practicing lawyer in New York City. From 1975 to 1980 I served as Vice Chairman of the American Bar Association's Commission on Law and the Economy. At present, I am Chairman of the Association's Coordinating Group on Regulatory Reform. This Group seeks to coordinate the work and views within the Association on the subject of regulatory reform and to present the views of the Association on that subject to the legislative and executive branches of the national government. I might also add that from 1967 to 1971 I served as a Commissioner of the Securities and Exchange Commission and from 1971 to 1974 as a member of the Council of the Administrative Conference of the United States.

I appear here today Mr. Chairman, at your invitation, as the representative of the American Bar Association to comment on S. 1080. We very much appreciate this opportunity and also the courtesy and cooperation of the members of your staff in discussing these matters with us.

We, of course, applaud the intensity of interest in regulatory reform expressed by the large sponsorship of this bill. We also applaud, Mr. Chairman, the leadership direction being given to regulatory reform. We also especially appreciate your statement on introducing the bill that S. 1080 is only a first step and that further legislation is necessary incorporating additional roads to reform. That and similar statements by other sponsors served to reassure us against our initial fear that important subjects were being dropped from the legislative calendar.

Indeed, on reflection, I want to commend the Subcommittee for the way in which it is approaching the

problem of regulatory reform legislation, namely, by promptly addressing a manageable number of specific issues rather than awaiting development of a total legislative reform package. We deeply appreciate the Subcommittee's action in placing those issues on the current agenda for discussion, debate and resolution. We also express the hope that once the matters dealt with in this bill have been disposed of, other important aspects of regulatory reform will be accorded like treatment.

That later agenda, or comprehensive context, is vital, because, as you noted, Mr. Chairman, S. 1080 cannot be considered a full addressing of the issues. Among the remaining roads to reform are:

1) a reasonable, modified, flexible form of sunset or high noon -- better characterized we believe as periodic reauthorization of regulatory programs;

2) provisions dealing with compulsory process -- both adjudicatory and investigatory subpoenas -- and confidentiality under the Freedom of Information Act (particularly in light of the regulatory analysis requirements of this bill which might lead agencies to seek more information from regulated entities);

3) importantly, a monitoring, coordinating and supervisory role for the President or his delegate to achieve reasonable and wise balancing choices among courses of action proposed by specialized agencies, each pursuing its own statutory goal that often conflicts or competes with others;

4) introducing greater flexibility and efficiency into administrative procedures by forms of expedited or modified hearings, possibly regulatory negotiations, reconciliation of federal-state regulatory conflicts, improved deployment of the corps of administrative law judges, and better utilization and possible restructuring of the Administrative Conference of the United States; and

5) finally, under a regime of periodic reauthorization or otherwise, improving the end product of regulation -- after all, procedure is a means to an end, not an end in itself -- by undertaking the particularistic, perhaps tedious and unglamorous task of studying and correcting individual regulatory statutes; that is, achieving substantive deregulation.

The ABA has adopted policy positions on a number, although

not all, of the foregoing subjects, and has developed language for some of them which we would be happy to share with the Subcommittee.

Having pointed out subjects not contained in S. 1080 which we would hope the Congress will address in further legislation, we should also point out that we are happy to see that there are some subjects which the bill does not contain. Chief among these are legislative veto provisions.

Turning now to S. 1080 itself, I shall first indicate where the American Bar Association has an adopted policy which supports the provisions that are in the bill. I shall then indicate those aspects of the bill which we believe could be improved to carry out its goals.

S. 1080, in brief, does the following things:

changes §553 of the Administrative Procedure Act applicable to all agencies of the government by:

1) requiring, for major rules, performance of regulatory analyses [(c)];

2) imposing, for major rules, judicial reviewability in some respect of the determination of whether the rule is major and of an inadequacy in the regulatory analysis and a failure to afford cross-examination [(c)(1)(G), (f)(3)];

3) requiring, for major rules, "hybrid" rulemaking, that is, oral presentation for significant controversies and cross-examination for material factual issues [(d)(3)];

4) requiring, for all rules, a more precise and expanded statement of basis and purpose [(e)(1)];

5) requiring, for all rules, the creation of a rulemaking "file" [(f)(1)];

adds a new §560 to the APA:

6) requiring agencies to review and reconsider outstanding major rules over a ten-year period;

adds a new §561 to the APA:

7) requiring preparation and regular publication by each agency of an annual agenda for all rulemakings;

amends §706 of the APA:

8) clarifying the judicial review of rules by requiring substantial support for factual determinations, preventing any presumption in favor of or against agency action, requiring strict construction of the jurisdiction or authority of an agency, and pointing courts generally to take an independent posture in their review of agency actions; and

amends Title 28 of the U.S. Code:

9) seeking to eliminate races to the courthouse and venue shopping in the judicial review of agency proceedings.

In summary, the ABA's adopted policies are fully supportive of 1) the concept of regulatory analyses for major rules and of 8) the judicial review amendment to §706 of the APA. We also believe that the concepts of 4) clear statement of basis and purpose, 5) a rulemaking file, 6) review of outstanding major rules and 7) annual regulatory agendas are all consistent with ABA views. At this time the ABA does not have a position on 3) hybrid rulemaking or 9) venue treatment. ABA policy is strongly opposed to 2) subjecting the regulatory analysis requirement to judicial review.

Our general support for the bill, then, is somewhat qualified to the extent of our urging certain changes which we believe are of varying degrees of importance. We hope you will consider our suggestions as being constructive and designed to improve a bill that on balance we consider well conceived.

1) Regulatory analysis

We enthusiastically support the requirement laid down in S. 1080 that costs and benefits of proposed major rules be carefully identified and appraised and that--unless directed otherwise by the enabling statute--an agency shall not promulgate a rule unless it makes a reasonable determination (a) that the benefits of the rule justify the costs and adverse effects of the rule and (b) that the rule will substantially achieve the rulemaking objectives

in a more cost effective manner than any alternative considered in the rulemaking. We think this formulation of the requirement of a regulatory analysis is a distinct improvement over the formulation contained in H.R. 746, although not necessarily over that contained in E.O. 12291.

Because we so firmly endorse the regulatory analysis requirement and, like you, want to make it an effective mechanism for improving the regulatory process, I want to discuss with you in a constructive spirit those difficulties that we think we perceive.

A principal difficulty we see in the regulatory analysis provisions as drafted is the absence of any Executive Branch role. Indeed, we have grave doubts that the regulatory analysis requirement, which we strongly support, is workable without it. There are several reasons for this.

First, the definition of a "major rule", which triggers the requirement, is necessarily somewhat general. That definition, in proposed section 551(16), contains terms such as "substantial" and "significant" in subparagraphs (ii) and (iii). Perhaps there is no more precise terminology which can achieve the drafters' purpose. Even the precise $100 million cost in subparagraph (i) is less than clear, because of the generality of the defining term "indirect social costs and effects" and the fact that measurement and standards for measurement of cost are difficult. Moreover, various agencies in the government might apply conflicting criteria, both in determining whether a rule is major or not and in performing the analysis. Some agencies may develop superior instruments of regulatory analysis, while others may be singularly inept. There should be some sort of centralizing process that will produce uniformity and comparability of meaning on a real time basis.

Second, some practical drawing of lines needs to be made so that the acquisition of cost information does not become more burdensome, both on the agency and on regulated entities who may be called on to produce such cost information, than any possible value in the incremental information. This should not be left entirely to the individual agencies, and if the program is to work it cannot await later judicial resolution and reconciliation, for example, of the relative applications of the regulatory analysis requirements, the Federal Reports Act and the Paperwork Reduction Act.

Third, cost-benefit and cost-effectiveness analysis for governmental rules is at a relatively early stage of development. Their understanding by regulator and regulated alike is undoubtedly uneven. And we do not know of any authoritative, generally accepted methodology of analysis as yet. This does not mean the concepts are not valid. To the contrary, they are vitally important and too little considered in regulatory actions. They should be required. But the methodologies for application are still being developed. At such a time, oversight should be prompt and managerial in nature. Flexibility and practical judgment will have to be brought to bear at the agency level and by somebody at a supervisory level outside the agency to assure comparability.

2) Judicial review of regulatory analyses

The same reasons that lead us to presidential involvement lead us away from putting enforcement of the regulatory analysis provisions in the court system. Judicial review at this stage of development would add detrimentally to the complexity and rigidity of the statutory scheme. Courts will have significant difficulty, particularly under the standards of Section 706 as it is proposed

to be revised, in determining whether a rule is major and so requiring an analysis and whether the analysis is "inadequate". After-the-fact judicial review of procedural compliance does not provide guidance to the agencies up front. Indeed, it tends to delay. I would think that Congress would not wish to add to an already over-litigated economy a sure source of more unnecessary litigation.

Cost-benefit and cost-effectiveness analysis should be regarded as tools of regulatory management rather than as a source of legal right. It may be, in time, that the meaning and method for analysis of costs and benefits will become sufficiently fixed that judicial review might be appropriate but, in our judgment, that time is not yet.

We do believe, however, that any analysis which is performed should be made part of the materials available to a court on review of the rule itself. The language developed for this purpose in S. 262 last year after extensive discussion and consultation, and which is substantially reflected this year in H.R. 746, serves this purpose. We do not agree with proposed Section 553(f)(3) of S. 1080 as it applies to regulatory analyses.

Further with respect to regulatory analysis

In any event, we also believe that great care should be taken not to appear to restrict, limit or conflict with the operation of Executive Order 12291 with respect to Executive Branch agencies. Indeed, the leanest approach would be for the bill simply to express Congress' approval of the extension of the Executive Order to the independent agencies, with an obligation on the part of the President to report periodically to Congress on his administration of it. If the bill's approach on regulatory analyses is adopted, given its detailed requirements, we would urge inclusion of both a savings provision with respect to the President's

constitutional authority over Executive Branch agencies and an affirmative provision for the President's oversight of the regulatory analysis provisions generally.

Because of the need we perceive for presidential involvement and for other reasons, we would strongly prefer to see the regulatory analysis provisions relocated. S. 1080 presently builds them into section 553 of the Administrative Procedure Act - which has no other presidential involvement. We believe they should be moved to a separate chapter of the APA, as has been done with the regulatory review and regulatory agenda provisions of S. 1080. Another reason for this move is that one of the virtues of section 553 is that it has been a purely procedural provision for rulemaking. The regulatory analysis provisions, on the other hand, impose standards that go beyond pure procedure, standards for decision-making. While we are in agreement with those standards, we have reservations about mixing them into what has heretofore been a purely procedural section of the Act. Section 553 is relatively uncluttered and has worked well over the years for the bulk of rulemakings, which are not major rules and which have not involved factual issues of central importance. I might point out that all the bills in the prior Congress put the regulatory analysis provisions in a separate chapter. We do not see that it adds any benefit to put them in section 553 and as a drafting matter see the detriments I have mentioned.

3) Hybrid rulemaking

The quasi-legislative, quasi-judicial separation in the Administrative Procedure Act between section 553 rulemaking and section 554 adjudication has become strained in a number of ways.

There are policy issues in section 554 adjudications to which trial-type procedures are not well adapted

and which have resulted in inordinate delays in completion of proceedings. The concept of modified or expedited procedure reflected in last year's bills was addressed to this problem, providing a mechanism for parsing out issues for the treatment appropriate to them. The purpose was to avoid binding all issues into a single hearing mold because of an adjudicatory classification of the proceeding at its beginning. We believed that substantive agreement had been reached on those provisions last year, and were therefore disappointed not to see them in S. 1080. We continue to hope they will receive prompt consideration by the Congress.

Just as trial-type procedures have become inappropriate for all issues in adjudication, so legislative-type procedures have become inappropriate for all issues in informal rulemakings. Rulemaking under some of the newer regulatory statutes, particularly, sometimes involves factual determinations of central importance to the rule. Courts have been troubled by the problem, as have academicians. In some cases the regulatory statutes, recognizing this, spell out particularized procedures. Until S. 1080, none of the regulatory reform bills considered by the Congress provided for hybrid procedures on a mandatory basis. The final version of S. 262 last year did describe various procedures that an agency might choose for use in section 553 rulemakings, but on a nonreviewable discretionary basis. At the time we encouraged this discretionary treatment, thinking as did the ABA's Commission on Law and the Economy that the sorting of the issues had best be left to the courts for the time being.

S. 1080 would now revise section 553 to require agencies, for major rules, to afford opportunity for oral presentations on significant controversies and, in certain circumstances, cross-examination on material issues of fact.

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The Association is giving consideration to the important but difficult subject of hybrid rulemaking, but at this time does not have a policy on it.

I do note that the provision in S. 1080 is limited to major rules. Its application should be clearly limited in some fashion, because there are many rulemakings when oral presentation and opportunity for cross-examination would unduly formalize and delay the process. But I am not sure that major-minor is the right line for this purpose, especially given the inherent difficulty of marking with a bright line when a rule becomes major.

The bill would make any failure by an agency to provide opportunity for cross-examination judicially reviewable in limited circumstances. We do not understand how this unique provision will be construed by a court. It is markedly different from provisions with ostensibly the same objective in the version of S. 262 approved by the Judiciary Committee in the last session of Congress and also from the solution legislated by section 305 of the Clean Air Act Amendments of 1977. We are unsure whether the S. 1080's special judicial review provision for cross-examination in rulemaking to reach a result different from that of S. 262 of the Clean Air Act. I believe that deserves close attention.

4) Statement of basis and purpose

We believe this to be a generally beneficial provision, although we question the need for a memorandum of law for each rule. Perhaps this requirement could be limited to those rulemakings when public comments have raised an issue of the jurisdiction or authority of the agency. We suggest that in subsection (e)(1) "each of the alternatives" read "any alternative" in (B) and that "the factual conclusions" read "any material factual conclusion" in (D).

5) Rulemaking File

We believe this to be a desirable provision. It has a relevance both to the bill's amended section 706 for judicial review generally and to the bill's amended section 553 for hybrid rulemaking. We may have a few suggestions which we believe technical in nature to give to your staff.

6) Regulatory Review

We believe imposing an obligation on agencies to review existing major rules is useful. We have some question, however, about any ten-year statutory schedule. The five-year extension possibility does not meet our concern that more flexibility is needed during the ten years to revise and adapt schedules to then current problems. Some room for the President or his delegate (we do appreciate the bill's recognition of a presidential role here) to reallocate the attention of the agency, and not simply to add rules, seems appropriate. The President's perspective on the whole national economy and important sectors of it gives him an informed view on how major rules of the agencies are impacting or are applying inconsistently. We can visualize the usefulness of coordinated inter-agency review of sets of rules of more than one agency. Yet one agency alone setting its own time schedule may not discern or wish to discern the relationship of its rules to those of another agency. Such a desirable degree of coordination would be facilitated by a larger Executive Branch role in the review process.

7) Regulatory Agenda and Calendar

We are also generally in favor of these concepts, although one should recognize that citation of the number of pages of the Federal Register could no longer fairly be used as evidence of the unreformed explosion of regulation.

8) Judicial Review

We are heartily in favor of this amendment to section 706 of the APA, first developed by Senator Bumpers,

and have testified on its behalf a number of times. I shall not take time to repeat our argumentation here, but would be glad to add it to the record of this hearing later, if the Chairman wishes.

I shall only say that under current law, the courts have occasionally felt constrained to accept adventurous administrative readings of governing statutes even absent a clear legislative indication that so much authority was intended. By appropriately stressing the independent judgment Congress expects courts to bring to the resolution of legal issues and, in particular, the need that agency authority be justified in terms of legislative language and history, the proposed amendments to section 706 will help assure that government exercises no more authority over citizens than Congress commands.

We have two minor suggestions. We suggest adding "concerning statutory jurisdiction or authority" following "determinations" and in front of "under clause 2(C)" in the first line of subsection (c). As its principal proponent has often stated, the purpose of this part of the proposed amendment of section 706 is to make sure that agencies do not intrude or extend their regulatory activities into areas not intended by Congress. Senator Bumpers emphasized again at the time of introduction of S. 1080 that his amendment is not intended to preclude the rational interpretation and application of statutory criteria in ways that lessen the costs and other burdens of regulation. Nor should it be used to preclude agencies from exempting persons from complying with regulations under traditional de minimis doctrines. It thus, as we understand it, is not the purpose of the amendment to require or force agencies to exercise regulatory authority to the fullest extent of their authority. That is for their discretion, as bounded by the cost-benefit/cost-effectiveness standards in the same bill.

Since APA section 551(13) defines "action" to include "failure to act" and since clause 2(C) refers to more than jurisdiction and authority, the clarifying change is intended to make it clearer that subsection (c) deals with actions in excess of jurisdiction or authority.

We also suggest adding "ascertainable" following "evidence of" and in front of "legislative intent" in the fifth line of subsection (c). This may be regarded as redundant, that is, that "evidence of legislative intent" must be "ascertainable" and therefore there is no need to add the word. Our point, however, is that by employing the term "ascertainable" the drafter is sending a message to the judiciary that the requisite intent must be identifiable or ascertainable and not merely presumed. The point is limited, but we think it appropriate for the legislation to make it.

9) Venue

The Association has no formal position on the venue provision, and so I am not authorized to support or oppose it. We nevertheless have two comments to offer.

The venue provision as drafted does not adequately cover the problem of an appeal from a remanded proceeding. As a matter of consistency in judicial administration, if an appealed case is remanded by a circuit court, an appeal from the remanded proceeding should go to the court which had the first appeal and made the remand. Under the venue provision as drafted, nothing is said about appeals of remanded proceedings. Thus an appeal from a remanded proceeding could go to a circuit other than the court which remanded. This result could occur because either a single appeal might be taken to a different circuit court, or, if multiple appeals were taken, the random selection process in the venue provision might result in the appeal from the remand going to a court other than the court which remanded the original proceeding.

I should also point out that the Association has long been in favor of a legislative provision that would facilitate prompt resolution of controversies between regulatory agencies relating to jurisdiction to regulate a public utility. The purpose is to eliminate the unnecessary expenditure of time and money, as well as obstacles to effective utility regulation, occasioned by the duplicative and protracted litigation that often occurs when two or more regulatory agencies assert conflicting jurisdictional claims. A federal district court should be enabled to resolve such jurisdictional conflicts expeditiously at the outset. The substantive regulatory issues would then be dealt with only by the agency found to have jurisdiction and not by any agency erroneously claiming jurisdiction. The present system, often necessitating extensive proceedings before multiple agencies and courts prior to a determination as to where jurisdiction lies, is a deficiency in regulatory procedure calling for reform. The statutory provision which this proposal would amend is §2201 of Title 28 of the United States Code, which follows immediately after §2112 of the same Title proposed to be amended by Section 6 of S. 1080.

* * *

Mr. Chairman, I attach to this statement a copy of a memorandum prepared by a consultant to our Group, Professor Clark Byse, Byrne Professor of Administrative Law at Harvard Law School, which analyzes S. 1080 and makes suggestions concerning technical and other matters which your staff may wish to consider.

We stand ready to assist the Committee and the staff in any way we can to bring the provisions of S. 1080 to fruition as a Congressional enactment and then to move on to the other matters on the regulatory reform agenda. Thank you.

APPENDIX A

May 5, 1981

MEMORANDUM

TO: Richard B. Smith, Chairman, ABA
Coordinating Group on Regulatory Reform

FROM: Professor Clark Byse, Consultant

SUBJECT: S. 1080

This is in response to your request for a memorandum analyzing S. 1080, "The Regulatory Reform Act," introduced by Senator Laxalt for himself, Senator Leahy and a large number of other Senators on April 30, 1981.

I. Rulemaking Provisions, §§ 2 and 3

Basic to the bill's requirements for issuance of major rules is the definition of a major rule contained in proposed section 551(16). I appreciate the difficulties inherent in the definitional task and thus understand the use of such terms as "substantial" and "significant" in subparagraphs ii and iii and perhaps there is no more precise terminology which will achieve the drafters' purposes. My concern is that if an agency decides that a proposed rule will not cause or is not likely to cause the stated "substantial" or "significant" consequence and therefore does not conform to bill's requirements, what happens on judicial review? Is the administrative decision not to treat the rule as "major" subject to examination and reversal by the reviewing court?

Proposed section 553(f)(3) states that a rule shall not be held lawful or set aside because "an inadequacy in the statement required to be published pursuant to paragraphs (2) and (3) of section 553(C) and paragraph (2) of section 553(3) . . . unless the court finds . . . that such inadequacy or failure renders the rule unlawful under section 706(a)(2)(A) (B) or (C) . . . ." Thus, the drafters' intent appears to be that paragraph (D) of section 706(a)(2)--"without observance of procedure required by law"--shall not be applicable to review of a major rule and that a major rule shall not be held "unlawful or set aside" unless the inadequacy of the analysis "renders" the rule, we assume substantively, "arbitrary or capricious, an abuse of discretion or otherwise not in accordance with law," unconstitutional or outside the scope of the agency's authority or jurisdiction. Procedural errors in discharging the duties mandated by the stated paragraphs, in and of themselves, thus are not reviewable. But is a complete failure to comply with those paragraphs similary nonreviewable? It is my opinion that the bill does not answer to that question. Accordingly, it should be amended to provide a clear answer. If the answer is that the failure to designate as major a bill which in fact is major is reviewable, then the use of terms such as "substantial" and "significant" introduces major elements of uncertainty and consequent potentiality for undesirable delay in the administration of the regulatory statute. On the other hand, if such a failure is not reviewable, or if the bill is amended to make clear that no agency's complete failure to attempt to comply with its stated paragraphs is not reviewable, then the use of those general terms would not cause delay.

But it might be thought undesirable to give agencies the unreviewable power to fail completely to engage in the

kind of analysis and decisionmaking mandated by those paragraphs. My suggested resolution of this problem is to make the agency's decision that a rule is or is not major unreviewable by the courts, but to provide that the President or his delegate shall have authority to require an agency to designate a proposed rule as major and thus to require the agency to engage in the mandated analysis and mode of decisionmaking.

The American Bar Association is firmly committed to the proposition that the President, as the nation's chief political official and only executive should be intimately involved in monitoring agencies' compliance with required procedures and, in appropriate instances, authorizing a waiver of those requirements. I believe (1) that in the modern regulatory state which the United States has become, there is need for a central authority to coordinate the actions of the multifarious, single-issue, often conflicting and sometimes independent regulatory agencies and (2) that the coordinating authority should be politically accountable. I also am of the opinion that placing the monitoring responsibility in the President's hands would be conducive to some measure of Presidential support and participation in the program, and without Presidential support and at least some participation it is unlikely that any such program will succeed.

In light of these considerations, I suggest that the bill be amended to authorize the President or his delegate (who should be an official who has been confirmed by the Senate, or perhaps the Vice President) to exercise a directive or monitoring function with respect to the agencies' discharge of the responsibilities imposed on them by proposed section 553.

Proposed subsections 553(b)(1)(A)--(E) list a number of exceptions to the rulemaking requirement of 553. My comments on these exceptions are as follows:

(A) This exception of a rule to the extent it "involves a military or foreign affairs funciton of the United States" may well be too broad. The matter is the subject of Recommendation 73-5 of the Administrative Conference of the United States, 1 CFR § 305.73-5, and is comprehensively discussed in the consultant's report concerning that Recommendation, "Military and Foreign Affairs Function Rule-Making Under the APA," 3 Recommendations and Reports of the Administrative Conference of the United States 266.

(B) The existing APA excepts a rule to the extent that there is involved "a matter relating to agency management or personnel. . . ." Proposed paragraph (B) excepts "internal personnel rules and personnel practices" but does not except a "management" matter. I do not readily perceive a reason for the omission of management matters.

(C) Subparagraph (C) would exclude from the APA's existing exceptions for interpretive rules and general statements of policy, rules and statements which would have a "substantial impact" on the substantive rights or obligations of persons outside the agency. This problem also has been addressed by the Administrative Conference of the United States. See Recommendation 76-5, 1 CFR § 305.76-5, and the underlying consultant's report, "Public Participation in the Adoption of Interpretive Rules and Policy Statements," 4 Recommendations and Reports of the Administrative Conference of the United States 615.

I agree with the judgment of the Administrative Conference that if an interpretive rule or statement of general policy would have a substantial impact on the public, the procedures of section 553 normally should be followed.

In my opinion, however, the question is not whether those procedures normally should be followed but rather how that objective shall be achieved: by reliance on the agencies, or by reliance on the judiciary or by reliance on some other governmental instrumentality, or by some combination of these means. The solution of the bill appears to be to rely first on the agencies, and if they do not comply to direct the judiciary to hold unlawful and set aside any rule having substantial impact which was not promulgated pursuant to the procedure of section 553. We believe that reasonable minds may differ on this issue. The argument pro judicial review is that agencies should not be a law unto themselves. The argument con is that the concept "substantial impact" is so imprecise that a rule may be set aside long after its issuance merely because the agency mistakenly assessed its likely impact or, in the alternative, a careful agency, fearing such an invalidation, would in a debatable instance use section 553 procedures and that such a de facto requirement might deter agencies from issuing interpretations and statements of policy.

The ABA does not at present have a formal position on this question and therefore the Group is not in a position to recommend concerning it. However, the Subcommittee should be urged to consider the implications of the proposal from the standpoint of the Internal Revenue Service. I suggest that considerations similar to those which led the drafters to exclude rules involving the internal revenue laws from the definition of a major rule, section 551(16)(B)(i), should lead to a like exclusion in this instance.

Proposed section 553(c)(1)(B) requires the agency to state in its notice of proposed rulemaking "the specific Congressional intent sought to be achieved by the rule." The point perhaps is not important, but I suggest that in

many cases courts have found it exceedingly difficult to ascertain a general Congressional intent. To require the agency to find an often non-existent "specific" intent seems to me not to be desirable. Perhaps the drafters' objective would be achieved by a revising paragraph (B) to read as follows: "A statement of the specific statutory authority under which the rule is proposed and the statutory objective sought to be achieved by the rule." If this were done, the word "objectives" in paragraphs (C) and (D) probably should be replaced with the word "purposes."

Proposed section 553(c)(2)(A) and (B) requires a description of costs and benefits of a proposed rule, including a description of "any beneficial effects" and "any adverse effects" that "cannot be quantified." I suggest that although the latter clause is stated in absolute terms -- "cannot" -- its fair meaning is "cannot be quantified at reasonable cost and effort" and that the clause should be so amended. For the same reason, I also suggest a similar amendment of proposed section 553(c)(3) so that the second sentence thereof would read as follows: "The description of the benefits, costs, and adverse effects of a proposed rule required under paragraph (2) shall include a quantification or numerical estimate of the quantifiable benefits, costs, and effects that can be quantified or estimated at reasonable costs and efforts."

Proposed section 553(d)(3) provides that participation in rulemaking shall include an "opportunity to make an oral presentation of data and information relevant to a signfiicant controversy in the rule making." This opportunity for oral presentation shall include an opportunity for cross-examination only (i) when requested by interested persons for the resolution of material issues of fact and (ii) when other available procedures for the resolution of such issues, including oral

and written rebuttal, are determined to be inadequate. This general provision for hybrid procedures in section 553 rulemaking presents an important and difficult issue of policy. As is the case of most such issues, there are reasonable arguments to be advanced on both sides. However, the American Bar Association has not adopted a position on the matter and therefore there is no ABA policy on the subject that can be urged before the Congress. But I should think it would be in order to invite attention to some matters which I believe warrant attention.

I am not sure I fully understand what is achieved by an oral presentation of data and information that would not also be achieved by a written presentation. In practically all instances, the ultimate decisional official will, of course, not hear or observe those who present data and information orally, and of course the reviewing court will decide on the basis of the rulemaking file. It may be that when an oral presentaiton is made, the agency employee responsible for supervising the rulemaking process will be prompted to ask the person presenting data and information to clarify or develop a point. But if that is the reason for the requirement or an opportunity to communicate orally, the objective might equally or better be achieved by allowing the employee first to read written statements and then request clarification or development by subsequent written or oral presentations.

Here, as in the case of "substantial impact" the phrase "significant controversies" introduces a potential for uncertainty and later delaying judicial reversal which a cautious agency might reasonably decide to avoid by always or nearly always providing an opportunity for oral presentation. The result, of course, would be additional costs and delay in rulemaking. I do not assert that those costs and delays

should not be incurred. I state only that I do not perceive what is the countervailing benefit to be achieved. In sum, I suggest that if it is desirable for agencies to weigh costs and benefits and be required to select the least costly alternative before burdens are imposed on the private sector, Congress should engage in a similar process when it imposes burdens on the administrative process, for in either event the public will pay -- as regulated persons or consumers in the first instance and as taxpayers in the second.

The requirement of an opportunity for cross-examination presents an entirely different issue, for if cross-examination is to be required, it must be done orally and not be an exchange of writings. The problem here, then is not orality or writings but, instead, whether the advantages of cross-examination outweigh the costs. The advantages are englightenment of the agency and enhancement of an effected party's sense that he has been provided a meaningful opportunity to participate in government decisions of great significance to him. The costs are delay and waste of society's resources. Under present law, "[a] bsent constitutional constraints or extremely compelling circumstances" Vermont Yankee Nuclear Power Corp. v. National Resources Defense Council, Inc., 435 U.S. 519, 5 (1978), the power to grant or deny cross-examination is the agency's. It is, of course, an entirely proper exercise of the law-making power for Congress to decide that the agency shall no longer have that authority and to require agencies to grant cross-examination in specified instances. The question, of course, is not Congressional power. Instead the question relates to (1) wisdom or desirability of the requirement, (2) its precise dimensions, and (3) the role of the reviewing court in enforcing the requirement.

The bill addresses these issues, i.e., it (1) requires cross-examination, (2) states explicitly that

opportunity for cross-examination shall be provided "only" for the resolution of "material facts" and when "other available procedures" "are determined [by the agency]* to be inadequate, and (3) provides that the reviewing court shall not hold unlawful or set aside an agency rule because of "a failure by the agency to afford an opportunity for cross-examination . . . unless the court finds . . . that such . . . failure renders the rule unlawful because it is (A) [substantively] arbitrary, capricious, or [substantive] abuse of discretion or otherwise not in accordance with [substantive] law, (B) unconstitutional or (C) outside the scope of the agency's jurisdiciton or authority.

I think I understand the objective and reasoning of the drafters: they wish to require cross-examination when material issues of fact can best be resolved by cross-examination but that the agency's failure to provide cross-examination, even where cross-examination is the best mechanism for finding facts, shall not be grounds for holding the rule invalid unless the lack of cross-examination renders the rule arbitrary, capricious, etc.

This solution is different from those proposed in the version of S. 262 approved by the Judiciary Committee in the last session of Congress. It is different also from the solution legislated by section 305 of the Clean Air Act Amendments of 1977, P.L. 95-95, 91 Stat. 685. Those solutions are as follows:

Paragraph (1) of section 626 of the Judiciary Committee's version of S. 262 listed additional procedures for use in connection with major rules and then provided:

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* The bracketed words are not in the bill but assume the determination is to be made by the agency and suggest that those words should be added.

"There shall be no judicial review prior to the promulgation of a final major rule with respect to the issue of whether the procedures used by the agency under paragraph (1) in promulgating such rule are appropriate. Upon review of a final major rule, the court may invalidate the rule on the basis that the agency made errors in determining appropriate procedures under paragraph (1) only if such errors were so serious and of such central relevance to the rule that there is a substantial likelihood that the rule would have been significantly changed if the errors had not been made."*

Paragraphs (7)(B), (8) and (9) of section 307 of the Clean Air Act provide as follows:

> "(B) Only an objection to a rule or procedure which was raised with reasonable specificity during the period for public comment (including any public hearing) may be raised during judicial review. If the person raising an objection can demonstrate to the Administrator that it was impracticable to raise such objection within such time or if the grounds for such objection arose after the period for public comment (but within the time specified for judicial review) and if such objection is of central relevance to the outcome of the rule, the Administrator shall convene a proceeding for reconsideration of the rule and provide the same procedural rights as would have been afforded had the information been available at the time the rule was proposed. If the Administrator refuses to convene such a proceeding, such person may seek review of such refusal in the United States court of appeals for the appropriate circuit (as provided in subsection (b)). Such reconsideration shall not postpone the effectiveness of the rule. The effectiveness of the rule may be stayed during such reconsideration, however, by the Administrator or the court for a period not to exceed three months.

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* Section 607 of S. 262 as approved by the Governmental Affairs Committee authorized additional procedures in major rulemaking and then provided: "The decision of the agency to invoke, or not to invoke, any procedures pursuant to this section, or the choice of one or more of such procedures, shall be within the sole and unreviewable discretion of such agency."

"(8) The sole forum for challenging procedural determinations made by the Administrator under this subsection shall be in the United States court of appeals for the apporpriate circuit (as provided in subsection (b) at the time of the substantive review of the rule. No interlocutory appeals shall be permitted with respect to such procedural determinations. In reviewing alleged procedural errors, the court may invalidate the rule only if the errors were so serious and related to matters of such central relevance to the rule that there is a substantial likelihood that the rule would have been significantly changed if such errors had not been made.

"(9) In the case of review of any action of the Administrator to which this subsection applies, the court may reverse any such action found to be --

"(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

"(B) contrary to constitutional right, power, privilege, or immunity;

"(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; or

"(D) without observance of procedure reuqired by law, if (i) such failure to observe such procedure is arbitrary or capricious, (ii) the requirement of paragraph (7)(B) has been met, and (iii) the condition of the last sentence of paragraph (8) is met.

§ 305 (a) of P.L. 95-95, 91 Stat. 775.

In light of these provisions, I am unsure whether the present bill's limiting judicial review is intended to reach a result different from that of S. 262 or the Clean Air Act. If the intended result is the same, as, say that mandated by S. 262, my thought would be that the language of S. 262 is preferable to that of the bill. If the intended result is different, the question becomes: in what way is it different and why?

In sum, I express my sincere admiration of the drafters' creativity in fashioning proposed section 553(3). But, truth to tell, I don't readily perceive precisely what has been created. I believe that this is a matter which deserves further consideration.

Proposed section 553(e)(2) obviously is a very important provision and it may well reflect an understandable measure of give and take during the drafting process. Perhaps that spirit of compromise and adjustment -- the indispensible lubricant of the legislative machine -- accounts for inclusion of the use of the word "reasonable" to modify "determination" in line 2 of subparagraph (B) and for use of the word "justify" rather than, say "outweighs" in line 4 of subparagraph (b). If those words do reflect conscious decisions on the part of the Subcommittee, I say no more than that I think I can understand how it came about that they were used. If on the other hand, those words have not been carefully chosen, I suggest "reasonable" might well be deleted and "outweighs" substituted for "justify."

In proposed section 555(e)(4)(B) should not the words "such material" be substituted for "information" in line 2 of paragraph (B) and should not that part of paragraph (B) which begins on line 3 with the words "and interested" and continuing to the end of the sentence modify both (A) and (B)? Surely it would not be sufficient to put the written material in the file ten minutes before the final rule was promulgated. Also, in connection with proposed section 553(e)(4), how does that provision relate to the last sentence of APA section 556(e)? Is it intended to adopt the same or a stricter rule concerning official notice for informal rulemaking than the APA now provides for formal adjudication and formal rulemaking? Consider, for example, if after the close of a rulemaking proceeding newly discovered material becomes available to the agency. The material is relevant but not crucial. May the agency use the material? If the rulemaking were formal, i.e., required to be determined on the record, APA section 556(e) would permit the agency to use the material so long as a party who

submits a timely request is provided an opportunity to challenge the material. Thus, in formal rulemaking proceedings, as stated in the Attorney General's Manual on the Administrative Procedure Act p. 80 n. 5, "If official notice is taken of facts in the course of the final decision, the proceeding need not be reopened automatically, but the parties will be entitled to request reopening for the purpose of contesting the facts thus officially noticed by the agency." Proposed section 553(e)(4) governing informal rulemaking, on the other hand, apparently would not permit the agency to take notice of the material when issuing the rule so long as interested persons were given an opportunity to challenge the material in a reopened proceeding or otherwise. On its face, it does not seem desirable to impose stricter procedural requirements on informal rulemaking than on formal rulemaking. In any event, should not the relationship and apparent incongruity between proposed section 553(e)(4) and present APA section 556(e) be clarified? More basic are the questions: Is not the thrust of proposed section 553 to make informal rulemaking very similar to formal rulemaking? If so, is that desirable?

Proposed section 553(f)(1) states that agencies shall maintain a public file for each rulemaking proceeding, that the file shall "constitute the rulemaking record for purposes of judicial review" and that the file shall contain six specified categories of materials. My only suggestion concerning this proposal is that there be added to the six categories of materials which are to be placed in the file, the following:

> "Any other material which the agency considers relevant to the rule."

The reason for this suggestion is that since section 553(f)(1) provides that the file and the record for purposes of judicial review shall be the same, there should

be some way in which the agency can bring to the attention of the court and the parties material which may be relevant to the validity of the rule but which was not theretofore available or which because of inadvertence otherwise had not been placed in the file before promulgation of the rule. There is, of course, an obvious relationship between this suggestion and the immediately preceding discussion concerning proposed section 553(e)(4) and APA section 556(e).

Also related is the provision of proposed section 553(f)(1) that the rulemaking file "shall constitute the rulemaking record for purposes of judicial review." This provision, if enacted, could be a legislative codification of the holding of Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 420 (1971), that judicial review, "is to be based on the full administrative record that was before the agency at the time it made its decision." Since this now is the law, why not so state in the statute? Two answers might be given. (1) If the requirement is codified, the courts cannot change their minds or make exceptions. (2) To codify the requirement is to give Congressional approval to the movement to formalize the administrative process in that the validity of a rule which admittedly is not a rule required to be made on the record after opportunity for an agency hearing now will be determined on the record of the rulemaking proceeding. The proponent of codification might well reply that (a) since the requirement is a good one, it should be statutorily imposed so that courts could not later change it and (b) since rules are in fact reviewed on the basis of the rulemaking record, to recognize that fact in a statute will not increase formalization but could simply recognize the existing state of affairs. Again reasonable views may differ, and again the ABA has no formal policy concerning the issue.

II. Regulatory Review, § 4

Mandatory periodic review of major rules by each agency has not specifically been addressed by the ABA. But as we have stated above, the ABA is deeply committed to the proposition that the President should have a major role in monitoring and coordinating regulatory reform endeavors by the agencies. Accordingly, I should think the group would endorse those parts of proposed section 560 governing agency review of major agency rules which provide for a Presidential role in the process. Personally, I would increase the Presidential rule beyond that now provided in proposed section 560. For example, I would provide in section 560(f)(2) that the President could direct an agency to amend its schedule for the review of rules. I am also a bit uneasy about the practicality of mandating a ten-year review schedule. The reason for my unease is that we do not know how burdensome such a review responsibility may prove to be, that is, to what extent the compulsory review process will divert agency energies and resources from agency discharge of other important -- perhaps more important --statutory responsibilities. Subsection (f)(1) authorizes an agency to request an extension (for a total period of not more than fifteen years) for completing the review of any "particular rule". But the objective of section 560 clearly is to require review of all rules within ten years unless review of any "particular rule" is "impracticable." As of today it may appear reasonable to conclude that review of all major rules within a stated time frame is so crucial that the Congress should enact a statute which compels such a review. On the other hand, one committed to the cause of regulatory reform might reasonably conclude that such statute should not be enacted until after some experience with the review process. Up to now Congress has been unwilling to impose

such a requirement on itself, a compulsory requirement that it review all regulatory statutes. In that area of congressional sunset legislation, the ABA has taken the position that such a statute should be limited in scope. Recommendation 12 of the ABA Commission on Law and the Economy, approved by the ABA House of Delegates provides in part as follows:

> "(a) Until it is demonstrated by experience that Congress can accomplish a substantial number of reviews and reauthorizations effectively within a short period of time, sunset legislation should not require review of more than a very limited number of regulatory functions by any one Congress.
>
> (b) The legislation should delegate to the President, subject to approval by both Houses of Congress, the authority and responsibility of designating the agencies or regulatory functions to be reviewed and subjected to automatic termination or phase-out . . . unless reauthorized by new legislation."

Although as stated at the outset, the ABA has not specifically addressed the subject of mandatory agency review of major rules, in my opinion the paragraphs just quoted provide a sound basis for suggesting that agency review of rules should also be undertaken in limited form and with a major role for the President.

III. Judicial Review, § 5

The ABA approves the substance of the proposed revision of ABA section 706. I understand that you may wish to consider recommending the following two changes in proposed subsection (c):

1. Add the words "concerning statutory jurisdiction or authority" after the word "determinations" in line 1 of paragraph (c).

2. Add the word "ascertainable" after the word "of" in line 5.

As amended by these changes, paragraph (c) would read as follows (additions being underlined and deletions being crossed out):

"(c) In making determinations concerning statutory jurisdiction on authority under clause 2(C) of subsection (a) of this section, the court shall hold unlawful and set aside action by the agency that is not shown to be within the scope of the agency's jurisdiction or authority on the basis of the language of the statute or, in the event of ambiguity, other ascertainable evidence of legislative intent. In making determinations on other questions of law, the court shall not accord any presumption in favor or against agency action."

The reasons for the proposed changes are as follows:

1. As its principal proponent, Senator Bumpers often has stated, the purpose of the proposed amendment of section 706 is to make sure that agencies do not intrude or extend their regulatory activities into areas not intended by Congress. It thus can be argued that it is not the purpose of the amendment in any way to require or force agencies to exercise regulatory authority. However, clause (2)(C) provides that the reviewing court shall "hold unlawful . . . agency action . . . found to be . . . in excess of statutory jurisdiction, authority, or limitations or short of statutory rights" and APA section 551(1_) defines "action" to include "failure to act." Thus it is conceivable that as presently drafted, subsection (c) might be applied to achieve an expansion, rather than limitation of agency activity, which, of course, would be contrary to the objective of the amendment. Accordingly, the clarifying change stated would make it clear that subsection (c) deals with actions in excess of jurisdiction or authority.

2. Adding the word "ascertainable" in line 5 of subsection (c) may be regarded as redundant, that is, that "evidence of legislative intent" must be "ascertainable" and therefore there is no need to add the word. I concede the validity of this argument and recognize that this suggested change is far less important, not transcendingly significant. The point, however, is that by employing the term "ascertainable" the drafter is sending a

message to the judiciary that the requisite intent must be identifiable or ascertainable and not merely presumed. The point is a narrow one but I think it appropriate for the legislation to make it.

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June 25, 1981

FROM: Richard B. Smith

RE: Hybrid Rulemaking Procedure

On June 19, 1981 the American Bar Association's Board of Governors voted to recommend that the attached Resolution be approved by the ABA's House of Delegates when it meets this August. The Board also authorized the distribution of the attached Resolution and Report to Members of Congress, congressional committees, and other interested persons for their current consideration.

Only the Resolution presented herein, when approved by the House of Delegates, becomes official policy of the American Bar Association. This is listed under the heading Recommendation. Comments and supporting data listed under the sub-heading Discussion are not approved by the House in its voting and represent only the views of the Sections submitting them.

RBS:km

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June 25, 1981

Honorable Paul Laxalt
Chairman, Subcommittee on
Regulatory Reform
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

During my testimony before your subcommittee on May 14 I stated that the American Bar Association had not developed a formal policy concerning the provisions in S.1080 establishing hybrid rulemaking procedures. Since that time the Sections of Administrative Law and Corporation, Banking and Business Law have developed an extensive report in support of hybrid rulemaking procedures which will be considered by our House of Delegates this August.

However, because of your interest in processing S.1080 as quickly as possible, the sponsors of our Resolution requested expedited consideration by our Board of Governors. The Board met last weekend and voted to recommend that our House of Delegates approve the Resolution in support of hybrid rulemaking procedures and, furthermore, authorized me to distribute that Resolution and accompanying Report, with the Board's decision, to you and other interested parties for your current consideration. Consequently, I am pleased to enclose a copy of that Resolution and Report.

Sincerely,

Richard B. Smith

RBS:km
Enclosure
cc: John Nash
Robert Cynkar

AMERICAN BAR ASSOCIATION

SECTION OF ADMINISTRATIVE LAW

SECTION OF CORPORATION, BANKING AND BUSINESS LAW

JOINT RECOMMENDATION TO THE HOUSE OF DELEGATES*

The Section of Administrative law and the Section of Corporation, Banking and Business Law jointly recommend to the House of Delegates of the American Bar Association the adoption of the following resolution:

RESOLUTION

Resolved, that the American Bar Association support legislative reform of federal agency rulemaking procedures governed by Section 553 of Title 5 of the U.S. Code and recommend that such legislative reform be based on the principles enumerated in the Report of the Sections of Administrative Law and Corporation, Banking and Business Law dated June 9, 1981.

REPORT

1. The Need for Rulemaking Reform

(a) The American Bar Association supports efforts in the Congress consistent with this Report to revise and modernize the provisions of section 553 of title 5 of the United States Code (former section 4 of the Administrative Procedure Act) governing procedures for the promulgation of rules by Federal agencies. The Association believes that developments since the enactment in 1946 of section 4 of the APA make such revision and modernization a matter of high priority:

- the massive impact on the national economy of Federal agency rulemaking, currently estimated in the tens of billions of dollars or more annually;
- the critical economic, technological, and scientific aspects of the policy choices underlying many agency rules;
- the increased availability of direct review of agency rules and the reliance by the courts on a record developed in the agency proceeding rather than in a judicial action for enforcement, civil or criminal; and

* The Federal Communications Bar Association, by formal resolution, cosponsors this resolution.

- the judicial support for the promulgation by rule of policies which are binding in subsequent adjudications.

(b) The Association recommends that any revision of section 553 should reflect the principles set forth in this resolution.

(2) Applications of Rulemaking Procedures and Exemptions

(a) Rules of General Applicability. The Association reaffirms its previous recommendation that the definition of "rule" in the Administrative Procedure Act, 5 U.S.C. §551(4), should be amended to cover only those statements which are of general, as distinct from particular, applicability.

(b) Loans, Grants, and Benefits. The Association reaffirms its previous recommendation that the exemption of Federal programs for loans, grants, and benefits from the rulemaking procedures of section 553 should be eliminated.

(c) Rules relating to Public Property or Contracts. The Association recommends modification of the current exemption in section 553 for rules relating to public property or contracts to accomplish the following objectives:

(i) the development and formulation of generally applicable policies with respect to public property or contracts would be governed by rulemaking procedures;

(ii) such procedures would be employed by the agencies charged with responsibility for such policies rather than by implementing agencies; and

(iii) such procedures would be governed by section 553 until such time as rulemaking procedures were prescribed in the applicable organic statutes.

(d) Rules Pertaining to Military or Foreign Affairs Functions. The Association reaffirms its previous recommendation that the exemption for rules relating to military or foreign affairs functions should be modified to conform to the exemption in the Freedom of Information Act, 5 U.S.C. §552, and in particular that the exemption should be limited to matters specifically authorized under criteria established by Executive Order to be kept secret in the interest of national defense or foreign policy.

(e) Interpretive Rules or General Statements of Policy. The Association recommends that the exemption relating to interpretive rules or general statements of policy should be modified to require compliance with section 553 rulemaking procedures where such rule or statement (i) is of general applicability and (ii) has a substantial impact on persons outside the agency. However, the Association recommends that an agency be permitted to --

- delay compliance until after issuance of the rule or statement,

- make such rule or statement effective upon issuance, and

- comply only where there is a petition for such compliance by a person who makes a showing that he will sustain such substantial impact.

(f) Dispensing with Compliance; Partial or Delayed Compliance. Section 553 presently permits an agency to dispense with compliance with pre-promulgation requirements on the basis of written finding for good cause that such compliance would be impracticable, unnecessary, or contrary to the public interest. The Association believes that this provision is incomplete in failing to make provision in appropriate cases for partial compliance or delayed compliance or both. The Association recommends that the present provisions of section 553 be modified to provide that --

- an agency would have discretion to delay compliance or to comply only in part with the procedures of section 553 or both on the basis of a written finding for good cause that full compliance was impracticable, unnecessary, or contrary to the public interest; and

- an agency would be permitted to dispense totally with such compliance only upon a written finding for good cause that delayed compliance or partial compliance was impracticable, unnecessary, or contrary to the public interest.

3. Proceedings Prior to Notice of Proposed Rulemaking. The Association believes that the quality of agency rulemaking can be materially improved by informal consultation with interested persons or groups prior to the development and issuance of the notice of proposed rulemaking and the commencement of the procedures required by section 53. To encourage such consultation, the Association recommends that (i) such consultations should be expressly exempted from the requirements of the Federal Advisory Committee Act, 5 U.S.C. App. I, and (ii) the decision to use or not to use informal consultative procedures, and the choice of such procedures, should be within the unreviewable discretion of the agency.

4. Notice of Proposed Rulemaking. The Association believes that the notice of proposed rulemaking should serve the purpose of formulating clearly the proposals and policy choices to be addressed in the rulemaking procedure and the related purpose of informing interested persons of the factual data on which the agency proposes to rely in promulgating the final rule and of other relevant material in the agency's possession. To accomplish these purposes, the Association recommends that:

(a) The present notice requirements of section 553 should be expanded to require that the notice state --

(i) the terms or substance of the proposed rule;

(ii) a description of its objectives;

(iii) an analysis of alternatives to accomplish those objectives seriously considered by the agency;

(iv) an invitation to submit proposals for alternative ways to accomplish the rule's objectives;

(v) a description of reporting and recordkeeping requirements and an estimate of the time and costs necessary to comply; and

(vi) to the extent practicable after reasonable inquiry, an identification of duplicating or conflicting or overlapping Federal laws or rules.

(b) The notice be accompanied by --

(i) a summary of the factual basis of the proposed rule, a description of methodologies employed in developing such factual basis, and an identification or copies of supporting documents or studies; and

(ii) an identification or copies of any other significant factual material, and of relevant opinions (as to which the agency has a right of possession) of retained experts or consultants.

5. Proceedings after Notice

(a) The Association recommends that a period of sixty days be provided for submission of written comments on a proposed rule.

(b) The Association believes that the single cycle notice and written comment procedure provided for in section 553 continues to be appropriate in most situations. However, the Association is of the view that the present procedures of section 53 require amplification in some rulemaking proceedings. The Association recommends that, in proceedings of unusual complexity or with a potential for significant economic impact, the agency be required to --

(i) provide for a second cycle of written comments where it appears the initial cycle of comments that there is

- an important factual controversy,

or

- an important issue of law or policy, not reasonably to be anticipated from the notice of proposed rulemaking; and

(ii) conduct an oral proceeding to permit cross-examination of individuals who present testimony, documents, or studies but only to the extent that it appears, after consideration of other avail-

able procedures including oral and written rebuttal, that such cross-examination is essential to resolution by the agency of issues of specific fact critical to the rule.

(c) The Association recommends that an agency be required to provide an opportunity to respond to factual material which is critical to the rule, which becomes available to the agency after the period for comments has closed, and on which the agency proposes to rely.

6. Rulemaking File - Official Notice - Communications on the Merits.

(a) The Association recommends that the amended section 553 provide for the systematic development by the agency in the course of the rulemaking proceeding, of a rulemaking file, as a basis for agency factual determinations and a record for judicial review.

(b) The Association recommends that an agency be permitted to take official notice of facts which, in the agency's judgment, are either generally known or capable of determination by resort to sources of generally accepted reliability, provided that where such facts are subject to reasonable challenge, an affected person shall be afforded, on timely request, an opportunity to show the contrary.

(c)(i) The Association recommends that communications relating to the issues in a rulemaking proceeding should be encouraged but that any written communication concerning the merits from any source outside the Federal Government which is considered by the agency (whether or not originally directed to the agency and whether made before or after the close of the formal comment period) should be placed in the rulemaking file. The Association further recommends that agency rules provide to the extent practicable, that where there is an oral communication to the agency from any source outside the Federal Government, the agency shall, by request in writing to such person or by other means, assure that a memorandum of any relevant factual material contained in such communication is made for inclusion in the rulemaking file.

(ii) The Association recommends that a communication among officials of the rulemaking agency or between any such official and any officer of the Federal Government relating to a rulemaking proceeding should not be required to be placed in the rulemaking file or be subject to disclosure, except to the extent that it contains relevant factual material not previously placed in the rulemaking file or passes on a communication on the merits received from a source outside the Federal Government.

7. Statement of Basis and Purpose. The Association recommends that the function of the statement of basis and purpose as the agency's rationale for the rule should be clarified and that in particular the statement should be required to include:

(a) a statement of the reasons for the policy choices made in connection with the rule including a description of alternatives considered to accomplish the objectives

of the rule, and a statement of the reasons for the selection of the alternative embodied in the rule and rejection of other alternatives;

(b) factual determinations constituting an asserted or necessary basis for any policy choice made in connection with the rule, and an explanation of how such determinations are supported by the rulemaking file; and

(c) a response to each significant issues raised in the comments on the proposed rule.

8. Petitions The Association recommends that the present provisions of section 553 affording interested persons the right to petition for the issuance, amendment, or repeal of a rule should be amplified to provide a right to petition for advice or interpretation as to the application of a rule, and for a variance or exemption from the terms of a rule. The Association further recommends that agencies be required to prescribe by rule reasonable time limits for the disposition by the agency of such petitions, and to state the reasons for the denial of any such petition.

Discussion

On the agenda for intensive consideration in the 97th Congress is a subject of central importance to the public and to the bar -- reform of procedure for agency rulemaking. It is highly desirable that the House of Delegates of this Association address this subject in a comprehensive way and provide guidance for the legislative efforts of the Association's Coordinating Group on Regulatory Reform.

Over the last decade, the House of Delegates has adopted a series of recommendations by the Commission on Law and the Economy and the Section of Administrative Law calling fcr reform at the Federal level of substantive regulatory policy, of regulatory oversight structure, and of administrative procedure. One of the key proposals of the Commission (Recommendation 6), approved by the House, called for modified procedure designed to expedite on-the-record proceedings including those for licensing and ratemaking. Recommendation 6 called on the Congress to introduce a new flexibility into such proceedings dispensing with trial-type procedures in situations where they made no contribution to fair decision-making.

This report and the accompany resolution, prepared by the Sections of Administrative Law and of Corporation, Banking and Business Law, relate to rulemaking. They are complementary to Recommendation 6 and call for amplified procedures in cases where such procedures will improve the quality of agency rules by permitting a more thorough exploration of relevant facts and policy alternatives.

The Need for Revision of Section 553

In the last dozen years the Congress has adopted new regulatory schemes addressed to environmental protection; energy; health and safety in the workplace; consumer product safety; and consumer warranties. In the same period there has

also been a major increase in regulatory activity under earlier laws such as those relating to food and drugs. These statutes are typically not self-executing and have escalated the importance of agency rulemaking. Correspondingly there has been a sharp rise in the stakes of both the general public and of regulated interests in the fairness and efficiency of such rulemaking.

The basic provision governing such procedures is section 4 of the Administrative Procedure Act ("the APA") now codified as section 553 of title 5 of the United States Code. Section 553 has remained essentially unchanged in the thirty-five years since its original enactment in 1946.

The central features of section 553 are three: with some specified exceptions, an agency must give public notice of a proposed rule; any person may in response to the notice submit written comments on the proposal; and any rule adopted by the agency must be accompanied by a concise general statement of its basis and purpose. Under section 706(2)(B) of title 5, relating to judicial review, a rule will (absent jurisdictional or procedural defects) be sustained against challenge unless the court finds it is "arbitrary, capricious, [or] an abuse of discretion".

At the time of their enactment, these provisions were accepted as providing a flexible and reasonable process for general policy-making by an agency. There is now a growing recognition that significant changes in the premises upon which section 553 was based require reexamination and modification of this 35-year old statute.

The four principal changes are identified in paragraph 1 of the accompanying resolution. They may be summarized as follows:

1. The scope and importance of rulemaking as a regulatory tool and its impact on both the general public and on business have increased enormously. The annual impact on the national economy has been measured in the tens of billions of dollars and more. Weidenbaum, The Costs of Government Regulation of Business, A Study Prepared for the Joint Economic Committee, April 10, 1978; and Costs of Regulation and Benefits of Reform, Center for the Study of American Business, November 1980. The national stake in a reasonable process to assure that these burdens are no larger than necessary is now generally recognized.

2. The procedures adopted in 1946 appear to have been based on the premise that rulemaking would not ordinarily involve significant disputes of fact or that such disputes would ordinarily relate only to so-called legislative or general facts. To the contrary, some current rules involve difficult scientific, technological, and economic issues with a critical factual content. Exploration and resolution of these issues typically require an orderly process for developing a reliable factual data base, including a process for testing such reliability. Pedersen, Formal Records and Informal Rulemaking, 85 Yale L.J. 38 (1975).

3. The prevailing expectation in 1946 appears to have been that the validity of a rule would ordinarily be tested in

a Government-initiated action for enforcement, civil or criminal, rather than in a proceeding for direct review. The corollary of this expectation was the assumption that the factual support for the rule would be the subject of a trial in the enforcement action in a Federal district court. Consistent with this assumption, section 553 contains no requirement for agency development of a rulemaking record, and section 706 contains no special standard for review of factual determinations in a rulemaking, relying only on the "arbitrary, capricious, an abuse of discretion" criterion. Nathason, Probing the Mind of the Administrator: Hearing Variations and Standards of Judicial Review, 75 Columbia L.Rev. 721 (1975); Auerbach, Informal Rule Making: A Proposed Relationship between Administrative Procedures and Judicial Review, 72 Northwestern U.L.Rev. 15 (1977); Gifford, Rulemaking and Rulemaking Review, 32 Administrative L.Rev. 577 (1980).

This 1946 expectation as to the mode of judicial review of agency rules has changed as a result of two developments.

First, the risk of civil and criminal sanctions for noncompliance has, in some cases, induced regulated interests to seek direct and prompt judicial review of agency rules, even where no statutory mode of review was specified. The Supreme Court has permitted such review, subject to a ripeness test, unless it appears that Congress intended to preclude it. Abbott Laboratories v. Gardner, 387 U.S. 136 (1976).

The second development was the Congressional practice of including in organic statutes a specific statutory review provision. In several cases, these review procedures have been made exclusive.

The result of these two developments has been to focus judicial attention on the adequacy and quality of the record developed before the agency and submitted to the court as the basis for evaluating the agency decision. Stewart, Vermont Yankee and the Evolution of Administrative Procedure, 91 Harvard L.Rev. 1804 (1978); cf. Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402 (1971).

4. The fourth change since the enactment of section 553 has been the judicial encouragement for agency policy-making by rule with such policies to be given effect in subsequent adjudications, United States v. Storer Broadcasting Co., 351 U.S. 192 (1956); National Petroleum Refiners Ass'n v. Federal Trade Commission, 482 F.2d 672 (D.C. Cir. 1973), cert. denied 415 U.S. 951 (1974); American Airlines v. Civil Aeronautics Board, 359 F.2d 624 (D.C. Cir. 1966), cert. denied 385 U.S. 843 (1966). It is significant that Judge Leventhal's opinion in the last cited case contains one of the seminal discussion of procedures in rulemaking going beyond notice and opportunity for written comment.

These changes in the nature and scope of agency rulemaking led in the first instance to the adoption by the Congress in a number of organic statutes enacted or amended over the last fifteen years, of provisions supplementing section 553

and 706 or even superseding those sections. These provisions have, among other things, imposed a substantial evidence standard of review (by implication calling for better fact-finding procedures), called for oral legislative type hearings, and established in a few cases a requirement for limited cross-examination in the oral proceeding.

These changes also led the federal courts of appeals, principally the United States Court of Appeals for the District of Columbia Circuit, in a line of decisions over roughly the same period, to impose procedural requirements in rulemaking beyond those called for by the express provisions of section 553 ("additional procedures"). Relying on several rationales, the courts have in particular circumstances, required oral proceedings, including a carefully restricted opportunity for cross-examination; required agencies to provide an opportunity to respond to data which became available during the course of the rulemaking; required that the agency's statement of basis and purpose articulate a rationale for the agency's factual findings; and required that the agency respond to significant comments.

The statutes, cases, and law review literature are collected and reviewed in Davis, Administrative Law Treatise, (2 ed. 1978), Vol. 1, Chapter 6 on Rulemaking Procedure, and 1980 Supplement.

Again, the Administrative Conference of the United States ("ACUS") in a series of recommendations (codified in 1 Code of Federal Regulations Part 305) has proposed that agencies voluntarily adopt in complex rulemakings, a number of procedures going beyond those literally called for by section 553. Finally, both ACUS and this Association have recommended reexamination of some of the exemptions from section 553.

Judicial requirement of additional procedures has been called to a halt, at least temporarily, by the Supreme Court decision in Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519 (1978) which held broadly that courts had no authority to require procedures beyond those provided in section 553, except to the extent that constitutional concerns about fair process were implicated. The long-term effect of this much-analyzed opinion is unpredictable but near term it has created large uncertainties about even such fundamental decisions as those requiring an opportunity to rebut late-developed agency data. Currie, Direct Federal Regulation of Stationary Sources under the Clean Air Act, 128 U. of Pennsylvania L.Rev. 1389, 1435 (1980); Preston, Right of Rebuttal in Informal Rulemaking after Vermont Yankee?, 32 Administrative Law Review 621 (1980); Davis, Administrative Law Treatise (2d ed. 1978), §§6:35 et seq. (and 1980 Supplement §§6:37, 6:37-1, 6:37-2).

Moreover, the practice of supplementing section 553, organic statute by organic statute, is an awkward one. Scalia, Vermont Yankee, the D.C. Circuit Court, and the Supreme Court, 1978 Supreme Court Review 345. It has led to differences in required procedures, even for statutes administered by the same agency. A reformed and unified procedure for agency rulemaking -- adapted to the practical realities of regulation in the 1980's -- seems highly desirable. This view

finds support in the recent proposals of Professor Kenneth Culp Davis, who has called for substantial modification of section 553.

The Proposed Resolution

The accompanying resolution proposes a significant amplification of the procedural requirements of section 553 and outlines the terms of the proposed revision. Some provisions of the resolution reaffirm previous Association positions.

Section 1 of the proposed resolution declares Association support for a substantial revision of section 553. The remaining sections of the resolution outline a series of specific recommendations.

Application of Rulemaking Procedures and Exemptions

The six subsections of section 2 of the resolution address issues relating to the application of section 553, particularly exemption from its procedural requirements.

(a) This subsection reaffirms the 1970 action of the House of Delegates calling for a clarification of the APA definition of "rule" in 5 U.S.C. §551(4). The current definition includes statements of "particular applicability" which should be more properly classified as adjudication. The proposed change is not intended to modify existing procedures applicable to ratemaking, where such ratemaking is required to be on the record. The new definition would provide a clearer basis for enactment of ABA recommended improvements for adjudicatory as well as rulemaking proceedings.

The 1970 ABA recommendations was endorsed by ACUS in 1973, 3 Recommendations and Reports of the Administrative Conference, January 1, 1973-June 30, 1974 at 53 et seq.

(b) Section 553 currently exempts rules relating to "public property, loans, grants, benefits, or contracts". Both this Association and the ACUS are on record in favor of deleting this exemption. Subsection (b) of section 2 of the proposed resolution would reaffirm the previous ABA position on financial assistance (loan, grant, or benefit) programs.

(c) This subsection reaffirms with two modifications, the previous ABA position calling for elimination of the exemption relating to public property or contracts. Both modifications adopt positions of the Section of Public Contract Law.

The first modification reflects the fact that significant policies may be established by an agency with overall responsibility -- the Administrator for Federal Procurement Policy or the Administrator of General Services. If rulemaking procedures are followed at this level, it would be wasteful to repeat them at the level of the implementing agency.

The second modification reflects the preference of the Section of Public Contract Law for the specific prescription of rulemaking procedures in the applicable organic statute.

however, absent such specific prescription, it seems desirable to provide for coverage under section 553.

(d) Section 553 contains a sweeping exception for rules relating to a military or foreign affairs function. Bonfield, Military and Foreign affairs Function Rule-Making under the ABA, 71 Michigan L.Rev. 226 (1972). There can be Federal agency rules with significant impact on the economy and the general welfare, notably procurement policies, which are within this overly broad language. The Freedom of Information Act, 5 U.S.C. §552, contains a more carefully drafted exemption confined to cases where the subject matter of the rule should be kept secret in the interest of national defense or foreign policy, provided that the secrecy requirement is authorized under an Executive Order.

This subsection reaffirms the previous Association position, endorsed ACUS, calling for a narrowing of this exemption.

(e) This subsection relates to interpretive rules or general statements of policy of general applicability. These rules and statements of policy of general applicability. These rules and statements are currently exempt from the procedural requirements of section 553 regardless of their degree of practical impact on persons subject to agency regulation. They can be brought within these procedural requirements only if a court finds, after challenge to the agency, that the rule or statement was legislative in effect.

On the one hand, it is desirable to preserve agency flexibility in issuing and making effective interpretations and policy guidance for the benefit of of persons subject to regulation. On the other hand, persons should be afforded the protections of a rulemaking proceeding where the interpretation or policy statement significantly affects them. The recommendation in subsection (e) would balance these considerations by requiring post-effectiveness compliance with section 553 in proper cases.

The applicable ACUS action, 1 CFR 305.76-5, calls for compliance on a voluntary basis by the agency. Asimow, Public Participation in the Adoption of Interpretive Rules and Policy Statements, 75 Michigan L.Rev. 520 (1977). Subsection (e) would mandate post-effectiveness compliance where the rule or statement had general applicability and a substantial impact and there was a petition for a rulemaking procedure by a person who sustains such substantial impact.

In issuing interpretive regulations under the Internal Revenue Code, the Treasury Department has voluntarily complied with the pre-promulgation notice provisions of section 553. Under the proposal, such compliance would become mandatory with respect to virtually all such regulations, although the proposal contemplates that interpretive rules can be adopted effective upon issuance without compliance with pre-promulgation procedures so long as, on petition, the procedures are followed thereafter. The term "effective upon issuance", is not intended to mean interpretations may not apply as of the effective date of the statutory provisions pursuant to which they are issued. The proposal does not contemplate that the notice requirements be made applicable to

Revenue Rulings, Revenue Procedures, and similar pronouncements by the Internal Revenue Service, as opposed to Treasury Regulations, notwithstanding the fact that such pronouncements might be looked upon as having general applicability and substantial impact on taxpayers. To subject these rulings and procedures to mandatory pre-publication notice would substantially increase the time and manpower required to issue them and thus to provide the timely guidance so needed by taxpayers and revenue agents alike. In the view of the Association, this would impair rather than improve the administration of the tax laws. Finally, the Association does not intend by Recommendation 8 regarding petitions for advice or interpretations, to mandate any change in the administration of the private letter ruling program now conducted by the Internal Revenue Service.

(f) Section 553 currently contains a broad exemption for cases where the agency for good cause finds that compliance is "impracticable, unnecessary, or contrary to the public interest". The only limit on this broad discretion is that the required finding of "good cause" must be in writing and is subject to judicial review. Exceptions to Notice Requirements of APA Rulemaking Provisions, 45 ALR Fed. 12 §§25-39 (1979).

The provision is deficient in that taken literally it contemplates only two alternatives -- complete pre-promulgation compliance on the one hand or no compliance on the other. It makes no express provision for delayed compliance or partial compliance even though one or the other or both may be the fairest and most practical approach in a particular situation.

An exception for emergency cases and cases where the rule has a trivial or minor impact should certainly be preserved. however, agencies should be called upon in appropriate cases, to comply following emergency action ("delayed compliance") or to comply in part where partial compliance is practicable. Subsection (f) of the proposed resolution calls for such delayed or partial compliance or both in such cases.

Proceedings Prior to Notice

The objective of introducing into rulemaking a more effective procedure for developing the factual and policy basis of a proposed rule, is compatible with free and informal consultation in the pre-notice stage. Lawyers in Government and private practice with experience in complicated rulemaking share the belief in extensive pre-notice exchanges of views and information to assist the agency in the development of a realistic and workable rulemaking proposal.

Mechanisms such as an advance notice of proposed rulemaking, a concepts release, informal conferences with affected groups, and the use of advisory committees should therefore be encouraged. To this end it is desirable to make two clarifying amendments to section 553. Section 3 of the proposed resolution recommends such clarifying amendments.

The first proposal is addressed to doubts as to the scope of the Federal Advisory Committee Act ("FACA"), 5 U.S.C. App. I. In a recent statement, ACUS has taken the position that FACA should not be read as applying

> . . . (a) to groups convened by agencies, on an ad hoc basis, without formal organization or structure or continuing existence, to obtain views on particular matters of immediate concern to the agency, and (b) to privately established groups whose advice is "utilized" by an agency.

1 CFR §305.80-3, Interpretation and Implementation of the Federal Advisory Committee Act. See the supporting study, Cardozo, The Federal Advisory Committee Act in Operation, 33 Administrative L.Rev. 1 (1981).

Section 3 of the proposed resolution would confirm this interpretation and encourage agencies to use informal pre-notice consultation in connection with rulemaking.

The second recommendation in section 3 would make it clear that an agency decision to employ or not to employ pre-notice procedures and the choice of such procedures was within the agency's unreviewable discretion.

Protection against abuse of this discretion lies in requirements for fairness in the rulemaking procedures subsequent to notice. For example, significant factual material submitted at the pre-notice stage should be placed in the rulemaking file at the time of publication of the notice. Moreover, FACA would continue to apply to cases where the advisory body has a formal structure and continuing existence and is either established by the Government or is affirmatively supported and utilized by the Government as a preferred source of advice.

Notice Requirements

Section 4 of the accompanying resolution proposes an expansion of the notice of requirements of section 553. The recommended changes call among other things for an agency description of the objectives of the rule, an analysis of alternatives seriously considered by the agency to achieve those objectives, an invitation to the public to propose alternatives, a description of required paperwork (reporting and recordkeeping) and time and cost estimates for such paperwork, and to the extent practicable after reasonable inquiry, an identification of duplicative, overlapping, or conflicting Federal legal requirements.

The notice is to be accompanied by the incorporation in the rulemaking file, but not necessarily in the Federal Register publication, of a summary of the factual basis of the proposed rule, a description of the methodologies employed in developing such factual basis, and an identification or copies of supporting documents or studies. It is also important that other significant factual material and opinions of agency-retained experts and consultants become publicly available for comment and consideration in the proceeding, even though they are not supportive of the agency's proposed rule. Section 4 of the resolution calls for such public availability.

To develop in complicated situations the required notice and the supporting material, an agency may have to rely on pre-notice procedures, the use of which would be encouraged by the changes proposed in section 3 of the resolution.

Proceedings after Notice

Section 5 of the proposed resolution calls for a generally applicable 60-day comment period. Under a revised exemption permitting partial compliance this period could be shortened by the agency in appropriate cases.

The central recommendations of section 5 relate to additional procedures beyond a single cycle of written comments. It should be noted that these recommendations begin with the premise that a single cycle of written comments will be appropriate in most rulemaking situations. The provisions for additional procedures called for by the resolution will not be applicable to the routine or minor or purely technical issuances which constitute the great bulk of Federal agency rulemaking.

Section 5 of the resolution recognizes, however, that there will be a limited class of cases where the proceeding is of unusual complexity or has a potential for significant economic impact. In the class of cases, a second cycle of written comments is called for if it appears after completion of the first cycle that there is an important factual controversy or an important issue of law or policy not reasonably to be anticipated from the notice of proposed rulemaking. Careful development of that notice particularly through use of the informal pre-notice procedures will limit the occasions when more than one comment cycle will be necessary.

Another recommendation in section 5 calls, in the same class of cases, for a carefully limited opportunity or cross-examination. This provision employs the rigorous criteria defined by Judge Leventhal in International Harvester v. Ruckelshaus, 478 F.2d 615 (D.C. Cir. 1973). It is also compatible with the recent suggestions of Professor Davis which take a similar approach.

Section 5 of the resolution recommends codification of the rule in another of Judge Leventhal's decisions, Portland Cement Ass'n v. Ruckelshaus, 486 F.2d (D.C. Cir. 1973), cert. denied 417 U.S. 921 (1974). This decision calls for an opportunity to respond to data relied on by the agency in the course of rulemaking and disclosure of the data in the rulemaking file in time to permit such response. It is most unfortunate that the validity of this doctrine, with its constitutional due process overtones, may be in doubt because of uncertainty about the implications of the Vermont Yankee decision (see Currie and Preston articles, supra).

It is highly desirable to codify Portland Cement and to eliminate fruitless litigation about its continued vitality. There is no more critical decision on rulemaking procedure and codification is appropriate to assure fair and efficient rulemaking process.

Rulemaking File - Official Notice - Communications on the Merits

Section 6 of the proposed resolution deals with three related issues: the establishment of a rulemaking file; official notice; and communications on the merits. The section attempts to strike a reasonable balance between considerations

of informality and agency flexibility on the one side and fairness, particularly opportunity for rebuttal, on the other.

Subsection (a) of section 6 calls, as do pending regulatory reform bills, for the systematic development during the section 553 proceeding of a rulemaking file. The file is to serve as a basis for agency factual determinations and as a record for judicial review. Incorporation of material in a publicly available file also serves the fairness interest by putting interested persons on notice of the data, views and arguments which they may wish to rebut.

In using the words "factual determinations", the resolution is not incompatible with the accepted view that in a rulemaking such determinations cannot be limited to findings as to past occurrences or situations. Factual determinations may consists, in proper cases, of estimates or projections or inferences. Moreover, in rulemakings addressed to complex situations, such determinations may be subject to significant uncertainties and may necessarily reflect the agency's best assessment of probabilities.

On the other hand, the Association continues to believe that factual determinations in a rulemaking should have a reliable foundation. It has endorsed a proposed revision of section 706 relating to judicial review (the Bumpers Amendment) which calls for substantial support in the rulemaking file, viewed as a whole, for the asserted or necessary factual basis of a rule.

The ability of an agency to take official notice is essential to flexibility in rulemaking. Subsection (b) of section 6 proposes a rule of official notice which is indebted to the views of Professor Davis. Administrative Law Treatise (2d ed. 1980), Vol. 3, Chapter 15, Judicial and Official Notice.

The key notions in subsection (b) are: there is no requirement that the fact of which notice is taken must be indisputable (cf. Rule 201 of the Federal Rules of Evidence); and where a fact, of which notice is taken, is subject to reasonable challenge, there must be opportunity to show the contrary. This concept conforms to section 556(e) of Title 5 governing official notice in on-the-record proceedings.

Subsection (c) relates to communications, written or oral, in a rulemaking proceeding. It is confined to communications on the merits, and does not apply for example to inquiries about procedural status. The subsection also makes distinctions --

- between a communication for a source outside the Federal Government and an intra-Governmental communication, and

- between a communication which contains relevant factual material and one which does not.

The central principle is that communications are not forbidden but that, with limited exceptions, fairness requires

that they be included in the rulemaking file in order that interested persons may respond and that the reviewing court will have a proper record. The principal exception relates to intra-Governmental communications which do not contain relevant factual material or pass on communications from an outside source.

Protection from disclosure of intra-Governmental (including interagency) policy discussions is supported in Judge Wald's opinion in Sierra Club v. Costle, No. 79-1565 (D.C. Cir. April 29, 1980). It is also consistent with the ACUS recommendations, 1 CFR 305.80-6, Intragovernmental Communications in Informal Rulemaking Proceedings. See the supporting study, Verkuil, Jawboning Administrative Agencies: Ex-Parte Contacts by the White House, 80 Columbia L.Rev. 943 (1980).

Statement of Basis and Purpose

In an important line of decisions, Judge McGowan of the Court of Appeals for the District of Columbia has emphasized the critical role of the agency's rationale or explanation for the rule.

> Automotive Parts & Accessories Ass'n v. Boyd, 407 F.2d 330, 38 (D.C. Cir. 1968);
>
> Weyerhaeuser v. Costle, 590 F.2d 1011, footnote 11 at 1024, 1030 (D.C. Cir. 1978);
>
> American Optometric Association v. Federal Trade Commission, 626 F.2d 896, 905-906 (D.C. Cir. 1980);
>
> Davis, Administrative Law Treatise (2d ed. 1978), Vol. 1, §6:12.

These decisions give effect to two central doctrines of administrative law, namely that the agency's decision must be a reasoned one and that it should be evaluated by the reviewing court on the grounds articulated by the agency at the time of issuance, and not on the basis of a post hoc rationale developed in briefs to the court. Securities and Exchange Commission v. Chenery Corp., 318 U.S. 80 (1943) (Chenery I).

Section 7 of the proposed resolution calls for implementation of one of Professor Davis' recommendations and for statutory reenforcement of the McGowan line of decisions. It would require that the statement of basis and purpose contain both reasons for policy choices and factual determinations constituting an asserted or necessary basis for any such choice.

Under the terms of the recommended revision, the agency would be called upon to explain how factual determinations were supported by the rulemaking file. Moreover, the statement of reasons for a policy choice would have to include an analysis of alternatives. this latter requirement amplifies the criterion in Bowman Transportation v. Arkansas-Best Freight System, 419 U.S. 281 (1974) that an agency decision must be based on "relevant factors" and free of "a clear error of judgment".

Finally, section 7 recommends codification of the case law requiring that the statement of basis and purpose respond to significant issues raised by the comments, again for the purpose of facilitating judicial review. United States v. Nova Scotia Food Products, 568 F.2d 240 (2d Cir. 1977); Portland Cement Association v. Ruckelhaus, supra.

Petitions with Respect to Rules

Subsection (e) of section 553 requires an agency to give an interested person the right to petition for the issuance, amendment, or repeal of a rule. However, this very desirable requirement has no forcing mechanism.

Section 8 of the proposed resolution recommends expansion of this portion of section 553 to provide that interested persons may also petition for advice or interpretation and for a variance or exemption. It also contemplates an enforcement provision to the effect that agencies should be required to prescribe rule reasonable time limits for responses to private sector petitions, and to explain the reasons for the denial of any such petition.

June 9, 1981

Respectfully submitted,

Willis B. Snell Chairman, Section Administrative Law

A.A. Sommer, Jr. Chairman, Section of Corporation, Banking and Business Law

QUESTIONS POSED BY SENATOR LAXALT TO MR. SMITH

Question 1. Assuming that the President or his designee is given the authority to designate certain rules as "major," do you feel that the President or his designee should also have the power to waive regulatory analysis for certain major rules? If you support such waiver authority, please give specific examples (in addition to IRS rules) of rules for which such a waiver power would be needed. If you favor such waiver power, but with criteria set our in the statute, please elaborate on the details of such criteria. In addition, if you favor the addition of a waiver power, please explain why you do not feel that putting such discretion in the Executive inserts a major loophole in the requirements of S. 1080. Should the exercise of such a power be subject to judicial review?

Answer. The ABA's recommendation is that the President have authority for day-to-day oversight of the regulatory analysis process. That implies an ability to determine that a rule apparently meeting the tests of the statute as "major" need not be analyzed, as much as the ability to designate some rules as "major" which do not obviously fit the statutory definition. In its testimony on May 12 to the Senate Committee on Governmental Affairs, the present Administration testified at length concerning its experience in administering a waiver mechanism and its belief that such a mechanism is essential to efficient use of the still experimental technique of regulatory impact analysis. We believe that testimony, and the experience underlying it, to be the best source of data on the waiver issue.

The argument for permitting waiver is not limited to certain types of rules, like IRS rules, which might be legislatively defined in advance. The argument for waiver derives from the fact that the RIA requirement is likely to be expensive in government time and resources, and productive of delay or of rote performance if routinely required. Empowering an official located outside the responsible agency and cognizant of national policy directions to grant waivers will permit maximizing the benefits of this approach and minimizing its costs—in manpower, in dollars, and in delays.

We think it unhelpful to characterize a grant of authority to permit waivers as a "loophole"; executive discretion can usually be described in this negative way by those denying its importance. We do not so view the matter. The authority would not be exercised by the agency responsible for regulation but by the office of the President. The agency would have in the first instance to seek waiver, and grant or denial would be made by one responsible for general national policy, not a particular regulatory program. In this light, the waiver procedure appears as a necessary safety value. If, however, abuse is greatly feared, we see no objection to requiring that waiver be granted in a written document, reported to the public and to Congress, so long as the waiver decision was in no respect open to judicial review. While we would oppose case by case Congressional review of waiver grants, we would expect Congress to oversee the general implementation of waiver policy and thus to help prevent systematic abuse.

Central to the Bar Association's view of this matter is its conviction that the regulatory impact analysis requirement is warranted as a matter of governmental management, not private right. Judicial review, which can only be invoked after the fact and which is likely to lead to excessive litigation, should not be permitted either with respect to the analysis itself or the application or non-application of its requirements. Our prepared statement develops the basis for our objection to judicial review of the Regulatory Impact Analysis process. We believe imposing the requirement of the agencies, requiring the office of the President to monitor agency performance, and oversight by Congress of the monitoring by the Presidential office will be sufficient. Private parties can obtain judicial relief for any abuse of discretion in the rule's results.

Question 2. Should the determination of what is a major rule be subject to some form of judicial review? If you believe that there should be some limited judicial review, please explain how such review should be limited.

Answer. The significance of determining that a rule is "major" is that the determination triggers the regulatory analysis process. The Bar Association enthusiastically supports that process. But as we have made clear in our statement submitted at the Subcommittee's hearing on May 14, 1981, we believe that the regulatory analysis process should be viewed as a management tool and not as a source of legal right. The reasons for this position are fully developed in that statement. This determination should not be reviewed by a court after the event but instead the President should be authorized to monitor the agencies' exercise of their responsibilities to perform regulatory analyses.

If, nevertheless, the Subcommittee were to decide that the President should not be so authorized, which we would strenously oppose, we suggest that the legislation provide:

An agency's determination that a rule is not a major rule shall be set aside by a reviewing court only upon a clear and convincing showing that the determination is erroneous in light of the information available to the agency at the time it made the determination.

Question 3. When considering the definition of a major rule, most witnesses addressed subparagraph (i), dealing with $100,000 million in compliance costs. Do you feel that subparagraphs (ii) and (iii) are too vague to be practically useful? Are these subparagraphs necessary?

Answer. In our view, subparagraphs (ii) and (iii) , or provisions like them, are necessary. The problem with subparagraph (i) alone is that it does not cover situations in which no additional costs are imposed upon the economy as a whole, but substantial costs are transferred from one sector of the economy to another—for example, a rule adopted by the Food and Drug Administration transferring testing or labelling requirements formerly imposed upon the manufacturer to the retailer. Nor does it cover those rules whose economic effects are quite literally incalculable in dollar terms, but which will significantly deter useful economic activity—for example, a Food and Drug Administration ban on all new drugs. Rules of this sort clearly demand the same close scrutiny as those which impose a calculable compliance burden of $100 million.

It is of course true that subparagraphs (ii) and (iii) do not admit of precise determination. What we conclude from this, however, is not that they are practical-

ly useless, but rather that they must be enforced through continuous and flexible Presidential supervision, rather than through judicial review. The latter represents an attempt to convert into a rule of law what is largely a judgment call. It may be noted, moreover, that subparagraph (i) fares little better, as far as this element of precision and hence of judicial enforceability is concerned. $100 million is indeed a very precise number, but determining how it is to be calculated and when it is reached is hardly a task for a judge with a slide rule.

In short, we are of the view that the definition of "major rule"—if it is to embrace all that should be covered—must contain an unavoidable element of generality. For that very reason, its proper application requires Presidential supervision, and Presidential discretion both to require and to dispense with "major rule" treatment. And for the same reason, its proper application cannot feasibly be policed by the courts.

At the same time we believe some general standards for guidance of the agencies' and the President's judgment are useful.

Question 4. One of the witnesses spoke of the different balances of regulatory benefits and costs set by Congress in other statutes. Has Congress set such "balances" in other statutes? If so, do those Congressional judgments in other statutes preclude the application of S. 1080's regulatory analysis? Please be specific in your references to provisions in other statutes.

(No ABA response.)

Question 5. In the past, some have suggested that all judicial review of rule making be vested in the Court of Appeals. Do you support such a change of jurisdiction? If so, please discuss the practical application of such a change. How would such a jurisdictional change affect Post-enforcement review of rules? Don't the District Courts offer more opportunities for settlement than the more rigid procedures of the Court of Appeals?

Answer. The apparent objective of those who propose that all judicial review of rulemaking be vested in the courts of appeals is to eliminate the district court stage of "nonstatutory" judicial review of rules. The reasoning appears to be that since the rule would be reviewed on the basis of the record before the agency when it promulgated the rule, the court of appeals is as able as the district court to review the rule; and going directly to the court of appeals will save time and money, particularly in those cases which would be appealed to the court of appeals in any event. S. 1080's requirement of a rulemaking "file", with which we generally agree, enhances this line of reasoning.

The ABA does not at present have a formal policy position concerning the Court of Appeals issue. It is likely, however, that the subject will be studied in the appropriate Section of the Association and as soon as a result of such study occurs, we shall inform the Subcommittee.

In the meantime, we invite attention to paragraph 5 of Recommendation 75-3 of the Administrative Conference of the United States, 1 C.F.R. § 305.75-3, which addressed this problem as follows:

5. The appropriate forum for the review of rules promulgated pursuant to the notice-and-comment procedures of 5 U.S.C. 553 should be determined in the light of the following considerations:

(a) Absence of a formal administrative record based on a trial-type hearing does not preclude direct review of rules by courts of appeals because: (i) Compliance with procedural requirements of 5 U.S.C. 553, including the requirement of a statement of reasons for the rule, will ordinarily produce a record adequate to the purpose of judicial review, and (ii) the administrative record can usually be supplemented, if necessary, by means other than an evidentiary trial in a district court.

(b) Direct review by a court of appeals is appropriate whenever: (i) An initial district court decision respecting the validity of a rule will ordinarily be appealed or (ii) the public interest requires prompt, authoritative determination of the validity of the rule.

(c) Rules issued by agencies that regularly engage in formal adjudication and whose "orders" are subject by statute to direct review by the courts of appeals will normally satisfy the criteria of (b) above and in any event should be reviewable directly by the courts of appeals.

(d) Rules of other agencies that do not satisfy the criteria of (b) above should generally be reviewable in the first instance by the district courts.

The Conference discussed the reasons for this recommendation as follows:

This recommendation rests on three basic premises. First, direct review by the courts of appeals, where feasible, is generally desirable in the interest of efficiency and economy, as respects both litigants and the judicial system. The classic case for the courts of appeals is review of agency action taken on an evidentiary record. A second premise, however, is that direct review by the courts of appeals is not necessarily rendered feasible by the absence of such a record; the records generated

by the processes of notice-and-comment rulemaking and of informal adjudication are frequently adequate to the purpose of judicial review and, also, can usually be supplemented without the necessity of a judicial trial. The third, and qualifying, premise is that review by the courts of appeals, even when review is of a purely appellate nature, or, if not so, can feasibly be conducted by the courts of appeals, is not invariably desirable. The courts of appeals, burdened by rapidly increasing caseloads that threaten the quality of their decisions, constitute a scarce resource that should be reserved, to the extent possible, for the resolution of issues of law or policy issues of major impact; administrative review cases that do not present such issues and that would not ordinarily reach the courts of appeals unless brought there initially should be assigned instead to the district courts.

See also D. P. Currie and F. I. Goodman, Judicial Review of Administrative Action: Quest for the Optimum Forum, 75 Colum. L.

Rev. 1, 54 (1975): * * * Not all regulations are of equal general importance. To provide for direct review of all regulations because some of them are of great importance would be overhasty; it might risk burdening the courts of appeals with a myriad of trivial cases that might be better end in the district courts * * *. The best approach would seem to be for Congress to consider separately each category of regulation, with a view toward ascertaining whether they are likely to be of sufficient importance to justify bypassing the district courts.

Additional arguments against the proposal have been advanced by Richard K. Berg, Executive Secretary of the Administrative Conference. If Mr. Berg has not testified before the Subcommittee, he will, we are sure, be glad to provide the results of his research on the subject. His conclusions were: (1) some rulemaking cases may more appropriately be resolved by district, than by circuit, courts and (2) enactment of the proposal would create confusion and waste in that since there is no bright line between rules (to be reviewed in the circuit court) and order (to be reviewed in the district court), litigants would be confronted with difficult jurisdictional choices.

In sum, it appears that while the proposal invites attention to a problem, a blanket prohibition of district court review very likely would be inappropriate. Possibilities for modification of the proposal include:

1. Authorizing immediate transfer to a court of appeals of any district court case involving pre-enforcement review of a rule which the Attorney General (or perhaps, the agency) certifies is one of general public importance.
2. Providing that review of "major" rules shall be brought in a court of appeals.
3. Providing that any statute which directs that nonstatutory actions for judicial review of rules should be brought in courts of appeal should also direct that if such an action is erroneously brought in a district court, or in a court of appeals of improper venue, the court in which the action is brought shall transfer it to the court of appeals for a circuit in which venue is proper.

How vesting all judicial review of rules in courts of appeals would affect enforcement review of rules would depend in significant measure on the precise terminology of the vesting statute. Consider the following two possibilities, the first taken verbatim from section 207 of H.R. 746, 97th Congress, first session, and the second based on section 307(b) of the Clean Air Act, 42 US.C. 1857h-5, before its amendment in 1977. In each instance section 704 of the Administrative Procedure Act would be amended by adding a new subsection (b) as follows:

VERSION 1

(b) If no special statutory review proceeding is applicable, an action for review of a rule defined in section 551(4) of this title shall be brought in the United States Court of Appeals, and venue of such action shall be determined in accordance with section 2343 of title 28, United States Code.[1]

VERSION 2

(b) If no special statutory review proceeding is applicable, an action for review of a rule defined in section 551(4) of this title shall be brought in the United States Court of Appeals, and venue of such action shall be determined in accordance with section 2343 of title 28, United States Code. Any such action shall be brought within 30 days from the date the rule was promulgated, or after such date if such action for review is based solely on grounds arising after such 30th day. A rule with

[1] 28 U.S.C. 2343: "The venue of a proceeding under this chapter is in the judicial circuit in which the petitioner resides or has its principal office, or in the United States Court of Appeals for the District of Columbia Circuit."

respect to which review could have been obtained under this section shall not be subject to review in civil or criminal proceedings for enforcement.

Whatever may be the consequences of existing doctrines of res judicata and collaterial estoppel as applied to an enforcement action, enactment of version 1 would seem to leave them unchanged, for version 1 deals only with the identity of the pre-enforcement reviewing court and not with the consequences of that court's judgment. Conceivably, it might be argued that since Congress had designated the court of appeals to review the rule, and since in an enforcement action, the rule is "reviewed", therefore an enforcement action could not be brought in the distrct court. Such an argument would disregard the last sentence of section 703 of the APA. In any event, a simple statement in the Committee's report should make clear that (as indeed is true at present in some situations) an action to review a rule shall be brought in the court of appeals and an action to enforce a rule shall be brought in the district court. This is not to say that the relationship between review and enforcement actions does not present troublesome legal issues. It is to say that enactment of version 1 would not deal with those issues and thus would not introduce additional problems.

On the other hand, enactment of version 2, or some variant, would change existing law and raise difficult constitutional issues. See *Yakus* v. *United States*, 321 U.S. 414 (1944), Rutledge, J., dissenting: *Adamo Wrecking Co.* v. *United States*, 434 U.S. 275 (1978), Powell, J., concurring; Note, Reviewability: Statutory Limitations on the Availability of Judicial Review, 1973 Duke L. J. 253.

In any case, room must be left for raising in the district court questions of viability of rules in agency enforcement cases, and in civil litigation not involving a governmental party when the claims are based on a rule violation or the defense is based on reliance on a rule (there is a large amount of such litigation).

Question 6. Should a deregulatory rule making be subject to regulatory analysis?

Answer. On balance, we do not see a need for deregulatory rules to be subjected to statutory requirements of regulatory analysis. The purpose of such a requirement is to prevent the imposition of unnecessary economic burdens upon the economy, burdens which mission-oriented agencies tend to overlook. In the case of deregulation, the risk of such imposition by definition does not exist.

Of course a particular deregulatory measure may be unwise for some other reason—for example, because it fails to take adequate account of health effects. But those effects, unlike economic effects, are not likely to be disregarded by the regulating agency, and review under section 706 of the APA as well as congressional oversight would discipline any disregard of the legislative mandate. The regulatory analysis device is neither intended nor well destined to produce added protection against such disregard. Thus, in the deregulatory context the principal effect of a regulatory analysis requirement would be the delay of desired reform.

It is true, of course, that a particular deregulatory measure may not be as deregulatory as it should be—that is to say, it may eliminate merely some of an unnecessary economic burden when all of the burden could be removed. In our judgment, the occasional case that may fit those facts does not justify imposing the regulatory analysis requirement upon all deregulatory measures across the board. What this possibility does suggest, however, is an additional reason for permitting the President, in his discretion, to bring within the regulatory analysis requirement rules that are not technically covered by the statute. Such a provision would permit some deregulatory measures to be subjected to the process, without requiring that all be.

Question 7. Many have said that regulatory analysis should not be the sole criterion of a rule making. What impact should regulatory analysis, as provided in S. 1080, have on a particular regulatory decision? What other criteria should be guiding a regulator in addition to the regulatory analysis?

Answer. Properly understood, regulatory analysis should contain or reflect all the elements of decision making on a proposed rule. Those who frame their argument against regulatory analysis attest it should not be the "sole criterion", tend to have an erroneous notion of what it entails. On one level, they fail to appreciate that regulatory analysis requires the balancing of all potential benefits—not merely economic or commercial benefits—against all potential costs—not merely economic or commercial costs. On another level they fail to recognize that the regulatory analysis is a managerial tool for improving agency decision-making and not the decision itself.

It is evident that when a balancing is conducted, the outcome will be a determination that there is, or is not, more to be gained than to be lost by the proposed rule—in one sense that, surely, is the "sole criterion" in any rulemaking unless the substantive statute prescribes otherwise. To put the point another way: where the substantive statute does not predetermine the outcome, all valid criteria, including

issues such as health, safety and competitive impact, should be embodied within the regulatory analysis. Since the analysis constitutes a compendium of all applicable social values, it is difficult to visualize any factors that would remain.

The bill as introduced requires that a rule be both cost beneficial (the beneficial effects outweigh the costs) and cost effective (no less costly way to achieve the beneficial effects). The agency's explanation and conclusions on these requirements must presumably be set forth in the agency's statement of the basis and purpose of the rule. However, that statement should not necessarily be the regulatory analysis, or in terms of the President's Executive Order, the regulatory impact analysis. The RIA is a separate document containing, optimally, a full and ranging discussion of alternatives, approaches to cost and benefits determination, aspects of analysis that may not be necessary to justify the agency's conclusion. Under this scheme, while the RIA should certainly be part of the rule making file, and available to a court on judicial review of the rule, the reviewing court will judge the rule substantively on the agency's statement of the rule's basis and purpose.

The only obvious instance in which a criterion external to regulatory analysis should govern a regulator's decision is the case in which a substantive statute prescribes a particular result regardless of any agency-determined relationship between benefits and costs. The bill provides for this exception.

Question 8. Some have supported a requirement for agency descriptions of the effects of a rule, but have at the same time opposed any requirement for an agency determination concerning the relationship of those trade-offs. Do you feel such a determination (as in S. 1080, the benefits "justify" the costs, and the rule is a "cost effective" alternative) is necessary to make regulatory analysis worthwhile?

Answer. The Association has no authorized position on making cost-benefit a statutory requirement. We can see the usefulness, in dealing with excessive regulation, of imposing a central discipline upon the agencies not merely in the form of an academic listing of potential costs and potential benefits, but in the necessity, before adopting a rule, of making an informed judgment that the latter predominate (or that they "justify" the cost, or whatever other language is used to describe the outcome of the balancing process).

Question 9. What will happen to Executive Order 12291 if S. 1080 becomes law?

Answer. Should S. 1080 as introduced be enacted into law, it would likely control E.O. 12291 in any case of conflict, including its definition of "major rule", especially if its provisions for judicial review are enacted. Those provisions, by appearing (as we think unwise) to create a private right to have a regulatory impact analysis performed, would deprive RIA's of their uniquely management characteristics, and establish constraints which will compete with any oversight measures the President might wish to take for agency attention. Waiver, for example, cannot meaningfully be granted in the fact of a threat of private enforcement. Conflict is also possible in more subtle ways. S. 1080 as introduced is more limited in expression and scope than E.O. 12291. A court might well take this as evidence Congress had disapproved the broader requirement. While Congress could not deprive the President of his inherent authority to oversee the affairs of executive government, courts evaluating the limits of that authority have in the past seemed strongly influenced by the shape Congress has given the affairs of government.

We doubt a similar implication would be drawn respecting the procedural measures for executive branch oversight contained in the Executive Order, although we would very strongly prefer to have that explicitly provided for in the statute. A "savings" clause for the President's authority under the Executive Order, which we urge be added to the bill, would serve this purpose. OMB and Task Force oversight of executive branch agency performance, including the possibility of directing additional work to be done or finding need for an RIA where an agency finds none, does not seem inconsistent with the statute. And a setting in which a court could or would disapprove such presidential interventions is not readily imagined. It seems likely, however, that some degree of rewriting of the Executive Order would be required to accommodate S. 1080 if it became law. It is the judicial review provisions involving regulatory analysis and the building of regulatory analysis concepts into the statement of basis and purpose that produce this effect. The savings clause would be unlikely, in our view, to overcome its effect.

Question 10. Why not have a standard for rule making that a final rule should be the one that saves the most lives and avoids the most injuries, unless the agency offers an explanation to the contrary?

Answer. The suggested standard has a surface appeal—and it is precisely the susceptibility of the agencies to such superficial appeal that it is the purpose of the regulatory analysis requirement to remedy. For upon reflection, it becomes obvious that virtually no statute could reasonably be interpreted to establish such a standard. A Federal Aviation Administration rule disapproving all airplane engines

might well save the most lives; and a Consumer Product Safety Commission rule banning all children's toys might well avoid the most injuries—but neither would represent what the substantive statutes intended. Few, if any, of our laws envision a "zero-risk" or an "absolutely minimum-risk" environment.

The fact that such a standard could be seriously suggested demonstrates the need for spelling out, as the present bill does, the more complex nature of the judgment expected of the agencies, discussed above in our responses to questions 7 and 8.

Question 11. OMB or the Regulatory Relief Task Force operates without the procedural safeguards for fairness mandated by the Administrative Procedure Act. Is it wise to shape regulatory policy in a matter insulated from those procedures, through a mechanism like OMB or the Task Force?

Answer. For the reasons developed in our statement submitted to the Subcommittee on May 14, we believe that regulatory analysis is a management tool which should not be subject to judicially enforced procedural requirements but instead should be administered under the direction of the President or his delegate. Accordingly, we believe that it is wise to shape regulatory policy through the Regulatory Relief Task Force and OMB in a manner that does not require compliance with the full panoply of procedural requirements mandated by the Administrative Procedure Act, as it would be amended. If regulation is to be prompt and efficacious, there must be a limit to procedural complexity.

This conclusion does not mean that the Task Force and OMB are free from constraints. No rule can be adopted except by agency action, and the agencies will be subject to APA procedural requirements. We do not readily perceive why those requirements should be duplicated by the Task Force and OMB.

At the same time we are conscious of the desirability of lending as much legitimacy to the Executive oversight process as possible. If there were evidences of abuse by the Executive, we would think differently. Or, if as we favor, the President were to be given powers to supersede agency regulations of critical national importance because they conflict with the achievement of one or more statutory goals in addition to the goal primarily entrusted to the issuing agency, we are on record as urging that appropriate procedural safeguards be enacted (see Recommendation 3 of ABA Commission on Law and the Economy). However, since we do not visualize Congress taking the President's role so far, and since we know of no abusive situations, we do not see the need at this time for additional procedural rigidities. We understand that procedures under the Executive Order substantially reflect the principle that any submissions of material to the Task Force or OMB are also required to be given directly to the affected agency, and that any factual material given by the Executive office to the agency, as well as Executive office comments on a proposed rule out for public comment, are required to be included in the rulemaking file. We believe these are desirable procedures.

Question. 12. The "General Requirements" of E.O. 12291 (Section 2) are imposed "to the extent permitted by Law." What does this phrase mean? What law does not permit the requirements of E.O. 12291 to be applied to regulatory action? What law limits the application of E.O. 12291?

Answer. This question, of course, is best answered by the drafters of the order. In our judgment, however, the "to the extent permitted by law" phrase represents an acknowledgment by the President that he cannot impose a legal requirement on any agency contrary to the judgment of Congress. Thus, if Congress has directed in a given context that cost-benefit analysis not be used in decision making (for example, on account of an urgent need Congress perceives to protect public health or safety), the President by this language agrees that he cannot impose that requirement. Where, on the other hand, law permits that factor to be considered, the President has issued instructions how agencies are to structure their discretion and decisional processes—instructions the President has the right to expect to be followed within the scope of agency discretion ("to the extent permitted by law").

Senator LAXALT. Mr. Mallino, who testified on behalf of the steelworkers this morning made some interesting observations, I thought. Some of them were opinions which were rather breathtaking, and I think this is one that was made. I would like to get your reaction if I may.

As for the economic costs of regulation, we believe that in addition to serious technical problems in accurately determining regulatory costs, there are certain fundamental social responsibilities of government which must be exercised without regard to dollar considerations. Foremost among these are the preservation of life, liberty, and justice.

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And, of course, the point was made—and, I think, rather well—by him this morning that the human values should have a priority above and beyond those of the economic values.

What we are striving here to accomplish somehow is a balance. So many out in the country feel that, on the environmental protection provisions and a lot of the regulatory provisions, we have looked purely at the so-called human values and not paid enough attention to the economic values.

Do any of you have any thoughts in respect to his general observation?

Mr. Lave?

Mr. LAVE. I think this is one of these situations where one should "render unto Caesar what is Caesar's." For civil liberties or other fundamental rights, no amount of money should lead us to abbrogate these rights.

But regulation involves resource allocation, both Government resources and compelling people to spend their own moneys. These decisions are practical, not ideological and we must decide how much we are willing to spend to achieve a goal.

One of the exercises that a number of people have gone through is to look at the implicit value of a premature death that stems from agency or individual decisions that were made—the decision of an individual to work in a risky occupation or the decision of an agency as to how far to go in enforcing standards on coke ovens or mine safety.

Enormously different values are used. Why is a human life worth more in some areas than in others? I object for both efficiency and equity reasons to large differences.

What we are asking for and what benefit-cost analysis will help to do is to give a more systematic examination of resources allocation, instead of waving our hands and saying that there are some values that go on beyond analysis and action.

Even when the steelworkers make their own decisions, both about what job to take and about how far OSHA ought to press certain regulation, they do not opt for complete safety. That is a myth, not a serious contention.

Senator LAXALT. Thank you.

Mr. Moore?

Mr. MOORE. I would just like to add that I am sure that the gentleman from the steelworkers could not really have believed that. He would not have been willing, I am sure, to reduce carbon monoxide, say, 1 percent 1 day during the year in exchange for shutting down the entire steel industry. He would be unwilling to bear that cost for that small benefit.

It is just too simplistic an argument.

Senator LAXALT. I think that is the case.

Mr. Yandle?

Mr. YANDLE. Yes. I have two points, Senator.

With respect to such things as OSHA's cotton dust standard or the coke oven standard or reducing the risk of damage to hearing, given a goal, the use of cost-benefit analysis often reveals a less costly way to accomplish that goal and, thus, more of that good is achieved, having discovered a less costly way by applying the analysis.

The other thing is that nothing is achieved by regulation unless the regulations can be implemented and enforced. To the extent that the cost and burden of the regulation is reduced, it enables the regulation to be implemented and enforced so that some of that goal can be achieved.

Senator LAXALT. Thank you.

Tell me this, panel: In looking at this piece of legislation, if you were sitting in my position and trying to lead the charge, so to speak, and chair this subcommittee, what would you recommend by way of major improvement, considering that we are approaching this whole problem on the basis of rather reasonable expectations? As had been alluded to here, we are just taking a rather short step in terms of a huge problem. In terms of what we have within the four corners of the bill, do you see any substantial holes that we have that perhaps we should fill?

Mr. Moore?

Mr. MOORE. I would like to amplify what Mr. Smith said earlier in line with what I was talking about. I do believe that one of the most important things is to have some review function, whether it be OMB or a separate agency, notwithstanding my friend Lester Lave's point about excess bureaucracy.

I also think there is one other problem that I would like to see addressed by this legislation that has not been mentioned. As it is currently drawn, as I understand it, it would require cost-benefit analysis for deregulation as well as regulation, and that I do not think is desirable.

We have seen a lot of deregulation in the airlines, in trucking, and we have seen it in some other fields. We would like to promote that. We may, in fact, slow that up. I think that should be addressed in here.

Senator LAXALT. May we hear from you on the deregulation point, Mr. Lave?

Mr. LAVE. Certainly. Let me conjecture that if Tom thought about what he just said for an hour or more he would not have said it. [Laughter.]

The reason I favor benefit-cost analysis is not that I want to slow down regulation. I want to improve the regulatory process. I want to make regulation more efficient and more effective. If benefit-cost results in more regulations, under those conditions, it is wonderful. If it results in less enforcement under those conditions, that is wonderful, too.

Rather than go willy-nilly into deregulation, we ought to examine each proposal. I am completely in favor of the deregulation that has gone on in transportation and some other areas, but we should not exempt some area because regulatory analysis would slow down deregulation, is not fair or even handed.

The legislation might have a strong presumption that we have got too much regulation—certainly too much inefficient, ineffective regulation—and that getting rid of it should have the greatest priority. But that is different from saying that we ought to exempt some area from these rules.

Senator LAXALT. Mr. Yandle.

Mr. YANDLE. In terms of problems or difficulties which I see in the proposed legislation, it speaks to the same problem that Mr.

Smith and Tom Moore have addressed, and that is with respect to what is major and what is significant in terms of cost impacts and things of that sort.

Thinking back on the brief experience which I had serving 1 year on the staff of the Council on Wage and Price Stability where we were reviewing newly proposed regulations from the executive branch agencies, at that time, OMB received from each of the agencies the Agency's definition of what would be "major" and then went through a clarifying and approving process.

Whether that would be the correct vehicle, I do not know, but it did give some flexibilities for agencies of the sort that Mr. Smith mentioned where one type of analytical approach to assigning "major" might vary from agency to agency.

Another thought is that, irrespective of where that responsibility might be seated with respect to defining "major," what is "major" changes with inflation and with the economic times, and so there might be some statement periodically required defining "major."

Senator LAXALT. Mr. Smith, do you have any problems with the venue provisions to stop the race to the courthouse?

Mr. SMITH. I have made a suggestion for filling a glish, I believe, which is in my prepared statement. The association has no announced or established policy on venue. It strikes me personally as an eminently reasonable provision, but I cannot speak for the association. We have not studied that.

If I could respond, Mr. Chairman, to your invitation for improvements—one I have mentioned, which is the Presidential role and the elimination of judicial review with respect to reg-analyses.

Another, related to that, and I think important, is to have a provision that I would describe as a savings clause, to make it very clear that there is no effort on the part of this legislation to impede, or conflict, or interfere, with the President's activities under his Executive order.

Senator LAXALT. We have been concerned about that, too. Do you see anything here that could be counterproductive?

Mr. SMITH. I think that once the Congress legislates in an area that has been occupied by the Executive order for executive branch agencies there is some risk. There is a risk that litigation would be brought to say that there is a displacement.

Senator LAXALT. We have a deferred date here, you know—2 years.

Mr. SMITH. I understand, but what happens 2 years out? So I would very much urge you to make it clear in this bill in that respect.

I would also like to speak just briefly about the hybrid rulemaking provisions, which is the second important change in section 553.

But to go back to regulatory analysis first. Because of the Presidential involvement and because the reg-analysis provision is to add, really, a standard for decisionmaking that is not strictly procedural to regulatory legislation generally, we think that should be taken out of section 553 and put into a separate chapter. Section 553 has been a remarkable and good piece of legislation since 1946 for the bulk of rulemakings in the Government. One of the advantages of that provision has been its relative simplicity and its

purely procedural character. We are fully supportive and like the regulatory analysis provisions, but we think it is a substantial drafting disadvantage to have it incorporated into 553.

Another change in 553 is the introduction of the idea of oral presentations and cross examinations on factual issues. Our concern with that provision is the generality of its application.

It is limited in the bill to major rules. If one removes the "major rule" definition from judicial review and has the President be the monitoring authority on that question, it does create some complexities in deciding what kind of cases to which to apply the right of cross examination and oral presentation.

We think the concept should be limited in some fashion. It will introduce a volume of litigation, we expect, to ordinary rulemaking that I would not think the Congress would wish to invite. We have not yet developed a bright line for that.

The problem, Senator Laxalt, is that since the midsixties, with the new kind of regulatory legislation, particularly that involving clean air and clean water and safety—OSHA-type regulations—the Congress selected a rulemaking method for determining the particular standards to comply with. That kind of rulemaking has, as a matter of central importance to it, some decision about facts.

People have been properly concerned with the inadequacy of notice and comment rulemaking under 553, as it exists, for that purpose. And, indeed, in most of those statutes, there are special provisions to deal with this problem.

We have some concern about generalizing from that kind of legislation to all rulemaking where, in our judgment, 553 has worked pretty well. I am talking about things like SEC rules and FCC rules, and that is the vast bulk. It is not major rulemaking; it is not minor, inconsequential; it is something that is close to being legislative-type rulemaking, and where notice and comment has been a healthy provision.

To introduce now questions of what is a material fact, what is a controversial issue—we are concerned that it is going to clutter and overjudicialize a process that has worked pretty well. That is the other area of concern we have with the legislation.

Senator LAXALT. As soon as you flesh out some suggestions, let us have them.

Mr. SMITH. We shall certainly do so. Thank you for that invitation.

Senator LAXALT. We do not want to clutter this process up with all those lawyers out there.

Mr. SMITH. I am sure that is not your objective. We do not want this to be known as the Lawyer's Relief Act. Indeed, I can speak for the association in saying that we would like to see the volume of litigation reduced.

Senator LAXALT. Thank you.

I have one last question here. It is on behalf of Senator Leahy, and it is addressed to you, Dr. Moore.

Dr. Moore, you would exempt repeal of existing rules from the requirement of a benefit-cost analysis. You would call the repeal of a rule the return to the marketplace. One witness before this subcommittee today has pointed out that deregulation is preferred strategy for improving economic regulation but that it is not a

viable alternative for most health, safety, and environmental regulations.

How could you justify repeal of any of these regulations without a benefit and cost analysis? We have touched on that before, but perhaps you could address his question specifically.

Mr. MOORE. Yes. It is a matter of where you start from. The bill, as it is currently drawn, accepts essentially the principle that the existing set of regulations is good, and you have to show a benefit greater than the cost to move away from those in any direction.

My own presumption is that we start from the assumption that the market works and that Government interference has to be justified. So we have to justify a movement toward regulation, and you do not have to ever justify using the market. It is a matter of where you start from.

We have started, and we have grown. We have had a tremendous growth of regulation over the last decade without any evaluation of whether this is justified. If it is justified, fine, if we can show it under cost-benefit. But I would start from the initial point: Government interference must be justified, not the other way around.

Senator LAXALT. I thank you, Dr. Moore.

I would also like to thank the entire panel for your time and trouble in coming here. You have been extremely helpful to me and to the members of the subcommittee.

If you have any followup suggestions as we go along nursing this little baby, please let us know. Thank you very much.

Mr. SMITH. Senator, did you want me to say something about compulsory process, as you had indicated at the outset?

Senator LAXALT. I think that, lest I get into the Thurmond doghouse, perhaps you should.

Mr. SMITH. We have submitted a suggestion for language to deal with questions of subpenas. In last year's Congress, we worked out provisions dealing with adjudicatory subpenas which are substantially reflected in what we have submitted. What was not dealt with in last year's legislation was investigatory subpenas where a lot of the subpena problem lies.

We think this is an important area to be dealt with, we have tried to resolve problems of confidentiality, venue. The agencies have had problems with abuse of subpena process on the part of private parties. Private parties have been troubled about problems of hanging subpenas and abuse of subpena by agencies. This is an attempt to give a balanced, fair, and standardized treatment to subpenas throughout the Government, and I think it works. We have worked pretty hard at it. It has been vetted by both the Business Law Section and the Administrative Law Section of the association, and we commend you to it. Is has also been approved by the House of Delegates of the association.

If your staff have any questions about it, we would be glad to respond to them as promptly as we can.

Senator LAXALT. Very well. Thank you very much, Mr. Smith. Thank you all.

Our final panel today will be a debate on the practicality of the requirements of S. 1080, focusing on the provisions for regulatory analysis of proposed rules. Arguing on behalf of regulatory analysis, we have three witnesses.

Robert Crandall is presently a senior fellow of the Brookings Institution. He has been a professor of economics at M.I.T. and at George Washington University. In the early 1970's, he was a consultant to the FTC and to the EPA. He has also worked at the Council on Wage and Price Stability, most recently as deputy director in 1977 and 1978. He has many publications in a number of fields, including the subject of regulation.

He is joined by George Freeman, a senior partner of the law firm of Hunton & Williams. He began his distinguished legal career as a clerk for Justice Black. He specializes in energy and environmental law and has been active in the American Bar Association's coordinating group on regulatory reform.

Their side is completed by Lawrence White, a professor of economics at the NYU Graduate School of Business Administration. In 1978 and 1979, Professor White was a senior staff economist at the Council of Economic Advisers. He has served as a consultant to, among others, the EPA, HUD, and the U.S. Regulatory Council. He has also written widely, his most recent book, "Reforming Regulation: Processes and Problems," being of particular interest to this subcommittee.

On the other side is another gentleman of extensive experience in matters of regulation. Nicholas Ashford is associate professor of technology and policy and assistant director of the Center for Policy Alternatives at M.I.T. He is chairman of the National Advisory Committee on Occupational Safety and Health and serves on the Science Advisory Board of EPA. He has been a prolific author. Most notably, his 1976 book, "Crisis in the Workplace," has often been cited in discussions of regulation.

Last but not least—and he will be here momentarily, I understand—is Robert Nordhaus, a member of the Washington, D.C. law firm of Van Ness, Feldman, Sutcliffe, Curtis & Levenberg. Before joining the firm in January 1980, Mr. Nordhaus was general counsel of the Federal Energy Regulatory Commission. Mr. Nordhaus served in 1977 as assistant administrator for regulatory programs for the Federal Energy Administration.

Gentlemen, I welcome all of you. I expect this exchange will be lively and most illuminating. As you know, each of you will make a short opening statement, followed by a rebuttal, after which you will have questions from the subcommittee. Without objection, your prepared statements are ordered to be inserted in the record.

I might say that this format has been utilized recently in some of the other panels before the Congress and uniformly have been very, very helpful in terms of spontaneous statements, getting away from structure and all that. So fire away.

Mr. FREEMAN. Shall I start?

Senator LAXALT. Yes, please.

STATEMENT OF GEORGE CLEMON FREEMAN, JR., SENIOR PARTNER, HUNTON & WILLIAMS

Mr. FREEMAN. Before we talk about how this bill is eminently practical and will work, I would like, having sat through these hearings all day today, to just make a few general observations before we get into that.

I think one of the most important things is that your bill is really intended to change the way agencies make their decisions. It is intending to do that by mandating the greater use of cost-benefit methodology.

Your bill is also intended to change the way some courts review those agency rules by backing out the judicially created doctrine of presumption of validity.

And, finally, your bill is intended to give clearer, fairer standards in rulemaking that will expedite those rulemakings by ending lawyers debates over what procedures ought to be followed in rulemaking and such debates in appeals of those procedural issues to the courts.

Your bill is intended to change the status quo. It will change the status quo. And I think it will change the status quo in a number of beneficial ways.

Your bill is, as I see it, going to be the Magna Carta for at least the next 20 years on how regulation is going to be turned around in the United States. I think it is important to recognize that.

As important as Presidential oversight is—and we heard that emphasized this morning—your bill should endure over at least the next 20 years. Presidents and administrations will come and go. Congress will come and go. But we hope your bill will be here forever. We hope that its important recognition of the principle of self-help will be here to help us.

When all is said and done, the people who really have to help themselves are the regulated. Heaven helps those who help themselves. And your bill will give the regulated a chance at the agencies to bring the facts to the regulators' attention that ought to be brought to their attention. Your bill will give them a chance to see that the regulators pay attention to those facts by providing for meaningful judicial review.

When it comes to what the agencies will do when your bill is passed, they will not do things any differently at some agencies where they have been making good decisions in the past. But the quality of decisionmaking will go up at all agencies.

Cost-benefit analysis is nothing new in the Government. It has been around since at least the passage of the National Environmental Policy Act back in 1969. A number of us labored with it when it was really being misapplied at the wrong place in Government.

It was being applied in the licensing process, not where policies were being made but where they were being implemented. The NEPA procedures became used as a device to keep licenses from being issued, and largely those for large powerplants. I happened to represent a number of those plants, and so I learned about NEPA a lot earlier than a lot of the people who have testified here today.

In 1972, when I testified before Senator Baker in oversight hearings on NEPA, I said NEPA was a good thing. It just said what is rational. It said you should look at alternatives and you should look at their costs and the benefits, and by that we mean in the practical way that your bill requires. Your bill says you quantify when you can, and when you cannot quantify any further, you stop. But at least you go down that road as far as possible.

That discipline was more important and needed at standard-setting where these major rules, of major impact, with their unavoidable tradeoffs were occurring.

We had a great war in the mid-1970's over whether EPA should do these NEPA impact statements and do the cost-benefit analysis. We lost that war. If we had won it, when this year you in Congress have to tackle substantive legislation—the Clean Air Act and the Water Act—just think how much better off you would be, and how much better off the country would be, if you had EPA analyses of the costs and benefits of the policies they have enacted under those acts and we know what the reasonable alternatives were and what their costs and benefits are.

In a number of rulemakings, particularly in the last 2 years of the Carter administration, we have been able to get EPA to cost-benefit some of their decisions under the Clean Air Act. We have also been immensely aided by the courts. Do not underestimate the role of the courts here.

We lost the battle in *Portland Cement*—that is, EPA did not have to do the impact statement—but the court said that implicit in the command that Congress wrote in the statute to consider costs was the requirement to look at what you were getting for your money. So, if people did cost-benefit analyses, the agencies had to look at them.

When I was faced with representing the electric utility industry in the recent EPA rulemaking over revised new source performance standards, I went out and got the best engineers and the best economists I could find in the country, and I said: "Do me cost-benefit analysis."

I went into the agency, and I said: "I'm going to do those things. You had better do them, too." So they went out, and they got some first-rate economists. They got the ICE in the act and OMB and the Council of Economic Advisers.

The new Carter administration's Executive order was in force. I went down and pleaded with RARG to be sure to put this rule on the list of rules for interagency review because the cost was so great. They did.

That whole process was a practical experiment, and it was, by and large, a very good experiment that shows that you can do these types of analyses.

I have submitted as exhibits to my prepared testimony some evidence of that, and I commend that evidence to you. This analyses was a practical thing. The rule is better because we went through it. If EPA can do that there, then it can do it elsewhere.

I strongly urge that this committee get on and enact its Magna Carta, and do it now while there is still hope. Keep the three major parts of the bill that are in there now intact and essentially unwatered down.

These parts are: the reg-analysis provisions with their cost-benefit requirement; second, the hybrid rulemaking procedures which are so important and, frankly will shorten the time spent at agencies and in the courts rather than lengthen it—they are very practical—and, third, the judicial review provision—that is the Bumpers amendment—keep it intact. Do not get rid of that presumption of validity, and we will have something that is workable.

Later on, if you want to ask me, I can tell you some more good things you can put in your bill, but that is not the subject of our panel.

Senator LAXALT. Thank you very much, Mr. Freeman. Without objection, your prepared text will be included at this point.

[Mr. Freeman's prepared text and supplementary exhibits follow:]

Prepared Statement of George Clemon Freeman, Jr.

My name is George Clemon Freeman, Jr. I am the senior partner in charge of the Energy and Environmental Law Section of the law firm of Hunton & Williams. I am a member of the D.C. and Virginia bars, with offices in both Washington and Richmond. I am pleased to appear before you today to urge the speedy enactment of S.1080, the "Regulatory Reform Act."

My practice over the past decade has been predominantly before the Environmental Protection Agency, Nuclear Regulatory Commission (and its predecessor the Atomic Energy Commission) and the various energy regulatory agencies presently congregated in the Department of Energy. It has involved participation in rulemakings, individual licensing and permitting actions and judicial appeals and related litigation. In the middle 1970's our firm represented electric utility industry participants in four of the five maior rulemakings which the Nuclear Regulatory Commission conducted. Our firm has also been counsel, and I have acted as lead counsel, for the electric utility industry in all of the maior rulemakings at EPA affecting that industry under the Federal Water Pollution Control Act since its passage in 1972 and all of the EPA rulemakings uner the Clean Air Act affecting that industry since the passage of the 1977 Amendments to that Act. Our firm has, in addition, acted as counsel for the electric utility, coal and other industries in a number of appellate cases that have resulted in decisions of the Supreme Court, and of the Courts of Appeals that are directly relevant to the matters before you today. Thus, for about a decade I have been in the trenches at the key federal agencies dealing with rulemakings directly posing the unavoidable trade offs that are a part of national energy and environmental policy and before the appellate courts, testing these rules and the procedures by which they are implemented. I mention these experiences, because I think it important that the Subcomittee examine the practical impact of the bill before it. And from my viewpoint

as a lawyer actively involved in agency rulemaking proceedings, I believe that the Regulatory Reform Act will result in sounder, fairer rules. I also believe this is a goal all of us who have testified before the Subcommittee share.

In the early 1970's, as a result of our firm's experience in various AEC and NRC rulemakings, I recognized and strongly advocated the need for greater explicit balancing of the costs and benefits by all federal agencies in their formulation of significant rules which had the potential to impose extraordinary costs on the American consumer. From the perspective of involvement in a variety of factually complex rulemakings, I have also appreciated the need for more clearly defined and fairer procedures that enable an agency and those directly affected by its decisions, or otherwise concerned with them, to develop the kind of record necessary for sound decisions -- decisions that are not based on myth, wishes or hopes but on a fully developed factual record and clearly articulated policy decisions. As the principal spokesman for the electric utility industry in rulemakings before the Nuclear Regulatory Commission and the Environmental Protection Agency in the early 70's, I was in the unusual position of practicing daily before one agency then thought to be favorable to industry and another agency thought to be biased against industry. I could see how cost-benefit requirements, which in those days we often referred to collectively as "NEPA methodology," and expanded "hybrid-type" rulemaking procedures, could and should cut both ways. I still feel that way about it. All who are here today in support of this legislation should recognize that its provisions should cut both ways. They will allow rulemaking participants, whatever their philosophy or social views, to force the agencies to examine carefully the factual and legal bases for their actions. Morever, I personally believe that all of the provisions of S.1080 should be fully effective across the board upon the day of enactment. Since they are sound provisions, there is no reason to delay their implementation.

Even though I have spent a substantial amount of time representing the electric utility industry over the past decade, have been active in American Bar Association efforts for regulatory reform, and in 1980 represented The Business Roundtable as special counsel to the Legal Committee advising its Task Force on Regulatory Reform, I am here today speaking solely for myself. On earlier panels you will have heard from spokesmen for the ABA and The Business Roundtable. While I have not seen their prepared testimony for this particular hearing at the time these remarks are being drafted, I am certain that my views coincide in large measure with theirs. My friend and colleague in efforts involving the ABA and The Business Roundtable over the past three years, William Kennedy, will also be filing detailed comments on S.1080 on behalf of the General Electric Company and I also commend them to you.

As I understand it, the reason I have been asked to testify today is to give you my perspective from involvement in rulemakings before EPA, NRC, DOE and various judicial review proceedings on the practical effects of the major changes in the Administrative Procedure Act made by S.1080. How will this bill change the way those agencies and the appellate courts operate? As I have said before, it is my belief that rules formulated through the procedures required by this legislation will be based on sounder reasoning. They will be sustained by economic analysis. They will be well ventilated before the public. And they will be thus less vulnerable over the long run to reversal by reviewing courts. In short, we will have fewer rules, but we will have better rules. And what do I mean by "better" rules? I mean rules tht reflect consideration of all the factors that Congress directed to be considered in the substantive, organic statutes. At the same time, to the maximum extent permitted by those statutes, the agency will have to consider and balance direct and indirect social costs and benefits in a way that arrives at a result which is best for the American people.

But we also need something more than good motivation and good methodology for better rules. When the rule has to be based on facts, we want the agencies to be accurate. Since no one is omniscient, this requires that all who have relevant facts must be given the opportunity to bring them to the attention of the decisionmaker at a meaningful time and in a meaningful way. I have learned from experience that we will come nearer to getting better rules from agencies if we require them to do two things: first, to prepare for judicial review and second, to follow minimum prescribed procedures. These two requirements go hand in hand. Once the right to judicial review is accorded, it is clear that certain procedures have to be followed in the agency proceedings to produce the kind of record necessary for meaningful judicial review.

S.1080 amends the Adminsitrative Procedure Act in three major areas to accomplish the twin goals of better rules and meaningful judicial review. First, the bill mandates cost-benefit and cost-effectiveness analysis of proposed rules. Second, following the pattern of a number of statutes enacted during the 1970's, including the Clean Air Act amendments of 1977, S.1080 specifies procedures in addition to those presently required by section 553 of the APA to be followed in informal rulemakings. Third, the bill articulates standards for judicial review of agency rules that require adequate record support for agency factual determinations in rulemaking and clarifies the weight to be accorded by reviewing courts to agency determinations of jurisdiction and statutory interpretations while preserving the deferential standard of review presently accorded agency policy determinations.

I will now turn to each of these three areas of change and explain why I think what you are proposing to do is eminently workable, practical and necessary.

1. The Requirement for Evaluation of Costs and Benefits in Major Rulemaking.

The cost-benefit provisions of S.1080 are relatively simple and stratightforward. For each proposed major rule, the

agency must include in its notice of rulemaking a description of the quantifiable and non- quantifiable benefits and costs of the proposed rule, a description of alternatives to the rule, and unless the particular organic statute directs otherwise, an explanation of how the benefits of the proposed rule would justify its costs and why the proposal is more cost effective than its alternatives. Essentially the same process must be completed as part of the statement of basis and purpose published at the time the agency promulgates a major rule. Proposed § 553(c)(2).

In my view, a crucially important element in the mandated agency consideration of costs and benefits contained in S.1080 is the expansive definition given to each of these terms. Proposed subsections 551(17) and 551(18) make clear that both direct and indirect costs and benefits are to be addressed. The word "social" is also used to make certain that we mean costs and benefits to people and not more limited definitions of costs and benefits that have sometimes been given to that phrase. These definitions are vital to preclude agency disregard of the indirect costs imposed by regulations and to ensure that agency's do not unjustifiably narrow their examination of the benefits associated with a particular action.

There is nothing novel in the thought that agencies, in formulating regulations, should look at the costs and benefits of their proposed rules and reasonable alternatives and choose the alternative that produces the most good for society. That is in essence what the NEPA as interpreted by the landmark Calvert Cliffs decision, (Calvert Cliffs' Coordinating Committee v. AEC, 449 F2d 1109 (D.C. Cir. 1971)), said all federal agencies must do in making major decisions affecting the human environment. And I have long been in favor of a similar, albeit less cumbersome, requirement being imposed on agencies involved in rulemakings concerning energy or environmental issues. In fact, I noted its desirability in 1972, during

joint hearings before the Senate Public Works and Interior and Insular Affairs Committees on NEPA:

> "I believe that as a matter of sound public policy neither EPA nor any other federal agency . . . setting environmental standards should be exempt in its rulemaking . . . from the basic NEPA requirements of (1) stating alternatives, (2) cost-justifying the alternative chosen, and (3) publicly articulating the basis for its decision.
>
> "Environmental quality standards should be set after a full assessment of the extent of biological harm, if any, either to people or to plants and animals associated with varying levels of pollutant discharge and the economic cost associated with obtaining those levels. The extent of any harm is then traded off against the cost of eliminating the discharge and the social decision is made as to the level of environmental quality society wants to attain, given the costs of doing so. A cost benefiting balance results, whether consciously or unconsciously.
>
> * * *
>
> "[This process] is inherently complex, the data necessary to implement it is often scant, subject to conflicting interpretation. Where this is the situation there is a temptation to resort to simplistic administrative solutions. This temptation occurs to the objective as well as to the zealous regulator. The economic costs of yielding to this temptation and of failing to strive consciously for a least-cost type solution to environmental problems can be overwhelming.
>
> * * *
>
> "It is for this reason that I view with alarm the recent statement by Mr. Ruckelshaus that EPA should be above NEPA because its heart is pure. We have now reached a stage in our society where we recognize that our resources are not limitless and that they must be used in the best way to meet the needs of all segments of our people. I believe that it is important in standard-setting for the regulator to be required to weigh and consider alternatives and to elect the alternative that imposes the least overall cost on society. I think it is important for him to articulate publicly that reasoning process. I believe that the basic purpose of NEPA to impose rational discipline on this entire decisionmaking process was long overdue." (Joint Hearings Before the Committees on Public Works and Interior and Insular Affairs of the United States Senate, 92nd Cong., 2d Sess., Serial No. 92-H32 at page 504).

I think it is also of interest that at that same hearing in 1972, Anthony Z. Roisman, on behalf of the Sierra

Club, and J. G. Speth, for Natural Resources Defense Council, spoke in opposition to the exemption of any federal agency, including the Environmental Protection Agency, from these NEPA cost-benefit requirements.

Those hearings in 1972 signaled the beginning of a long fight over whether or not the Environmental Protection Agency in promulgating rules under the Federal Water Pollution Control Act and under the Clean Air Act had to follow NEPA procedures, including the preparation of environmental impact statements containing cost-benefit analyses. This issue split industry down the middle and it also split the environmental movement. I found myself allied with environmentalists to whom I was frequently opposed in AEC rulemakings. At the same time, a number of lawyers who represented other industries told me that I had lost my mind because the requirement for impact statements, with their cost-benefit analyses, would make it impossible for agencies to operate or ever to render any decision favorable to industry. To give you some perspective on how that debate evolved, I have included as exhibits to my prepared testimony an article by Claude E. Barfield entitled "Environmental Reports/Water Pollution Act Forces Showdown in 1973 Over Best Way to Protect Environment" printed in the December 9, 1972 National Journal (Exhibit 1), a speech which I made at the American Bar Associaton's Annual Meeting in Washington, D.C. on August 6, 1973, on "NEPA Methodology and Standard Setting under the Federal Water Pollution Control Act of 1972" (Exhibit 2), and a copy of the testimony of Alfred E. Kahn, then Chairman of the Public Service Commission of New York, in hearings on Implementation of the Federal Water Pollution Control Act on December 19,1977 (Exhibit 3).

Because the history of EPA's reluctance to include cost-benefit analysis as a part of its rulemaking process illustrates both the desirability of and need for this legislation I would like to discuss that history in some detail.

Those of us who in the last decade sought to impose cost-benefit methodology on EPA rulemaking through the vehicle of the National Environmental Policy Act lost that battle. Congress amended the Water Act to expressly exempt EPA from NEPA and the courts took that agency partially off the hook in the historic Portland Cement decision (Portland Cement Ass'n v. Ruckelshaus, 486 F.2d 375 (D.C. Cir. 1973)).

So we turned to an alternate argument. The Portland Cement decision reasoned that the statutory commands to set standards under the Clean Air Act based on "best" technology carried with it an implicit obligation to consider whether or not the costs that would be spent when applying the standards were "worth it," in terms of resulting social benefits. We seized on this logic in our efforts to force EPA to consider evidence of costs and benefits in setting "best" technology based standards under both the Water Act and the Air Act. The electric utility industry, through the Utility Water Act Group and the Utility Air Regulatory Group, have been in the forefront of those efforts. EPA has consistently fought us in resisting consideration of the total costs and social benefits associated with its rulemaking activities under the Clean Water Act. And it was only after explicit requirements were written into sections of the Clean Air Act by the 1977 Amendments to that Act, and after EPA had to comply with the Carter Administration's Executive Order 12044, that the Agency started to come around to our position in certain Clean Air Act rulemakings.

In our battles under the Clean Water Act, we won a resounding victory in the decision of the Court of Appeals for the Fourth Circuit in Appalachian Power v. Train, 545 F2d 1351 (1976). In that case, the Court reversed and remanded EPA's thermal effluent reduction regulations for powerplants because of EPA's failure to consider whether its actions would result in any benefit to society. The court said that absent such evidence it could not determine whether or not EPA had been

arbitrary and capricious in imposing billions of dollars on the consumers of electricity by its thermal backfit requirements. The court ordered EPA to formulate new standards based upon a reasonable effort to quantify, in practical terms, the benefits that would accrue from abatement of thermal discharges or at least to tell the court why it was impracticable to do so.

In the five years that have passed since Appalachian Power, EPA has done nothing to comply with this mandate of the court. When it become apparent tht EPA was dragging its feet, the Utility Water Act Group, the Edison Electric Institute and the National Rural Electric Cooperative Association commissioned a massive 18-month investigation by some of the nation's leading biologists of the then current status of available information on the ecological effects of thermal discharges from powerplants. This study updated and went far beyond a study which EPA had done earlier under section 104(t) of the Water Act. In July of 1978, a nine volume report on the results of this investigation was submitted to EPA to assist the Agency in determining the reasonableness of the relationship between ecological benefits and thermal backfit costs. A copy of the Executive Summary of that report is included as Exhibit 4 to my testimony and a copy of the full report has been filed with the Committee staff.

Despite our many efforts to have EPA consider the costs and benefits of its various rulemakings under the Clean Water Act, we have been largely unsuccessful. As recently as March 31 of this year, EPA steadfastly repeated its refusal to admit or to consider evidence whether its regulations establishing "best" technology based standards would result in any benefits to society to justify the extraordinary costs they imposed. In oral argument before the Court of Appeals for the Fourth Circuit on our petition to enforce a portion of the mandate in Appalachian Power, EPA argued it could not consider whether its actions benefited the environment because the statutory command

in section 304(b)(1)(B) for EPA to consider the "total cost of application of technology in relation to the effluent reduction benefits to be achieved from such application," only authorized consideration of how many pounds of pollution would be eliminated. In the Agency's view, it was not authorized to consider whether the removal of the pollutant at issue would benefit the aquatic ecosystem or society as a whole. EPA's argument was that selected legislative history contradicted the plain language of the Act and that the legislative history should prevail. Despite the fact that in the real world different pollutants and different treatment technologies can have a wide variety of effects on different receiving waterbodies and the aquatic life within them, and that sometimes these effects can be beneficial as well as detrimental, EPA argued that this legislative history showed that "Congress determined there would be benefits whenever effluent is reduced."

EPA has been successful in selling this extraordinary interpretation of "benefits" in other forums, such as the Court of Appeals for the District of Columbia. See Weyerhauser v. Costle, 590 F2d 1011 (D.C. Cir. 1978). If EPA's interpretation ultimately prevails, provisions will be included in Water Act permits which impose costs that produce little, if any, actual benefits and in some cases make the water worse rather than better. It is ironic that EPA was steadfastly adhering to this strained interpretation of the Clean Water Act six weeks after issuance of Executive Order 12291 which mandates consideration by Executive Branch agencies of the social costs and benefits of proposed major rules.

We have also argued with EPA, in vain I should add, that the recent Supreme Court decision in Nat'l Crushed Stone Assn v. EPA, ___ US ____ (1980), does not support the Agency's reading of "benefits" in section 304(b)(1)(B) of the Clean Water Act. The narrow holding of Crushed Stone is that EPA's regulations authorizing limited variances from

requirements that industry apply "best practicable" treatment technology by July 1977 were not invalid because they failed to include a "nonaffordability" exemption. To use the Court's words, EPA was not required to permit a variance to be granted "on the basis of the applicant's economic ability to meet the costs of implementing the uniform standard." (slip opinion at 3). Thus, in Crushed Stone the Supreme Court did not have before it the issue of what the statutory phrase "effluent reduction benefits" means.

There are, however, statements in the Supreme Court's Crushed Stone opinion that support, rather than undermine, a reading of "benefits" in the context of the Water Act much broader than that given the term by EPA. For example, the Court noted that Congress, in directing EPA to establish the 1977 limitations, referred the Administrator to

> industry and to existing practices to determine BPT. He was to categorize point sources, examine control practices in exemplary plants in each category, and after weighing benefits and costs and considering other factors specified by § 304, determine and define the best practicable technology. . . ." (slip opinion at 9-10).

It's noteworthy, in my view, that the Court said "after weighing benefits --" and not after weighing "effluent reductions," or after weighing "percent or pounds of pollutant removed." The Court also noted that, under section 304 of the Water Act, the Administrator is directed to consider the benefits of effluent reductions as compared to the costs of pollution control in determining BPT limitations. Thus, every BPT limitation represents a conclusion by the Administrator that the "costs imposed on the industry are worth the benefits in pollution reduction that will be gained by meeting those limits." (slip opinion at 11-12).

There is no gobbledygook in Crushed Stone about percentage or pounds of effluent removed -- no hint that the statutory term "benefits" is to be read out of the statute -- no hint that "benefits" means something opposite to or

different from its common sense meaning -- no hint that benefits means something other than benefits to the people of this country that result from pollution reduction. Yet EPA, as recently as the beginning of April, was citing Crushed Stone as evidence that it was precluded from considering costs and benefits in rulemakings and other actions taken pursuant to its authority under the Clean Water Act.

You may rightly ask how can we tell whether there will be benefits to people -- benefits to society -- from the effluent reductions under the Clean Water Act? And even if we can determine that there are benefits, how can we tell how much those benefits are worth? We have to start by determining what effects the effluents and their abatement to the level proposed are likely to have on the receiving water body. We must recognize that in the world of reality -- some discharges may be either beneficial or innocuous or harmful. To determine the net effect of the discharge, and the net result of its proposed abatement by a particular technology, we have to look at a number of variables. We have to start by asking such questions as what is the effluent? Is it a chemical substance? Or is it a physical characteristic, such as temperature? What aquatic life is, or is likely to be, present in this water body? What uses is society making, or likely to make, of that water body? The characteristics of the receiving water body are unavoidably factually relevant to the answer to these questions. Finally, we can ask -- though we will sometimes not be able to get the answer -- how much these benefits are worth in dollars. Even if we cannot clear this last hurdle, and the bill before the Subcommittee recognizes that we may not be able to, we are much more likely to reach a balanced, practical result by going as far as possible down this analytical route.

Of course EPA can be turned around on this particular interpretation of "benefits" in this particular statute in several ways. First, the Court of Appeals for the Fourth

Circuit can reaffirm its original Appalachian Power decision notwithstanding what has happened in other circuits. If EPA does not seek certiorari or the Supreme Court refuses to grant it, then EPA would at least have to consider social costs and benefits in rulemakings for the electric utility industry under the Clean Water Act. Or the new EPA Administrator could change the agency's mind and interpret the statute as we have urged.

Certainly that would be in keeping with the basic thrust of the new Executive Order, and it would also be in keeping with the provisions of S.1080 that write those requirements of the order into the Administrative Procedure Act. The short and simple command in both the Executive Order and subsection (c)(2)(D) of revised section 553 in your bill, as I read them, is that unless the enabling statute forbids the consideration of social costs and benefits, expressly or by necessary implication, the agency is to read the Act to require it to perform a cost-benefit analysis and reach a decision in keeping with cost-benefit and cost effectiveness principles.

The Executive Order and S.1080 thus anticipate and avoid in advance any future attempts to circumvent rigorous cost-benefit analysis by defining costs and benefits to mean something other than total social costs and benefits. The definitions in amended subsections 551 (17) and (18) spell out explicitly that Congress means total direct and indirect costs and total social benefits -- benefits to people. This should head off attempts to foist on agencies and courts bizarre interpretations of those words that are diametrically opposed to cost-benefit principles.

Just as it is possible, and indeed practicable, for EPA to identify environmental benefits or benefits to society and to balance them against costs (not always in absolute dollar terms) under the Clean Water Act, it is equally practicable for EPA to do the same thing under the Clean Air Act. In this regard, I would like to call to your attention to an interesting article by Professor Fred S. Singer of the

Univeristy of Virginia, entitled "Cost-Benefit Analysis in Environmental Decision Making," which appeared in the November 1977 issue of the Journal of College Science Teaching and which is appended to my testimony as Exhibit 5. Professor Singer points out how cost-benefit analysis should be used in setting emissions limitations for automobiles under the Clean Air Act. I would also like to bring to your attention efforts to apply cost-benefit and cost-effectiveness analyses in a recent EPA rulemaking that established standards of performance for new coal-fired generating plants under that Act.

On April 29, 1981, the Court of Appeals for the District of Columbia handed down a massive 253 page opinion in Sierra Club v. Costle, Nos. 79-1719 et al., which involved the appeal of those EPA standards. The court upheld EPA's regulations against an attack by Sierra Club and the Environmental Defense Fund on EPA's interpretation of the Act and EPA's rationale for setting a sulfur dioxide removal requirement for low sulfur coal. It also upheld the rule against an attack by the electric utility industry on the adequacy of evidence in the rulemaking file to support the asserted factual basis for EPA's sulfur dioxide removal standard on high sulfur coals. A copy of the D.C. Circuit's opinion is included as Exhibit 6 to my testimony.

The court's opinion and the record compiled during the rulemaking are of particular relevance to both the practicality and the reasonableness of quantifying and balancing social costs and benefits in Clean Air Act rulemakings. A critical issue that was addressed by the D.C. Circuit in its April 29 opinion involved EPA's obligations to examine the costs of its regulations. The court held that the statutory command in section 111 of the Clean Air Act to consider "costs" is to be broadly construed. Indeed, the court noted, referring to Portland Cement, that:

> "Essential to the Court's reasoning was the understanding that 'Section 111 of the Clean Air Act, properly construed, requires the

functional equivalent of a NEPA impact statement.' The court explained:

> The standard of the 'best system' is comprehensive, and we cannot imagine that Congress intended that 'best' could apply to a system which did more damage to water than it prevented to air.
>
> Largely as a result of Portland Cement, the 'cost' considerations of former Section 111 were specifically supplemented by Congress in the 1977 Amendments to cover considerations of non-air quality health and environmental impact and energy requirements. In so doing, Congress made no attempt to cut back on EPA's ability to apply the new terms broadly nor did Congress reduce the range of discretion that had been read previously into the 'cost' factor." (slip opinion at 50).

And the Court explicitly recognized that

> "If EPA was to do as Sierra Club suggests, and set the standard according to the single factor of technological achievability then EPA could not even begin to intelligently balance the stated purposes of the Act." (slip opinion at 51).

The Court's opinion is also of interest because it validated EPA's use of econometric models to estimate the capital and the increased annual revenue requirements of the electric utility industry associated with sulfur dioxide emission reductions under various alternative new source performance standards being considered by the Agency.

The D.C. Circuit was not asked to consider whether EPA could have, or should have, gone further in estimating the benefits to human health or welfare associated with various SO2 emission reduction alternatives. In this regard, it is interesting to note that the comments in the rulemaking record of the Regulatory Analysis Review Group on behalf of the Council on Wage and Price Stability, which were filed January 15, 1979, (Exhibit 7) contains the following criticism of EPA's methodology:

> "Although EPA had conducted an extremely careful analysis of the costs and emissions of alternate standards, the agency to date has presented no analysis of population exposure or health effects. Rational decisionmaking requires that benefits be compared with both costs and energy impacts. The RARG urges EPA to analyze exposure and health effects before reaching its final decision on the form of NSPS. (emphasis in original)

Bruce Ackerman and William Hassler in a book just published by the Yale University Press, Clean Coal/Dirty Air, agree with the RARG comments and make a strong plea for broad use of cost-benefit analysis in setting Clean Air Act standards. (Exhibit 8).

The importance of looking at the benefits associated with standards under the Clean Air Act, which generally impose billions of dollars in costs, is underscored by a study on Cost-Effectiveness and Cost-Benefit Analysis of Air Quality Regulations performed by Dr. Lewis Perl of National Economic Research Associates, Inc., on behalf of The Business Roundtable. I commend that study to you and have filed copies of it with the staff as Exhibit 9 to my testimony.

The NERA study uses liberal assumptions and in estimating health and non-health benefits from SO2 and sulfate reduction, based on a number of analyses done for the NAS and EPA. It uses costs and emissions data developed for the recent EPA new source performance rulemaking. It then looks at projected capital and operating costs imposed on the electric utility industry by the sulfur dioxide percentage removal requirement added by the 1977 Clean Air Act Amendments over and beyond compliance with an emissions limitation "cap" of 1.2 lbs/MMBtu on new coal-fired power plants established as a result of the 1970 Clean Air Act. Because of the long lead times involved in building coal-fired generating plants, the Study focuses on the year 1990. The results, as shown in the following table, are startling:

	Aggregate Costs (Billion Dollars) (1)	Emissions Reductions (Million Tons) (2)	Costs per Ton Removed (Dollars per Ton) (3)	Aggregate Benefits (Billion Dollars) (4)	Net Benefits (Billion Dollars) (6)
Regulations Promulgated Under 1970 Clean Air Act	3.09	20.38	152	5.06	1.97
Revisions Under 1977 Amendment	3.50	3.53	992	0.76	-2.74
Aggregate Effect of Current Regulations	6.59	23.91	276	5.81[1]	-0.78[1]

[1]Numbers do not sum due to rounding.

Source: Cost-Effectiveness and Cost-Benefit Analysis of Air Quality Regulations, National Economic Research Associates, Inc, at 7-23 (Nov., 1980).

The NERA report concludes that from a marginal cost-effectiveness standpoint, EPA's regulations leave much to be desired and that ultimately it is questionable whether their benefits exceed their costs:

> We have estimated the incremental cost of these revisions by 1990 to be approximately $3.5 billion annually, which in conjunction with the cost of the original legislation brings total costs to $6.6 billion. The effect of these revisions on emissions, however, is quite limited; they reduce sulfur oxide emission by about 3.5 million tons, or 20 percent in excess of the reduction achieved by the initial regulations. Consequently, on a per ton basis, the cost of the revisions--$1,000 per ton removed--is more than six times the cost of the initial regulations. In addition, while the costs per ton of these regulations rise dramatically by comparison with the initial regulation, benefits per ton fall somewhat to $215 per ton. The decline reflects the concentration of the emissions reductions achieved by the revisions in areas where population density and background concentration are low. The combination of higher costs and lower benefits results in an incremental benefit/cost ratio for the revisions of about one to five. This very unfavorable benefit/cost ratio for the revisions more than offsets the favorable balance of the initial regulations. The

overall benefits from combined regulations are about $5.8 billion which is $800 million less the aggregate costs.

You may be interested to know that EPA and the electric utility industry, even before the promulgation of the new Executive Order, had already taken steps to move toward the preparation of cost- benefit analyses in connection with now pending rulemakings to revise the ambient air quality standards. Several weeks ago, I wrote the acting EPA Administrator, Walter Barber, requesting that he or his successor have the EPA staff sit down with our experts and perhaps those in other agencies, including OMB, to share what each of us are doing in this area. This takes on special significance because of the new Executive Order.

I realize that this has been a rather extended and particularized discussion of problems which we have had with one agency - EPA. But it does have a broader lesson and that is that Executive Orders are not always sufficient to force reluctant agencies to examine the full impacts, including the costs and benefits of their actions. Sometimes legislation is necessary. It also demonstrates that where there's a will, there's a way. If Agencies, such as EPA, are directed to consider costs and benefits, they'll find a means of doing it. It is far from an impossible task.

2. Procedural Requirements that Recognize the Complex Nature of Modern Rulemakings

Turning to S.1080's revisions to the procedural requirements of section 553, I'd like to make a number of general observations. First, in my view, the changes to section 553 incorporated in the bill are legally sound. Second, they are clearly long overdue. Third, I do not believe they will impose unjustified burdens on the agencies. Indeed, a number of agencies have had to live with similar procedural requirements mandated by various organic statutes. And those requirements have not been unduly difficult to implement.

There are a number of specific changes that the bill would make in section 553 that I believe are particularly appropriate. For example, I believe the limitation included in proposed section 553 (b)(1)(C) on the exemption from rulemaking requirements for "interpretive rules" and "statements of general policy" is a sound one. The bill would require agencies to comply with the requirements of revised section 553 prior to promulgation of interpretive rules or general statements of policy that have general applicability and would have a substantial impact on the substantive rights or obligations of persons outside the agency. This provision is best described as an "antievasion clause" because it will prevent agencies from evading compliance with the new procedural requirements, as well as the regulatory analysis requirements contained in the bill. My firsthand experiences in representing the utility industry before an "independent agency" like the old Atomic Energy Commission, now the Nuclear Regulatory Commission, and my current experiences before an executive branch agency -- the Environmental Protection Agency -- show the practical need for such an antievasion requirement.

In the early 1970's the Atomic Energy Commission often resorted to "guidance documents" to lay down what were in effect de facto rules for specific technological or operating requirements for nuclear reactors. In actual practice, these unofficial rules were just as binding as substantive rules under the Atomic Energy Act promulgated following the procedural requirements of that Act, the APA and NEPA. And, the need for this "antievasion" clause is equally demonstrated by recent actions of the Environmental Protection Agency in using "guidance documents" to establish requirements for NPDES permittees without adhering to the rulemaking requirements of the APA or the Clean Water Act.

Use by agencies of "guidance documents" or general statements of policy can be prejudicial in two important ways. First, they are not promulgated with even the current

bare-bones APA requirements of notice and comment. The public that is directly affected and knowledgeable never has a chance to comment on them. As a result the agency tends to act without all the facts. Second, unlike a rule, which can be appealed to a court where a definitive answer to the generic policy question presented can usually be obtained speedily in a single forum, a "guidance document" or "policy statement" frequently can be appealed only when it has been applied in a particular case. Even then, a definitive court answer cannot necessarily be obtained. The decision is limited to that particular case and is potentially applicable to others in the class affected through precedent. Thus, uncertainty is prolonged, time is lost, and much greater resources are required in wrestling with generic issues in multiple case by case adjudications.

While I think the "antievasion" provision in the bill has a sound basis, I believe the language could be simplified. In my view it is unnecessary to employ the phrase "substantial impact on the substantive rights or obligations of persons outside the agency" in specifying those interpretive rules or general statements of policy which would not be exempt from section 553. The words "substantial impact" should be sufficient.

The "hybrid" rulemaking provisions in section 553 of the bill also deserve praise. My experiences over the past decade with EPA, NRC and other agencies have convinced me that the current rulemaking provisions of the APA have outlived their usefulness. In our increasingly complex world, that Act no longer provides sufficient guidance to agencies or to the public as to procedures which should be followed by administrative agencies in resolving major substantive problems. The old labels of "policymaking" and "adjudication" should no longer control what mix of procedural rights should be afforded in agency rulemakings. The distinction in organic statutes between rulemakings "on the record" and other rulemakings should no longer be determinative.

The old APA standards, with their disarming simplicity but welcomed predictability have gradually been undermined by two recent major trends in Federal regulation. The first is the increased use of rulemaking by adminstrative agencies to resolve complex, industry-wide issues. This major shift from the use of case-by-case adjudication to generic rulemaking as the principal means of enunciating substantial regulatory policy has resulted in the second major trend: judicial controversy over the adequacy of procedures followed by agencies in rulemakings and Congressional efforts to supplement the threadbare APA procedures piecemeal by supplemental requirements in substantive laws, such as in the 1977 Clean Air Act Amendments, the FTC Improvement Act of 1976, the Toxic Substances Control Act and others. Where that additional Congressional guidance has not been provided, confusion and uncertainty now exists, particularly where a rule rests on factual conclusions that are in substantial dispute. Some of the courts of appeal will often no longer uphold agency rules that are based upon inadequate rulemaking records limited solely to the opportunity to make written comments within a specified deadline, usually thirty days after the publication of formal notice.

In this context Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971), International Harvester Co. v. Ruckelshaus, 478 F.2d 615 (D.C. Cir. 1973), Portland Cement Ass'n. v. Ruckelshaus, 486 F.2d 375 (D.C. Cir. 1973), Mobil Oil Corp. v. FPC, 483 F.2d 1238 (D.C.Cir. 1973), United States v. Florida East Coast Railway, 410 U.S. 224 (1973) and Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519 (1978) demonstrate the confusing cross currents of what has been called the "hybrid" rulemaking procedures controversy. The procedures are called "hybrid" as shorthand for a mix of procedures between notice and comment only, at one extreme and full trial type procedures, at the other.

Vermont Yankee, while leaving the Overton Park line of cases intact, substantially undercut much of what had been fashioned by the Court of Appeals for the District of Columbia Circuit in International Harvester and its predecessor, American Airlines v. CAB. Clearly the authority of the appellate court to specify what additional "hybrid" procedures were to be followed in the remanded rulemaking was drastically reduced where Due Process was not involved. But the Supreme Court left open for another day what process might be due and thus there are lingering uncertainties over how much of the logic and rationale of the D.C. Circuit hybrid rulemaking cases survive. Absent further guidance from Congress, we will be in for another decade of procedural battles in the agencies and the courts. And the place for such guidance is in this bill, which addresses the subject generally, rather than statute by statute review which can consume Congress, the agencies, the courts and the regulated forever.

The time has come to straighten up this mess and face the fact that a major revolution has come about in federal regulation in the last decade. In the early days of regulation, the pattern was for the regulated to take the initiative in asking the agency for permission to do something or to do it in a certain way. This was the heart of the case-by-case approach--agency adjudication. The agency's role was essentially one of responding to requests of the regulated. These requests suggested to the agency, explicitly or implicitly, the methodology of decision and the evidentiary context.

The shift from "adjudication" to "rulemaking" has resulted in the agency, rather than the regulated, taking the initiative in formulation of the decisional methodology and the identification of the areas of factual inquiry. In this context, the regulated individual is faced with responding to agency formulation of policy that will govern actions long into the future, as distinguished from the agency's acting on

his request to do a specific act in the immediate future. In generic rulemaking, the role of the regulated is essentially the reverse of his position in a licensing or permitting adjudication. He must respond to the agency's initiative, not vice versa. In order to do this, he must be able to comment on the adequacy of the agency's proposed methodology and the relevance and accuracy of its proposed data. This means that he has to know what the agency is thinking and then have time to formulate his response.

This suggests that the burden of initial articulation should be squarely placed on the agency when it is dealing with generic issues. By similar logic, the burden should remain on the regulated when he seeks permission to do something unique or different--an exception from the generic rule. The agency's burden of initial articulation can be met through expanded notice requirements. Once this is accomplished, however, it is necessary to address the manner in which public participation in the rulemaking should proceed, particularly where complex facts are at issue.

Starting with the major premises that we want a written record and some sort of judicial review, it follows, as Judge Wilkey stated in the D.C. Circuit 's opinion in Mobil Oil Corp. v. FPC, that evidence for and against the rule should be considered and this, in turn, means:

> [T]he procedures must provide some mechanism for interested parties to introduce adverse evidence and criticize evidence introducced by others. This process of introduction and criticism helps assure that the factual basis of [the agency action] will be accurate and provides the reviewing court with a record from which it can determine if the agency has properly exercised its discretion.

This requires the selective use of some, but not necessarily all, of the procedures traditionally provided in a full-fledged adjudicatory proceeding. As Judge Wilkey continued:

> Compliance with this standard could conceivably be achieved in a number of ways. There must, however, be some mechanism whereby adverse parties can test, criticize and illuminate the flaws in the evidentiary basis being advanced regarding a particular point. The traditional method of doing this is cross-examination, but the Commission may find it appropriate to limit or even eliminate altogether oral cross-examination and rely upon written questions and responses. In proceedings involving numerous parties, the Commission might find it expedient to screen the written interrogatories in the manner approved in International Harvester Co. v. Ruckelshaus. It is also possible that the Commission could use evidence incorporated by reference from other proceedings. But whatever procedure is followed, it must assure that the Commission has a substantial evidentiary basis for its findings and it must provide the court with an adequte record on review.

S. 1080 will help to clear up much of the current uncertainty over when procedures beyond notice and comment are required in rulemakings. By building upon the experience of various agencys under similar provisions in a variety of organic statutes, the bill will make rulemaking easier rather than more difficult since it will remove endless bickerings, and appeals, about what procedures are appropriate for the development of an adequate record or what procedures are required by Due Process.

S.1080 recognizes the developments in administrative law discussed above in a number of ways: First, it expands the notice requirements of section 553 to include specification disclosure of:

> (A) the time, place and nature of the proceeding;
>
> (B) the statutory authority under which the rule is proposed;
>
> (C) the proposed provisions of the rule;
>
> (D) an express invitation for suggestion of alternatives "to accomplish the objectives of the rule that are more effective or less burdensome;"
>
> (E) a description of "the data methodology, reports, studies or other information upon which the agency plans to substantially rely;"

(F) a statement that the rulemaking file may be inspected and copies of the file obtained at a reasonable cost;

(G) "a determination of whether the proposed rule is or is not a major rule and a short statement of the basis therefor."

Where the rule is a "major rule," proposed section 553(c)(2) would also require a description of the rule's costs and benefits, alternatives to the rule, an explanation of how the benefits are likely to justify the costs, and an explanation of why the rule is likely to be better than the alternatives.

These notice requirements clearly meet the need to inform the regulated, as well as the general public, of the agency's proposed decisional methodology and the facts on which it intends to rely.

Second, amended subsection 553(d)(1) provides the public at least 60 days to submit written comments on a proposed regulation -- a period that generally will be adequate to permit considered response. Subsection 553 (d)(2) permits participants whose personal rights or economic interests are directly and adversely affected to obtain an extension of up to 30 additional days. These provisions are a reasonable compromise between the usual need for expedition and the requirements of fairness.

After providing for adequate notice and what will generally be a practical public comment, the bill, following the general pattern of section 307 of the Clean Air Act, mandates in new subsection 553(f)(1) that the agency set up a rulemaking file that is open to the public. This is coupled with a requirement in new subsection 553(e)(4) that in promulgating the final rules the agency may not rely on any written material that was not identified in the notice of proposed rulemaking unless

"(A) such material is placed in the rulemaking file; or

(B) notice was otherwise given that the agency intends to take notice of information appearing elsewhere, and interested persons were given an adequate

> opportunity to comment upon such material prior to the promulgation of the rule."

This is a sound requirement, but needs to be clarified. I believe that the second clause of section subsections 553(e)(4)(B) should apply to both subsections 553(e)(4)(A) and (B). In other words rulemaking participants should be given adequate opportunity to comment on material placed in the rulemaking file before the Agency can rely on it. Otherwise an agency could place vital material in the file the day before promulgation of a rule and undercut the whole intent of these provisions.

The bill also provides in new subsection 553(d)(3) that a participant in the rulemaking involving a major rule shall also have the right to make an oral presentation. This is the same right now afforded by subsection 307(d)(5)(ii) of the Clean Air Act in certain EPA rulemakings. But S.1080 goes beyond that Act to include a limited right of cross-examination. Specifically, the bill provides that

> "This opportunity for oral presentations shall include opportunity for cross-examination only (i) when requested by interested persons for the resolution of material issues of fact and (ii) when other available procedures for the resolution of such issues, including oral and written rebuttal, are determined to be inadequate."

This essentially clarifies and codifies the reasoning of Judge Leventhal in International Harvester and removes the cloud over it cast by Vermont Yankee.

I believe that this provision is both sound and desirable. See generally Barr, "Judicial Review of Informal Rulemaking: When May Something More Formal Be Required?" 27 Am. U.L. Rev. 781, 805-821 (1978). While it is clear that participants in rulemakings are not entitled, as a matter of right, to a full-blown adjudicatory hearing where there is no specific statutory requirement for a hearing "on the record," International Harvester indicated that a court may nevertheless require the use of certain quasi-adjudicative techniques, such as limited cross-examination, upon consideration of four major

factors: (1) the gravity of the agency action, (2) the factual complexity of the issues, (3) the specificity of the factual questions raised, and (4) the statutorily mandated time constraints within which the agency must operate.

In International Harvester, the court was faced with a highly technical factual context involving far-reaching and serious nationwide consequences. In deciding what procedures EPA was required to follow prior to the statutory deadline, the court balanced procedural Due Process considerations against the time constraints faced by the agency. The court explicitly approved the same basic procedure that we had suggested earlier to the AEC for use in certain of its rulemakings: namely, submission by participants to the hearing board of written questions to be screened by the board for relevance and materiality and propounded to the agency staff for its oral or written response. In deciding the appropriate procedures to be followed by the agency after the statutory deadline, the court necessarily gave greater weight to Due Process considerations and ordered that the petitioners be afforded a limited right of cross-examination, since the agency was no longer under its initial time constraints. The court appropriately noted that "The [agency] may properly confine cross-examination to the essentials, avoiding discursive or repetitive questioning." This limited right of cross-examination was granted only after petitioners had demonstrated that "critical question could not be satisfactorily pursued by procedures previously in effect." Judge Leventhal in International Harvester relied heavily upon the distinction enunciated in American Airlines v. CAB, 359 F.2d 624 (D.C. Cir. 1966) between the "need for cross-examination of live witnesses on a subject of critical importance which [cannot] be adequately ventilated under. . . general procedures" and the assertion of a broad right of cross- examination.

Thus, the right of cross-examination sanctioned by International Harvester was limited to those "critical" points

where other procedures are inadequate to "probe 'soft' and sensitive subjects and witnesses." But the court recognized that interested persons in factually complex rulemakings should have the opportunity, after issuance of a proposed rule by an agency, to make a demonstration of need for cross-examination or other procedures needed to elucidate the facts. The International Harvester case also notes, while not actually reversing on these grounds, that the inability of petitioners to challenge the methodology of EPA "had serious implications for the court given the role of judicial review."

I believe that this provision of S.1080 strikes a reasonable balance between the need for dispatch and the need for accurate information on key factual issues central to major rulemakings. It should be emphasized that only the rulemaking participant who has done his homework and exhausted every other remedy will be granted this limited right to cross-examination. By adopting these procedures, we will come nearer to assuring everyone that agency decisions with major impacts on this Nation's economic and social well-being are made rationally, fairly and quickly.

Finally, the bill also ensures that its limited provision for cross-examination will not be used as an easy method of obtaining judicial reversal of a rule. Proposed section 553(f)(3) states that:

> "No court shall hold unlawful or set aside an agency rule because of ... (ii) a failure by the agency to afford an opportunity for cross-examination pursuant to subsection (d)(3) of this section, unless the court finds, upon review of the whole rulemaking record, that such inadequacy or failure renders the rule unlawful under Section 706(a)(2)(A),(B), or (C) of this title."

While I am not sure this judicial review provision is actually necessary, and indeed it may add some degree of confusion, I recognize that there are those who wish greater insulation from judicial review for such procedural decisions by the agencies. I believe the bill strikes a satisfactory balance on this point.

3. The Bumpers Amendment and Venue

Since this portion of the bill will be the subject of hearings tomorrow before another subcommittee, I will not discuss it at length here. I would, however, like to state my strong support for the version of the amendment contained in your bill. Senator Bumpers' explanation of it in his remarks in the Congressional Record of April 30, 1981, is comprehensive and definitive. As I indicated in my opening remarks, I believe that these provisions in your bill are needed and needed now. So I urge you again to consider making them effective immediately upon enactment

I would, however, like to comment on one other facet of judicial review addressed in S.1080, the "race to the courthouse" provision. Having been in a number of these races, I believe the provision in the bill providing for selection of the final forum by lot is eminently fair. I note that it is also in keeping with recommendations of the Administrative Conference.

While the Subcommittee is addressing the general subject of which Circuit Court of Appeals is the appropriate forum for appeals from agency rules, I would like to urge you also to take a hard look at the desirability of continuing to permit at least some ten-odd statutes, including the Clean Air Act, to confer exclusive jurisdiction over appeals of their rules of general applicability to the Court of Appeals for the District of Columbia Circuit. The Federal Water Pollution Control Act is conspicuously absent from this list. That omission is deliberate. The 1977 amendments to that act afforded an opportunity for full-fledged debate of the pros and cons of limiting appellate jurisdiction to only one particular court of appeals. At that time Congress, by an almost two-to-one margin, rejected an amendment that would have provided for such exclusive jurisdiction in the District of Columbia Circuit. I submit to you that the arguments of the opponents of that amendment set forth in those debates make a

compelling case for the abolition of the remaining pockets of exclusive jurisdiction. At the time you are dealing generally with the two other facets of judicial review of agency rules addressed in the present bill, I urge you to include, either in this committee or on the floor, a provision superseding those special interest jurisdiction provisions that require those who seek justice though appeal of agency rules of general applicability to come to Washington to do so.

EXHIBIT Z

STATEMENT OF GEORGE C. FREEMAN, JR.,* RICHMOND, VA., PARTNER, HUNTON, WILLIAMS, GAY & GIBSON, BEFORE THE SECTION OF PUBLIC UTILITY LAW, AMERICAN BAR ASSOCIATION ANNUAL MEETING

"NEPA METHODOLOGY AND STANDARD-SETTING UNDER FWPCA OF 1972"

I. Introduction

EPA is presently involved in providing the guidelines for effluent limitations to be imposed on existing point sources and in setting standards of performance for new sources under the Federal Water Pollution Control Act of 1972. This standardsetting is the most important aspect of EPA's adminstration of the Act. They must be set carefully to avoid imposing enormous unnecessary social costs on society. I have been asked to express my views on how that should be done based in part on past experience in representing industry—others might say biased by that representation. First, I will discuss the applicable statutory provisions and indicate why I believe they require that these standards be set by following NEPA methodology—that is that a careful balancing of the resulting social and economic costs and benefits of the proposed standards must be considered. Second, I will address the problem posed by the unrealistic statutory deadlines and the need to provide for meaningful industry and public participation in formulating the standards.

In setting environmental standards we are making tradoffs, whether made consciously or unconsciously. We must recognize this fact of life and make conscious, rational choices among reasonable alternative environmental standards. Our fundamental objective ought to be the economic allocation of our limited resources for the optimal benefit of the human beings in our society. We have to consider not only our physical resources, such as land, air and water, but also our human resources.

In this context, it makes no sense to decree the elimination of pollution regardless of total social costs. Pollution control and environmental preservation compete with other human needs for our limited resources. Clean water and clear air are important, but only so far as they increase the physical and mental health and welfare of people—the people who breathe the air, drink the water, or enjoy the psychic and physical pleasures of a clear sky or a sparkling stream. There should be no "environmental imperatives" save one: that we manage man's relationship with his environment to derive from that relationship the most benefit for the most people.

The Federal Water Pollution Control Act of 1972 sets as a national goal the elimination of the discharge of all pollutants into our waters by 1985. The goal is framed in absolute terms. Consequently the Water Act may be misunderstood to adopt an environmental imperative. But a closer look makes it clear that Congress intended the goal only as a general objective or ideal.[1] It is not a command to the Environmental Protection Agency (EPA) to ignore the costs involved in achieving the effluent limitations or standards it establishes under the Act. On the contrary, careful review of the Act and its legislative history indicates that EPA must consider social and economic costs when setting effluent limitation guidelines and performance standards for new sources.

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*I wish to acknowledge the assistance of William A. Anderson, Esquire, in the preparation of this paper.

[1] See 117 Cong. Rec. 51746 (daily ed. Nov. 2, 1972) (colloquy between Senators Buckley and Eagleton).

II. Outline of the Act

The 1985 "no discharge" goal is to be achieved by means of a permit system based primarily upon effluent limitations rather than water quality considerations. The nature of the effluent limitations depends upon whether the point source is an existing or a new source—that is, whether "construction," begins before or after the publication of proposed standards of performance for new sources under § 306. It is important to note that "construction" is defined to include contracting for the work or any "preparation work". Existing sources will be subject to effluent limitations imposed in two phases under § 301; while new sources will be subject to separate categorical standards of performance under § 306.

The Phase One effluent limitations for existing point sources are to require "the best practicable control technology currently available" and must be achieved by July 1, 1977. In addition, during this Phase One EPA or the States may impose any more stringent limitations necessary to meet water quality standards.[2] The deadline for Phase Two for existing point sources is July 1, 1983. By that date "categories and classes" of such sources must meet effluent limitations based upon "the best available technology economically achievable for such category or class."[3] This is to be a "no discharge" limitation if the Administrator determines is is "technologically and economically achievable" for the particular category or class. Moreover, if the Phase Two effluent limitations are inadequate for the "attainment or maintenance" of desired water quality in a particular locality, EPA may impose more stringent limitations.[4]

But before it can do so, it must first hold a public hearing to determine "the relationship of the economic and social costs of achieving [the stricter limitations] . . . to the social and economic benefits to be obtained."[5] If anyone affected demonstrates that there is "no reasonable relationship" between the costs and the benefits, the proposed water-quality related effluent limitation cannot be adopted.[6] It is important to note that there is an overriding relief provision from the general Phase Two effluent limitations. It is available upon a showing that compliance is beyond the economic capability of an owner and that lesser controls will result in progress toward the elimination of pollution.[7]

Turning to new sources, which as you recall are those contracted for, or on which construction starts after publication of proposed standards, the statutory formula for the standards of performance applicable to them is worded differently from both the 1977 formula of "best practicable" and the 1983 formula of "best available," which apply to existing sources. New source standards are to reflect "the greatest degree of effluent reduction which the Administrator determines to be achievable through application of the "best available demonstrated control technology" or processes.[8]

In sum, the Act provides three separate formulae for effluent limitations: (1) the 1977 existing source formula of "best practicable control technology currently available," (2) the 1983 existing source formula of "best available technology economically achievable," and (3) the new source formula of "best available demonstrated control technology." They could hardly be more general.

The Act gives EPA the responsibility to translate these formulae into more precise guidelines for each major industry in terms of effluent limitations for existing sources and standards of performance for new sources. Since the statutory formulae are so general, as we have noted, EPA has broad discretion in making these determinations. But that discretion is not unlimited. A careful review of the Act as a whole and guidance from the recent D.C. Circuit Court decisions in *Portland Cement Ass'n* v. *Ruckelshaus*,[9] reconciling somewhat comparable provisions of the Clean Air Act with the National Environmental Policy Act (NEPA) shows that EPA must consider costs in making the determinations. And the costs that EPA must consider are more than the immediate direct costs that compliance would consider are more than the immediate direct costs that compliance would impose on an industry. They include all major social and economic costs. And the requirement that these costs be "considered" means more than "looked at" or "ascertained."

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[2] § 301(b)(1)(C).
[3] § 301(b)(2)(A).
[4] § 302(a).
[5] § 302(b)(1).
[6] § 302(b)(2).
[7] § 301(c).
[8] § 306(a).
[9] Slip Opinion No. 72-1073 (D.C. Cir. June 29, 1973).

It means that these social and economic costs must be taken into account and balanced with the social and economic benefits. Thus while § 511 of FWPCA frees EPA from the procedural formalities of the National Environmental Policy Act in making these determinations, it must follow the basic NEPA methodology. So that discretion given EPA in translating the general commands of the Act into specific orders to the industry—and to the states—is merely greater procedural flexibility. The Agency is still required to make the same kind of reasoned balancing of costs and benefits of proposed actions now required by NEPA of all other Federal agencies in making decisions that also have major impacts on the human environment.

The main purpose of the National Environmental Policy Act was to impose procedural disciplines on governmental decisions so that they would be made in full light if their overall effects on the human environment. These disciplines are essentially that:

First, the agency must consider the overall social costs and benefits of the proposed action; Second, the agency must also identify the reasonable alternatives to it and the social costs and benefits of these alternatives; Third, the agency must choose the course of action which offers the greatest net benefits to society; and Fourth, the agency must publicly articulate the basis for its decision, affording other governmental agencies and the public an opportunity for comment.

III. EPA tasks in implementing FWPCA

With that summary of NEPA methodology in mind, let us briefly examine the immediate tasks confronting EPA in implementing FWPCA and see how that NEPA methodology applies.

By October 18, 1973, EPA is required to publish regulations providing "guidelines" for existing source effluent limitations under both the "best practicable" and the "best available" formulae.[10] These regulations must do two things. First, they must identify the degree of effluent reduction attainable through application of the control technologies and measures called for by the Phase One and Phase Two formulae.[11] Second, the regulations must specify the "factors to be taken into account" in determining both the "best practicable control technology currently available" [12] and the "best available technology economically achievable" [13] for "classes and categories" of point sources. The costs of achieving the required effluent limitations and the non-water quality environmental impacts including energy requirements) must be among the factors taken into account in establishing both the Phase One and Phase Two effluent limitations. In addition to publishing guidelines for effluent limitations for existing sources, the Administrator is required to publish, within 90 days after October 18, 1973, proposed standards of performance for new sources. Again, the Act requires that the cost of achieving the effluent reduction and non-water quality environmental impacts be taken into account.[14] Thus, in developing guidelines for effluent standards, and in establishing new source standards of performance, EPA is required to take into account the costs and the non-water quality environmental impacts involved.

There are, however, notable differences in the language imposing the separate requirements to consider costs. Under these circumstances, we turn to the legislative history of the 1972 amendments and to the courts' interpretation of comparable language in the Clean Air Act. The legislative history is meager and its creation has been subject to severe criticism. But on the floor of the Senate, Senator Muskie attempted to read into these semantic differences substantive distinctions and thereby read out of the Act some of the requirements for a meaningful cost-benefit evaluation. If, however, we leave the Senate floor and seek guidance from the courts, we find that the Circuit Court of Appeals for the District of Columbia has interpreted comparable language in § 111 of the Clean Air Act to require that EPA must consider costs thoroughly enough to provide the "functional equivalent" of an Impact Statement.[15]

With respect to the guidelines for the Phase One effluent limitations, the Act requires that the factors relating to "best practicable" controls include the "consideration of the total cost of application of technology in relation to the effluent reduction benefits to be achieved from such application." [16] Senator Muskie agreed

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[10] § 304(b).
[11] § 304(b).
[12] § 304(b)(1)(B).
[13] § 304(b)(2)(B).
[14] § 306(b)(1)(B).
[15] *Portland Cement Ass'n* v. *Ruckelshaus*, Slip Opinion No. 72-1073 (D C. Cir. June 29, 1973) at 16.
[16] § 304(b)(1)(B).

that this language requires a "balancing test between total cost and effluent reduction benefits," but felt that the costs of control technology would be justified unless wholly out of proportion to the marginal level of effluent reduction.[17] We will return shortly to examine this position.

EPA guidelines for Phase Two effluent limitations under the "best available" technology formula are to "take into account . . . the cost of achieving such effluent reduction." [18] Senator Muskie expressed his belief that this language does not require a balancing test, but that the Administrator was to be guided by a test of "reasonableness."[19]

Finally in establishing Federal new source standards, the administrator of EPA is required to "take into consideration the cost of achieving such effluent reduction." [20] Senator Muskie felt that this "reasonable cost test" would be even more restrictive than the cost test of "best available."

Now, my difficulty with Senator Muskie's faith in the test of "reasonableness" of costs lies in his definition of "reasonable." As Justice Black often observed, it is too vague a standard because reasonable men can differ endlesly over what is "reasonable". For my part, I do not believe it is reasonable to impose social costs in excess of the social bnefits obtained. I do not believe it is reasonable to waste our limited resources achieving uniform effluent limitations regardless of the quality or characteristics of the water into which the effluents are discharged.

Furthermore, both the House and Senate Committee Reports and debate in those chambers on the respective versions of the bill clearly contemplated a more expansive consideration of costs than Senator Muskie felt the Conference Report requires.[21] The House Report expressed the sense that the Administrator would be expected to give "specific and detailed consideration" to the "cost and the economic, social and environmental impacts" of achieving the effluent reductions prescribed under the Act.[22]

It is unfortunate that the Conference Committee, acting under the time pressure of the coming Christmas adjournment, took the liberty to make major changes which could not be fully debated or thoughtfully considered by Congress. Senator Jackson objected to the Senate Conferees' presenting the Senate with the limited option of voting up or down the Conference Report. As Claude Barfield pointed out in his excellent article in the National Journal of December 8, 1972, the Conference Committee surprised many by its last minute adoption of major changes in the bill, including a provision exempting EPA from the NEPA Impact Statement Requirements. Many Congressmen apparently believed that under either the House or Senate version of the bill, EPA would be required to produce NEPA statements on proposed effluent limitations, guidelines and new source standards. This expectation gives some insight into Congressional anticipation of the cost-benefit analysis that would precede the Agency decision.

But, notwithstanding the specific exemption from the formal NEPA Impact Statement procedure and this sketchy legislative history, I believe that the Courts will follow the basic reasoning of the D.C. Circuit's construction of § 111 of the Clean Air Act in *Portland Cement Ass'n* and hold that EPA is obliged to produce the "substantial equivalent" of an impact statement and to allow opportunity for public comment.

In *Portland Cement,* the court construed the § 111 directive to EPA to establish for new sources a "standard of performance" which reflects the "best system of emission reduction" taking "into account the cost of achieving such reduction." The court concluded that these criteria require the Administrator to take into account counter-productive environmental effects and economic costs. Now, under the Water Act, EPA is directed to identify the "best practicable" and "best available" effluent limitations for existing sources and the "best available demonstrated" control measures for new sources. And in all three cases it is to take costs into account. I do not believe that this language can be read to require less of a cost-benefit analysis or less of a reasoned basis for decisions than that required by similar counterpart provisions of the Clean Air Act. Nor should it be.

We should learn somethng from our experience under the Clean Air Act and avoid repetition of the same mistakes in implementation of the 1972 Amendments to the Water Pollution Control Act. The Senate is just now undertaking a review of

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[17] 118 Cong. Rec. S16873 (daily ed., Oct. 4, 1972) (extended remarks of Senator Muskie).
[18] § 304(b)(2)(B).
[19] 118 Cong. Rec. S16873, supra.
[20] § 306(b)(1)(B).
[21] See H.R. Rep. No. 92-911, 92d Cong., 2d Sess. 107-108 (1972); S. Rep. No. 92-414, 92d Cong., 1st Sess. 48-50 (1971) and accompanying debate.
[22] House Report at 107, 111.

the Clean Air Act Standards.[23] A number of Senators, including Senators Hart and Buckley, have called for a cost-benefit study of the Clean Air Standards. We could learn a great deal from such a review. Many of the bitter experiences and much of the confusion resulting from litigation over the Clean Air Act Standards would have been avoided had EPA conducted a NEPA cost-benefit analysis and provided the public with the equivalent of a NEPA statement supporting the standards and indicating the extent to which alternatives were considered. But since EPA in setting the initial standards not only refused to follow the NEPA procedures but also NEPA methodology, relevant facts as to the net social costs of present air quality standards are just beginning to be brought to light through reports of agencies such as the Office of Science and Technology, the Office of Emergency Preparedness and the Department of Health, Education and Welfare. NEPA procedures would have brought these costs to the attention of EPA, the Congress and the public before standards were set and we had to start paying for them. Only now are we beginning to see that many of the results of the economic and social costs of our present air standards are unnecessary.

Our detailed review of FWPCA shows that it, like the Clean Air Act Amendments interpreted in *Portland Cement*, was not intended to preclude EPA consideration of the social costs in setting environmental standards and accordingly may be interpreted and administered so as to complement rather than conflict with NEPA. Hopefully EPA will initially apply NEPA cost-benefit methodology and provide a reasoned basis for its decisions on effluent limitations and standards under the Water Act. There is some evidence that EPA is moving in this direction. In a recent notice in the Federal Register EPA established procedures for preparation and issuance of explanations when it sets major standards, regulations or guidelines which prescribe national standards of environmental quality or national emission, effluent or performance standards or limitations. These guidelines were not promulgated as regulations, no period for comment on them was allowed, and they do not go into effect until December 31, 1973, well after the October 1973 date for establishing guidelines for effluent limitations.

One particularly unhappy aspect of the Water Act is the unrealistic deadlines Congress imposed on EPA action. The time limits are so short and the tasks facing EPA are so great that it will be diffcult for the Agency to provide for meaningful public participation or to assemble all relevant facts in fashioning the effluent limitations and standards of performance. The compilation of sufficient facts takes a long time. For example, the National Academy of Sciences has indicated that providing the Senate new, reliable data on the health effects of air pollution will take from twelve to fifteen months.[24] And once the facts are assembled, it takes more time to provide for adequate public review and comment. Yet the Act directs that public participation in the process be "provided for, encouraged, and assisted by the Administration."[25] The problem of how to provide for meaningful public involvement given absolute deadlines is common to administration of much of the recent environmental legislation. At a minimum, the Administrative Procedure Act requires that in rulemaking proceedings affected parties have the opportunity to submit written comments on the proposed rules. Section 306 of the FWPCA also requires the Administrator to afford interested persons an opportunity to submit written comments on proposed regulations governing new source standards of performance. But in order for this form of participation to be meaningful and for the procedures to fulfill the requirements of "basic considerations of fairness," the opportunity for comments should be adequate to permit thoughtful analysis and scrutiny of the basis for the decision. When an Agency makes available a mammoth technical report such as the recent Burns & Rowe work on control of thermal discharges from steam-electric plants and provide only 30 days for industry comment, there can be only minimal opportunity for review, much less comment. On the other hand, EPA cannot ignore the statutory deadlines. The conflicting statutory obligations to both meet the deadlines and provide for adequate public participation will require an imaginative and innovative approach to the administration of the act.

Recent decisions of the Court of Appeals for the District of Columbia Circuit in *International Harvester* v. *Ruckelshaus*,[26] the auto emissions case, and in *Portland*

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[23] J. Burby, "Environment Report: Challenges to Health Statistics Push Senate to Review Clean Air Act Implications," 5 Nat'l Journal Reports 1087 (July 28, 1973) 1087.

[24] *Id.* at 1090.

[25] § 101(e).

[26] Slip Opinion No. 72-1517 (D.C. Cir. Feb. 10, 1973).

Cement make clear that the courts can and will exercise the authority to remand to the agency for clarification regulations finalized without adequate opportunity for affected parties to comment on EPA methodology. In *International Harvester* the court noted that "unusual time restraints" do not "jettison the flexibility and capacity of reexamination that is rooted in the administrative process." [27] The process can accommodate a flexible approach which would comply with the deadlines but avoid initially casting the regulations in concrete. Some flexibility is accomplished by the opportunity to petition the agency for reconsideration or modification of its final regulations. But this is not enough when the regulations in question may impose enormous unnecessary costs pending reconsideration. Also, as Judge Leventhal recognized in *Portland Cement* [28] the opportunity to petition for reconsideration after an agency decision may not be the same as the opportunity for meaningful participation and comment during the decision-making process. Once the decision is made and the regulations are finalized the burden of demonstrating a need for reconsideration is much greater. What is needed is flexibility during the decison-making process.

EPA should follow the cue of the D.C. Circuit and administer the Water Act with a flexible and imaginative approach. Initial regulations can be framed in the alternative following the example of EPA's proposed regulations on non-deterioration of air quality. The regulations can also be administered with a latitude which permits the decision-making process to continue. Agency consideration need not be frozen as of the date of the statutory deadline. The process of refining the standards can then proceed as additional information is gathered and meaningful public participation is allowed. Where reconsideration is permitted, new evidence should not be weighed differenctly from evidence received earlier nor should other procedural requirements inhibit a completely objective decision.

This brings us back to where we started. Environmental standards have no importance for governmental policy apart from their relationships to people. In setting environmental standards, it is imperative that we do so consciously to encourage the use of all of our resources for the optimum benefit of all of our people. History, both ancient and recent, teaches that the good motives of the regulator alone are not enough. The very existence of law shows the necessity for discipline over governmental decisions. NEPA methodology provides that discipline for decisions affecting the human environment. EPA should apply that methodology in setting standards under the Federal Water Pollution Control Act of 1972.

EXHIBIT 7

EXECUTIVE OFFICE OF THE PRESIDENT,
COUNCIL ON WAGE AND PRICE STABILITY,
Washington, D.C., January 15, 1979.

Hon. DOUGLAS M. COSTLE,
Administrator, Environmental Protection Agency,
Washington, D.C.

DEAR MR. COSTLE: The Regulatory Analysis Review Group has completed its review concerning the proposed revisions to the new source performance standards for electric utility steam generating units. On September 29 and October 23, respectively, I submitted for the Environmental Protection Agency's public record a notice that this proposal had been selected for review and a list of the issues the Review Group expected to address. The outcome of this review is the enclosed report which I request be placed in the public record for this proceeding.

Sincerely,

BARRY P. BOSWORTH,
Director.

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[27] Slip Opinion at 25.
[28] Slip Opinion at 31-35.

Environmental Protection Agency's Proposal for the Revision of New Source Performance Standards for Electric Utility Steam Generating Units

Report of the

Regulatory Analysis Review Group

Submitted by the

Council on Wage and Price Stability 1/

January 15, 1979

1/ The Council on Wage and Price Stability is an organization created by the Council on Wage and Price Stability Act (P.L. 93-387) within the Executive Office of the President. The authority of the Council to intervene in governmental rulemaking and ratemaking proceedings, conferred by Section 3(a) of the Act, has been delegated to the Director of the Council (see 40 FR 52882).

On September 19, 1978, EPA proposed a revision to its new source performance standards (NSPS) for steam electric generating plants. The revision is required by the 1977 Amendments to the Clean Air Act.

On September 26, the Regulatory Analysis Review Group (RARG) decided to review the regulatory analysis which accompanies the EPA proposal. The regulatory analysis has been the product of extensive research. This review examines all such research and modelling analyses performed both before and during the public comment period. The thoroughness and depth of this work and of EPA's regulatory analysis have greatly facilitated the RARG review.

SUMMARY

-- The Clean Air Act Amendments of 1977 mandate both emission limits and a percentage reduction in emissions from the level that would result from the combustion of untreated fossil fuel. EPA has proposed a uniform emission reduction ("full control") requirement -- independent of the sulfur content of the coal. EPA has also outlined alternatives that would base percentage emission reduction on the sulfur content of the fuel ("sliding scales"), allowing less reduction for low sulfur coal.

-- The modelling results thus far:

- indicate that the sliding scales produce approximately 3-4% greater emissions than the full control alternatives at annualized cost savings of up to $800 million in 1990 (0.6% of total utility costs) and up to $1.5 billion in 1995 (0.9% of total utility costs).
- suggest that the low ceiling options are more cost-effective than the high ceiling cases (assuming scrubbers are equally reliable at 90% removal as at 85% removal).
- highlight the sharp increase in incremental costs of SO_2 removal in going from the sliding scale with the 0.55 lb. floor to full control.

-- Although EPA has conducted an extremely careful analysis of the costs and emissions of alternative standards, the agency to date has presented no analyses of population exposure or health effects. Rational decisionmaking requires that benefits be compared with both costs and energy impacts. <u>The RARG urges EPA to analyze exposure and health effects before reaching its final decision on the form of the NSPS</u>.

-- Other results of significance include:

- Utility oil consumption under full control is projected to be approximately 200,000 barrels/day higher than under the sliding scales.
- Regional distribution of coal production and future delivered prices of coal are projected to be largely insensitive to the choice of the performance standard.

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BACKGROUND

A major Congressional purpose in passing the Clean Air Act Amendments of 1977 was to correct perceived deficiencies in the NSPS that EPA, pursuant to the Clean Air Act of 1970, had promulgated in 1971. The 1971 NSPS for fossil fuel fired steam generating units (hereafter referred to as "Current NSPS") established maximum allowable emissions limitations, expressed as pounds of pollutant emissions per million Btu of heat input. Standards were set for the three primary pollutants of concern in generating electric power from fossil fuels: sulfur dioxide (SO_2), particulate matter, and nitrogen oxides. Since the deficiencies which led to the 1977 Amendments were primarily associated with the SO_2 standard, EPA's proposed revision of the SO_2 standard is the major issue in the rulemaking now underway.

Congress objected to the current NSPS for SO_2 primarily because it can be met by burning naturally low-sulfur coal without using any of the pre- or post-combustion cleanup technology necessary to meet the standard when burning intermediate and high-sulfur coal. Specifically, Congress concluded that among other effects, allowing use of untreated low sulfur coal (1) had adverse impacts on coal markets, (2) failed to force advances in the development of pollution control technology, and (3) would permit individual new sources to use up too much of the available air quality increment in areas where air quality meets or exceeds national

ambient standards. A more stringent standard would arguably help to maximize the potential for growth within the constraints of the prevention of significant deterioration (PSD) program established by the 1977 Amendments.

In Section 111 of the Clean Air Act as amended (the Act), Congress instructed EPA to remedy these defects by adding to the emission limitation provisions a requirement for the achievement of a percentage reduction in emissions (utilizing the best demonstrated technological systems for continuous reduction in the potential emissions). Flue gas desulfurization systems (FGD or "scrubbers") or their equivalent would have to be used even on the lowest sulfur coals.

The Conference Report states that the required percentage reduction in potential emissions should be set uniformly for all coal, regardless of the sulfur content, unless the Administrator of EPA finds that a non-uniform requirement would not undermine the basic purposes of the 1977 Amendments. Section 111 of the Act adds that in setting the NSPS, the Administrator must take cost, energy, and non-air-quality-related environmental impacts into account. In addition, the Conference Report states in relevant part that the Administrator "may, in his discretion, set a range of pollutant reduction that reflects varying fuel characteristics. Any departure from the uniform percentage reduction requirement,

however, must be accompanied by a finding that such a departure does not undermine the basic purposes of the House provision and other provisions of the Act, such as maximizing the use of locally available fuels."

Estimates of the impacts of the uniform percentage reduction ("full control") and sliding-scale options have been developed in a joint DOE/EPA study using a computer model of the coal and electric utility industries developed by ICF, Inc. The model was used to analyze a series of full control and sliding scale options. All of the options analyzed would require at least 90 percent SO_2 removal (averaged annually) on the highest sulfur coals.

The Alternatives

EPA proposed, without indicating a preference, two alternatives in its September Federal Register Notice. Additional options have been analyzed during the public comment period.

For ease of exposition, these alternatives can be defined along two dimensions. The first distinguishes the "full control" options that require roughly the same percentage removal on all coals from the "sliding scales" that permit less percentage removal on coals with lower sulfur content. The sliding scales are generally constructed by waiving the percentage sulfur removal requirement below specific emissions

levels ("floors"). This effectively reduces but does not eliminate percentage removal for the low sulfur coals. */.

The second dimension relates to the emissions "ceiling". For the "High Ceiling" cases, the emissions ceiling is set at 0.8 lbs./10^6 Btu (averaged annually). The "Low Ceiling" cases set the emissions ceiling at 0.55 lbs./10^6 Btu.

The above two dimensions are used in Table 1 to classify the relevant options. The September proposals are noted with an asterisk (*). Table 2 illustrates for the low ceiling cases how percentage removal and allowable emissions vary between full control and the 0.55 sliding scale.

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*/ Another variation of interest that was analyzed is an "East/West" option that would require full control in the West and a sliding-scale in the East. "West" was defined as all Mountain and Pacific coast States, "East" as everywhere else.

Table 1

Categorization of Options

	Percent Removal Requirement (averaged annually)	Emissions Ceiling (lbs./10^6 Btu)	Emissions Floor (lbs./10^6 Btu)
High Ceiling Cases			
Full Control*	90%	0.8	0
Sliding Scale (0.55)*	90%	0.8	0.55
Sliding Scale (0.77)	90%	0.8	0.77
Low Ceiling Cases			
Full Control	90%	0.55	0
Sliding Scale	90%	0.55	0.55

1/ The September proposals required 85% removal, averaged daily. This is equivalent to 90% removal, averaged annually -- a convention that was followed in the modelling of the later cases.

*/ Alternatives proposed in the September Federal Register Notice.

Table 2

Comparison of the Low Ceiling Options

Coal Sulfur Content As Mined	Annual Average Percent Reduction: Full Control	Annual Average Percent Reduction: Sliding Scale	Annual Average Allowable Emissions: Full Control	Annual Average Allowable Emissions: Sliding Scale
1.0 lb SO_2 per million BTU	90%	45%	.1 lbs.	.55 lbs.
2.0 lbs.	90%	72%	.2 lbs.	.55 lbs.
3.0 lbs.	90%	82%	.3 lbs.	.55 lbs.
4.0 lbs.	90%	86%	.4 lbs.	.55 lbs.
5.0 lbs.	90%	89%	.5 lbs.	.55 lbs.

ANALYTICAL BASIS

In the development of its regulatory analysis, EPA/DOE analyzed the impact of alternative standards through the use of the ICF coal and electric utilities model (CEUM). The model uses generally accepted cost data and linear programming techniques to minimize cost in meeting a specified generation load and is used to project emissions, energy and economic impacts of alternative standards in 1990 and 1995.

In assessing the results, the limitations of this type of model should be kept in mind. Particularly central to the model is the assumption that utilities operate as cost minimizers in all phases of their operation. While this is true in the dispatch and operation of generating plants, it may be less accurate in terms of decisions regarding new plant construction where factors such as perceived risks and public opinions may influence the decisions. In addition, there are a number of important factors external to the coal production and electricity generation equations in the model which may affect the projects. These include: the rate of growth of electricity consumption, the price of oil and gas, the cost of transportation, and available nuclear capacity. Several of the major assumptions to which the results are most sensitive are outlined in a later section.

The model itself contains several segments which together provide a detailed specification of coal production and electricity generation within the economy.

(1) The coal production portion of the model develops regional supply schedules, by coal type, using Bureau of Mines reserve data -- apportioned within regions to seam thickness and depth classes. Production functions represent surface and underground operations to provide an increasing cost of supply as more favorable deposits are depleted.

(2) A transportation model connects the supply regions with user locations to provide the delivered cost of coal from each of the coal supply regions.

(3) The electricity generation portion of the model specifies construction and operating costs for each of the major types of generation, including emission control costs. Beginning with a fixed mix of generation capacity in the base year, the model uses existing capacity and builds new capacity in order to meet a specified generation load at the lowest cost. In so doing, the model determines the low cost source of coal and the delivered price for each coal-fired plant.

On this basis, the model develops a projection of available capacity and load factors for each type of generation and, in turn, a projection for each region of annual generation costs, emission levels, oil and gas consumption, and regional coal production under the alternative standards.

The key assumptions for the model runs are outlined in Table 1. The increase in real oil and gas prices (1) used in developing the reported results corresponds closely with the current DOE mid-range forecast for oil and gas prices through the end of the century. The availability of nuclear capacity through 1995 (2) corresponds to current construction schedules. Transport costs (3) are assumed to rise in real terms by 22% through 1985 (with no real increase thereafter) due to expected increases in coal traffic volume that should accompany the increase in coal use. The transport cost assumptions assume no fundamental changes in the present regulatory climate.*/ The capital cost estimate for sludge removal (6) is designed to reflect probable costs of handling solid waste under regulations to be developed by EPA in accordance with the Resource Conservation and Recovery Act. Finally, it is assumed (7) that with 25% redundancy, scrubbers will be 100% reliable for both the high and low ceiling cases.

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*/ The course of coal transportation costs will be known with more precision once the ICC completes its current examination of the coal tariff structure for western railroads.

Key Model Assumptions

1.	Oil/Gas Prices ($/Bbl., 1978 Dollars)	1985: 15.20 1990: 19.45 1995: 24.80
2.	Nuclear Capacity	1985: 97 GW 1990: 167 GW 1995: 230 GW
3.	Transport Costs	22 percent real increase to 1985; no real increase after 1985
4.	Electricity Growth Rates	4.8 percent through 1985 4.0 percent after 1985
5.	Inflation Rate	5.5 percent
6.	Sludge Removal Capital Cost Equivalent	$20/KW
7.	Scrubber Reliability	Equal reliability for both the high and low ceiling cases.

MODEL RESULTS

Tables 3-6 summarize the dollar and total emissions impacts of the cases analyzed. Chart 1 illustrates the relationship between costs and total emissions for both the high and low ceiling cases for 1990 and 1995. Several key results emerge:

1. Relative to the current NSPS, the full control options reduce total emissions by approximately 7-9% in 1990 at an annualized cost of $2 billion (or 1½% of total utility costs). By the same standard of comparison, the sliding scales reduce total emissions by approximately 5-7% at annualized costs of roughly $1-1½ billion (approximately 1% of total utility costs). The 1995 estimates of emissions reduction and annualized costs are approximately double those for 1990.
2. Relative to the full control options, the sliding scales produce up to 2.7% greater emissions in 1990 at annualized cost savings of up to $800 million (0.6% of total utility costs) or up to $8 billion in present value. By 1995, these estimates rise to maxima of 3.5%, $1.5 billion/yr. (0.9% of total utility costs), and $15 billion in discounted present value, respectively.

3. Based on the scrubber reliability assumptions used in the modeling analysis, the Low Ceiling Options appear to be more cost-effective than the High Ceiling alternatives. The incremental cost of moving from the high to low ceiling is small (assuming that scrubbers perform with equal reliability in both the high and low ceiling cases, while the emission reduction is large).

4. As Chart 1 indicates, the slope of cost/emissions tradeoff generally flattens as the options approach full control, indicating rising incremental costs of SO_2 removal. In particular, the incremental cost of SO_2 removal sharply increases in both the High and Low Ceiling cases between the 0.55 sliding scale and full control. These costs should be compared to the estimated incremental cost per ton for SO_2 removal from other sources which are lower by at least 50%: $210 for non-ferrous smelters and $468 for petroleum refineries.

5. Table 6 illustrates the regional patterns of emissions. Relative to the 0.55 floor, emissions are higher in the East and lower in the rest of the country under full control. These regional effects will be analyzed in a more systematic way in a later section on benefits and exposure.

Table 3
Summary Table of Results

		CURRENT NSPS	FULL CONTROL OPTIONS		SLIDING SCALE OPTIONS				EAST/WEST OPTIONS	
			HIGH	LOW	.35	.55 HIGH	.55 LOW	.77	E/W HIGH	E/W LOW
SO_2 EMISSIONS (MILLIONS OF TONS)										
	1990	21.49	19.93	19.46	19.80	20.21	19.95	20.45	20.10	19.74
	1995	23.69	20.48	19.54	20.03	20.83	20.30	21.22	20.70	20.00
ANNUALIZED COST INCREASE (BILLIONS OF 1978 DOLLARS)										
	1990	-	1.93	2.05	1.83	1.39	1.46	1.14	1.60	1.67
	1995	-	4.11	4.34	4.01	3.11	3.28	2.57	1.87	3.72
PRESENT VALUE COST INCREASE (BILLIONS OF 1978 DOLLARS)										
	1990	-	21.9	23.1	20.6	15.8	16.5	12.9	18.2	18.9
	1995	-	41.4	43.6	40.1	31.15	33.0	25.8	36.9	37.3
UTILITY OIL AND GAS CONSUMPTION (MILLIONS OF BARRELS PER DAY)										
	1990	2.05	2.13	2.33	2.20	2.17	2.17	2.14	N/A	2.19
	1995	1.32	1.77	1.79	1.63	1.59	1.59	1.55	N/A	1.61
WESTERN COAL CONSUMED IN THE EAST (MILLIONS OF TONS)										
	1990	84	62	64	60	69	62	67	N/A	64
	1995	122	59	77	63	69	73	79	N/A	73

NOTE: "HIGH" INDICATES AN EMISSION CEILING OF .8 LBS. ANNUALLY
"LOW" INDICATES AN EMISSION CEILING OF .55 LBS. ANNUALLY
"EAST/WEST" INDICATES [illegible]

Table 4

Impacts of NSPS Options Relative to Current NSPS Standard

	High Ceiling			Low Ceiling	
	Full Control	.55 lb. Floor	.77 lb. Floor	Full Control	.55 lb. Limit
National SO_2 Emissions Decrease (million tons and percent)					
1990	1.56 (7.3%)	1.28 (6.0%)	1.04 (4.8%)	1.93 (9.0%)	1.54 (7.2%)
1995	3.21 (13.6%)	2.86 (12.1%)	2.47 (10.4%)	3.85 (16.3%)	3.66 (15.4%)
Annualized Cost Increase (Billions of '78 $ and percentage of total utility costs)					
1990	1.93 (1.43%)	1.39 (1.02%)	1.14 (0.83%)	2.01 (1.49%)	1.46 (1.08%)
1995	4.11 (2.36%)	3.11 (1.80%)	2.57 (1.49%)	4.33 (2.50%)	3.28 (1.90%)
Present Value Cost Increase (Billions of 78 $)					
1990	21.88	15.77	12.92	21.77	16.52
1995	41.40	31.15	25.77	43.40	32.97

Table 5

Incremental Sulfur Reduction Costs
Under Alternative NSPS Standards
($ per ton)

	1990		1995	
	High Ceiling	Low Ceiling	High Ceiling	Low Ceiling
A. Incremental Costs of Reducing Emissions Limit for Steam Electric				
from current NSPS to 0.77 Floor	1100	1100	1040	1040
from 0.77 Floor to 0.55 Floor	1040	640	1250	780
from 0.55 Floor to Full Control	1930	1510	3300	2000
B. Incremental Costs of Reducing Emissions Limit for Other Sources				
Non-Ferrous Smelters		210[a]		
Petroleum Refineries		468[b]		

a/ "Weak Gas Scrubbing Costs/Copper Reverberatory Furnaces," EPA/OAQPS August 1976.

b/ Proposed Standards of Performance for Petroleum Refining Sulfur Recovery Plants, EPA/OAQPS, September 1976.

Table 6

Regional SO_2 Emissions Decreases (Millions of Tons/Yr. and as a percentage of regional emissions) Under Sliding Scales Relative to Current NSPS

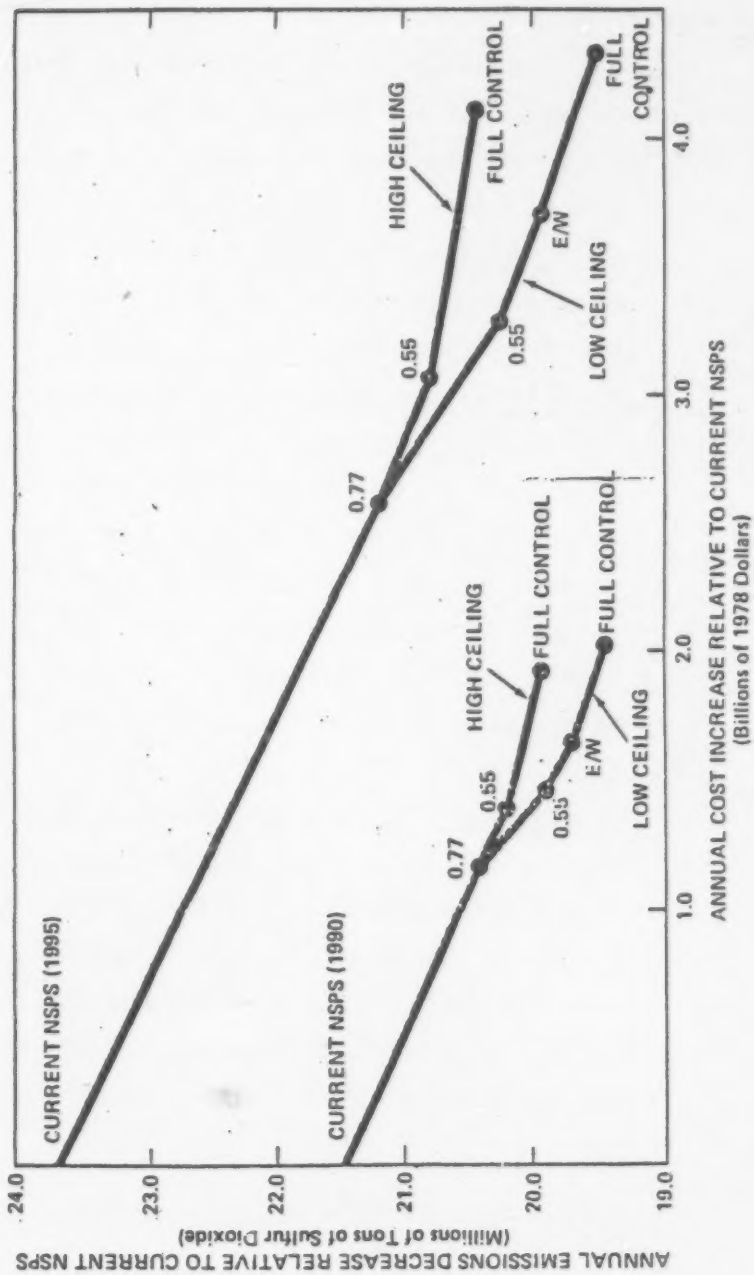
High Ceiling

	1990			1995		
	Full Control	.55 Floor	.77 Floor	Full Control	.55 Floor	.77 Floor
East	.36 (5.2%)	.46 (6.6%)	.39 (5.6%)	.78 (10.2%)	.96 (12.5%)	.80 (10.4%)
Central	.77 (5.8%)	.54 (4.1%)	.42 (3.2%)	1.65 (11.6%)	1.40 (9.8%)	1.26 (9.0%)
West	.43 (32.6%)	.28 (21.2%)	.23 (17.4%)	.78 (45.1%)	.50 (28.9%)	.43 (24.9%)
Total	1.56 (7.37)	1.28 (6.0%)	1.04 (4.9%)	3.21 (13.6%)	2.86 (12.1%)	2.47 (10.4%)

Low Ceiling

	1990		1995	
	Full Control	.55 Limit	Full Control	.55 Limit
East	.55 (7.9%)	.54 (7.8%)	1.17 (15.2%)	1.16 (15.1%)
Central	.97 (7.3%)	.72 (5.4%)	1.90 (13.3%)	1.74 (12.2%)
West	.43 (32.6%)	.29 (22.0%)	.78 (45%)	.50 (28.9%)
Total	1.93 (9.0%)	1.54 (7.2%)	3.85 (16.3%)	3.66 (15.4%)

CHART 1



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Key Uncertainties

The model results are sensitive, in varying degrees, to changes in a variety of assumptions. The following assumptions are most significant in influencing relative differences among alternative standards:

1) Scrubbing Costs. The cost estimates for full and partial control are probably the single most important set of assumptions in the NSPS analysis. The differential between full and partial scrubbing costs is more significant than the absolute level of costs, since it is the differential which determines the penetration of partial scrubbing when the option is available. A 25 percent change in this differential could cause a shift of up to 20 Mw between full and partial scrubbing, resulting in an annualized cost change of over $200 million in 1990.

2) Delivered Coal Costs. The delivered price of various coal types influences the amount of partial scrubbing which occurs. Two factors are important in determining these prices. Transportation costs have a major effect on the delivered cost of Western coal in the central states. The analysis has assumed a 22% rail rate increase by 1985. If

a higher price increase occurs, there will be less partial scrubbing which would reduce the cost savings associated with the "sliding scale." It is estimated that an additional 1% annual change in rail rates could result in a change in 1990 annualized cost of $100 million. The estimate of coal reserves has an impact on the coal price also. It has been suggested that Western reserves are higher than the estimates currently available would indicate. If the Western reserves are more plentiful, then the Western coal costs would be lower resulting in more partial control and a larger savings under the "sliding scale" options.

2) Oil Prices. The assumption regarding future oil prices influences both the decision to construct new coal plants and the dispatch of plants which are on-line at a given time. The oil price does not seem to have a major effect on the incremental oil consumption between the cases. However, high oil prices do result in more new coal plant construction, especially plants at the intermediate load level. It is these intermediate load plants where partial control makes the most sense, since

the scrubber costs are spread over lower electric generation. Therefore, high oil prices would tend to increase the value of a "sliding scale", while low oil prices would decrease that value.

4. Sludge Removal Costs. The base case assumes that under EPA's forthcoming solid waste regulations, the capital cost equivalent of sludge removal approximates $20/KW -- an estimate that EPA feels is high. Some electric utilities have expressed concern that sludge removal costs may prove to be considerably higher. Without expressing a view on how large these costs are likely to be, the RARG notes the high sensitivity of the total cost estimates to sludge removal cost assumptions. If, for example, sludge removal costs are twice as high as assumed (as they could easily be if away-from-site transportation is required on a large scale), the annualized cost difference between the full control and sliding scale alternatives could increase by at least another $100 million. Consideration of waste disposal in the siting of new plants, however, should help to control removal costs.

5. Scrubber Reliability. All of the model runs assume that 90% SO_2 removal from all coals is technologically feasible. DOE and some utilities have questioned whether scrubbers could achieve this performance level with a high degree of reliability. DOE has performed a sensitivity test of scrubber reliability under which individual scrubber modules are assumed to be 70% (rather than 90%) reliable. The results indicate that the overall cost difference between the full control and sliding scale options would be up to $100 million/year (1-3%) higher than in the base case.* This cost difference would shrink, of course, if scrubber reliability improved over time.

Interpretation of Model Results

The quality of the modelling results is directly related to the input assumptions and the reliability of these assumptions. As previously discussed, several assumptions could significantly affect the results and the differences between results. Uncertainty as to the absolute levels of costs and emissions that will prevail in 1990 and 1995 is much greater than uncertainty as to the differences between the options analyzed.

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* Radian, Inc. has prepared a study for EPA suggesting that reliability of typical currently-operating scrubber modules range between 70% and 90%.

The interregional shifts in both regional emissions and coal production across the alternatives are closely related. Under the "sliding scale" alternatives it becomes economic for some Eastern and Midwestern users to substitute low sulfur coal from Appalachia and the Northern Great Plains with "partial scrubbing" instead of using the higher sulfur Appalachian and Midwestern coals with "full scrubbing." Even though low sulfur coal is only "partially scrubbed" under the intermediate sliding scales, plant emissions may well be equal to or lower than those from full scrubbing on high sulfur coal.

At the same time, the projected increase in "high sulfur" coal production in 1990 and 1995 is largest under the "full scrubbing" alternative. As sources lose flexibility under the more stringent alternatives to choose a combination of sulfur content and level of emission reduction, cost minimizing behavior dictates the use of coals from the lowest cost source without regard to the emissions impact. In the Midwest, the most stringent alternative favors the use of locally available higher sulfur coal, raising both regional production and SO_2 emission rates. Of course, in those regions in which the use of low sulfur coal is economic under any of the alternative standards, increased levels of regional emissions are projected under the sliding scale alternatives, as reflected in the increase in projected annual emissions in the West.

A second factor affects the emissions results. Because the cost of constructing and operating new coal-fired generation capacity increases with the stringency of the standard, there is an economic incentive under the more stringent alternatives for electric utilities to utilize existing capacity more fully and construct new nuclear-powered facilities instead of constructing new coal-fired capacity. Since the SO_2 emissions factors are higher for existing capacity, the resulting substitution at least partially offsets any beneficial impact to be realized from the more stringent alternatives in the reduction of emissions from new plants.

The modelling results highlight a final important point. Although coal-fired plants are projected to account for more than 90% of SO_2 emissions in 1990, new plants in that year subject to the revised NSPS will account for less than 10 percent of the projected level of these emissions. Though this fraction will rise over time, the fact that emissions from new sources subject to a revised NSPS will represent a small fraction of total emissions from steam electric plants for a long time to come indicates the limited impact that a program of emission reduction aimed solely at these new sources can have. As a result, a modest program of increased control of existing sources is likely to result in a larger reduction in total SO_2 emissions from steam-electric plants at a lower cost.

Exposure and Benefits

Section 101(b)(1) of the Clean Air Act (as amended August 1977) sets forth as the twin purposes of Title I (of which the new source performance standards of Sec. 111 are a part) the protection and enhancement of the

> "...quality of the Nation's air resources so as to promote the public health and welfare and the production capacity of its population" (emphasis added).

This section discusses the effects of the various options on the "public health and welfare." Protection of the "production capacity of the population" will be discussed in a later section.

The benefits of any particular emissions standard depend on both the change in the ambient levels of sulfates and SO_2 and the number of people experiencing the change. The discussion thus far has focused on the differences in total nationwide emissions under the various alternatives. A single nationwide measure, however, cannot capture the benefit consequences of shifts in the regional composition of emissions.

Thus, additional information would assist decisionmakers in assessing and understanding more precisely health and other exposure related impacts of SO_2 emissions. One useful way of assessing at least the human health effects of the alternatives would be to construct an index of human exposure that relates the health effects of emissions on people for alternative NSPS

standards. Though the RARG lacks the capability to construct a sophisticated index that incorporates all relevant information such as nonlinear environmental effects of emissions (e.g., climatology; atmospheric chemistry; baseline air conditions), a simple population density exposure index is used below to illustrate the type of analysis that should be undertaken.

EPA has not conducted an analysis of this type. A rational decision on the form of the final standard, however, requires that benefits be compared with costs (and energy impacts). Because exposure is more directly linked to health impacts than measures of raw emissions, and because of the central importance of public health and welfare in the Act itself, the RARG urges EPA to consider exposure impacts on health when making its final decision.

While agreeing that a quantification of the health impacts is a worthy objective which would be useful in selecting a standard, EPA believes that the index presented here is not very helpful in this case. EPA argues that it is not a true exposure index because it assumes that emissions, background levels and population are uniformly distributed. In addition, the agency contends that the index does not reflect other air quality related impacts such as acid rain and visibility. For these reasons, EPA believes that the index does not provide

significant additional insight into likely differences in impacts from alternative standards. EPA does, however, support RARG's overall recommendation to develop and make greater use of exposure or other benefit indices in standard-setting.

1. Ambient SO_2

Primary and secondary ambient air quality standards for SO_2 and increments for the preservation of already clean air have been established under the provisions of the Act. Primary standards are designed to protect the public health; secondary standards the public welfare. PSD increments are intended to prevent clean areas from deteriorating to the ambient standards.

Currently, SO_2 ambient air quality is equal to or better than the primary standard in virtually all parts of the country. In 1976 primary standard violations were recorded only in about 2% of all counties.

Though such evidence alone questions the cost-effectiveness of major stress on a nationwide program to reduce SO_2 emissions from electric utilities, several additional issues are relevant in setting the appropriate form of the NSPS. First, the role of SO_2 emissions in the generation of atmospheric sulfates, which are generally held to present a more serious health problem than SO_2 itself, (and which are not currently regulated under the Clean Air Act), must be considered. Second, the

NSPS alternatives must be compared in terms of their exposure impacts. And finally, certain regional non-health related impacts (e.g., visibility in the West, acid rain in the East) may also be relevant.

2. Ambient Sulfates

Laboratory experiments and epidemiological studies provide strong evidence that sulfates are a more hazardous pollutant than SO_2. Most atmospheric sulfates are formed through transformation of SO_2 in the atmosphere, although the precise nature of the transformation process is not completely understood. SO_2 concentrations also tend to be more localized in the vicinity of the emission point than sulfates.

3. Construction of the Exposure Index

In a 1975 nationwide sample of planned coal fired power plants the average density of the counties in which plants were located was 121 persons per square mile. In contrast, the average American citizen lives in an area with a density of 3,579 persons per square mile.

Thus, a 1% decrease in nationwide SO_2 emissions from new steam electric plants would decrease overall population-weighted exposure to SO_2 by much less than 1%. A nationwide emissions figure, therefore, is a very poor estimator of human exposure since it does not reflect regional differences in the number of people likely to be living in the area affected by power plant emissions.

The index reported here weights SO_2 exposure by regional population densities. Because sulfates (as opposed to SO_2) can be transported several hundred miles, the regional weighting procedure approximates exposure to sulfates (which are more hazardous than SO_2), in particular. The same analysis was performed for population densities by county -- to approximate exposure to SO_2 (which compared to sulfates is highly localized). Because the results under the two weighting procedures were very similar, only the index with the regional weights is presented here.

4. Comparison of Alternatives by Indices of Exposure

Table 7 and Charts 2 and 3 compare exposure indices for alternative NSPS with annual cost increases relative to the current NSPS.

The decrease in the exposure indices ranges between 4.0 and 6.8% in 1990 (8.2-12.2% in 1995). The percentage decreases for the full control and the 0.55 sliding scale (under both the high and low ceilings) are almost identical. Weighted emissions for the 0.55 sliding scale actually fall below the emissions index under the high ceiling; the effect is reversed, but only slightly so, under the low ceiling.*

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*/ The exposure indices developed in this section correct for differences in population loadings across regions, but do not pick up the concentration of power plant siting at relatively less dense sites within each region. Actual exposure, which is influenced by both of these factors, will actually decrease by far less than the percentage decrease reported for these indices.

Table 7

Indices of Emissions Exposure
(Power Plants Only)

	High Ceiling			Low Ceiling	
	Full Control	.55 Floor	.77 Floor	Full Control	.55 Limit
Weighted Emissions (Regional Weights) -- % change from Current NSPS					
1990	-4.5	-4.5	-4.0	-6.8	-6.1
1995	-8.9	-9.4	-8.2	-12.2	-11.7
Raw Emissions -- % change from NSPS					
1990	-7.3	-6.0	-4.8	-9.0	-7.2
1995	-13.6	-12.1	-10.4	-16.3	-15.4

CHART 2
EMISSIONS EXPOSURE (HIGH CEILING)

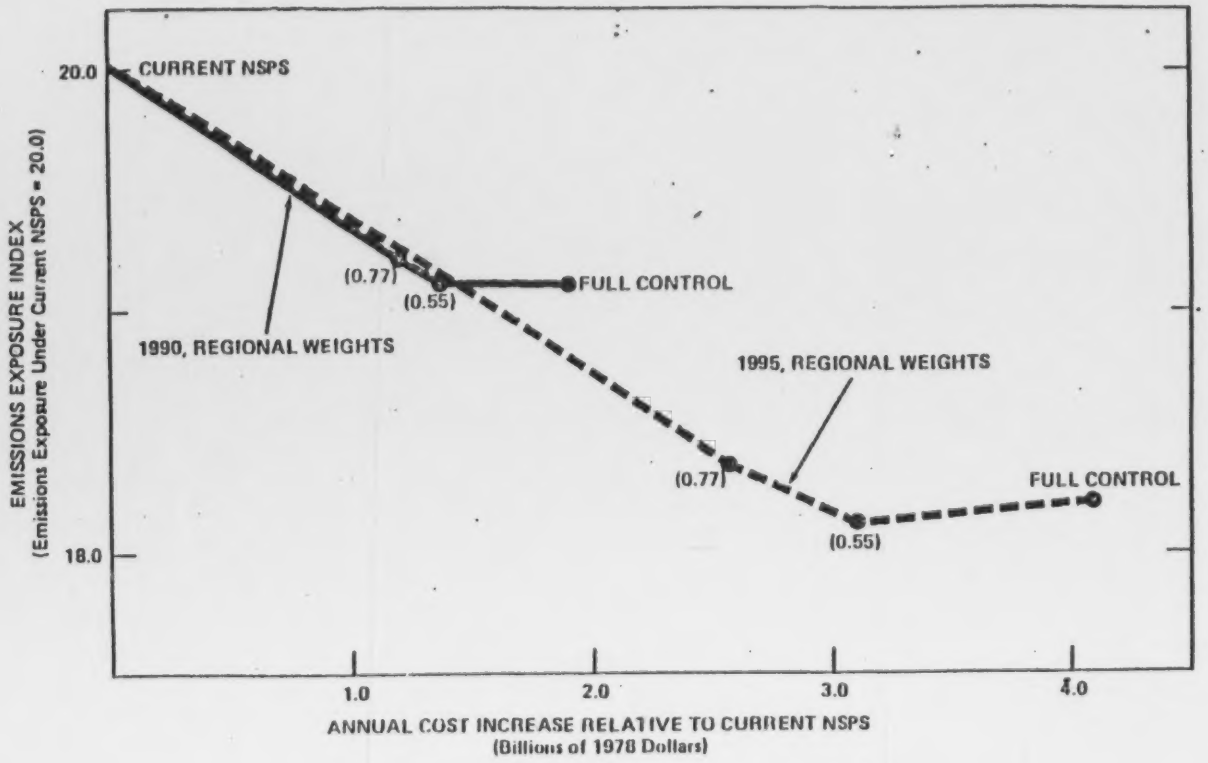
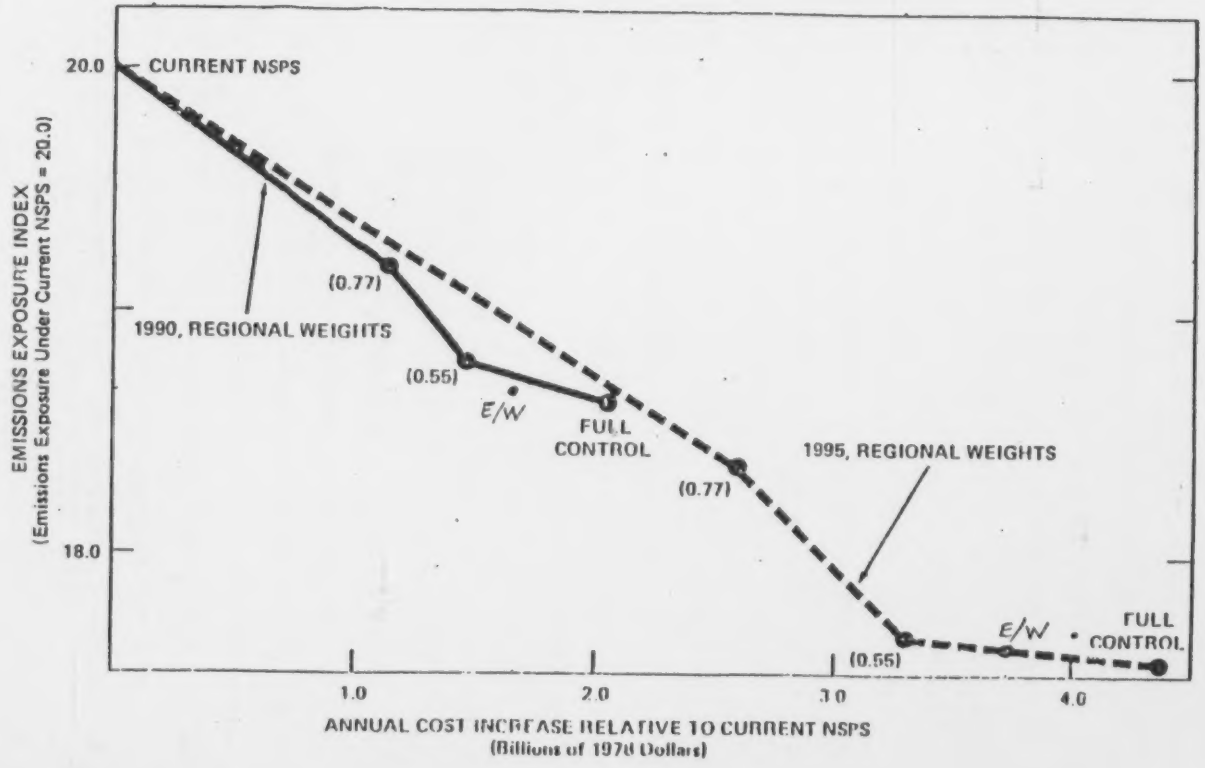


CHART 3
EMISSIONS EXPOSURE (LOW CEILING)



It is particularly instructive to compare the exposure/cost tradeoff illustrated in Chart 2 with the total emissions/cost relationship pictured in Chart 1 (discussed above). The comparison reveals the range of variation in the exposure index across alternatives to be far less than the range of variation in raw emissions.

Emission reductions can be translated into health impacts through application of the relevant dose response function. For the pollutants at hand, the dose response parameters have not been conclusively determined. Nevertheless, health impacts are much more likely to be related to exposure than to raw emissions. For the index used here, the 0.55 sliding scale produces much the same exposure as does full control.

Other Impacts

The results also highlight a number of other impacts, some of which are mentioned in the statement of purposes of the 1977 Amendments by the Conference Committee.

1. Emissions from New Power Plants

Nationally, total emissions would be up to 2.7% lower in 1990 under uniform control than under the sliding scale proposed by DOE. Emissions from new sources alone, however, would be about 50% lower than under the DOE alternative.

Most of the reduction in emissions from new sources under full control occurs in the West where low sulfur coals would

be only partially scrubbed under the sliding scales. To the degree that the requirements of the PSD program would take precedence, however, the difference between emissions (and costs) under full and partial control would be reduced. In addition, though new source emissions would be substantially lower than full control, the heavier utilization of existing facilities relative to the sliding scales would increase emissions from existing sources and therefore partially offset any of these gains. This effect declines, however, after 1995 as existing plants are retired.

2. Energy Impacts

In the base case, oil prices are assumed to rise to $24.80/Bbl (in 1978 dollars) by 1995. Given this price path, utility oil consumption under full control is projected to exceed consumption under the sliding scale alternatives by approximately 200,000 barrel/day. This arises because relative to the sliding scales, full control gives utilities economic incentives to retain existing oil-fired capacity for longer periods and to use it more intensively.

The adverse impact on oil imports under full control is about half the projected oil import savings from the Administration's proposed crude oil equalization tax. At 1990 base case oil price levels, the added oil imports would increase (decrease) the balance of payments deficit (surplus) by about $1.5 billion. These impacts are generally insensitive to other oil price assumptions.

3. Regional Coal Patterns

The DOE/EPA analysis projects the regional distribution of coal production to be largely insensitive to the choice of performance standard. Table 8 indicates that Midwestern coal production increases under any of the alternatives as compared to NSPS, while Eastern and Western production falls. In 1995, Western coal consumption East of the Mississippi is 10 million tons less under full control than under the .55 lb. floor. This is an 8% decrease in Western coal consumption in the East.

The production projections assume that utilities choose coal types solely on the basis of cost differentials. If, in addition, utilities fear that 90% sulfur removal from high sulfur coal will be more unreliable than for low sulfur coal (as some of their public comments appear to indicate) they will have strong incentives to purchase additional quantities of low sulfur coal. This would act to reduce any differences in coal production patterns between the full control and sliding scale options.

4. Effects on the PSD Program

These impacts are of concern principally in parts of the South where siting may affect growth opportunities and in the West where visibility and the effect of source emissions on Class I areas represent major considerations. In particular, the results indicate that the sliding scales would allow a

Table 8

Coal Production Impacts of Alternatives
Relative to Current NSPS (High Ceiling)
(Millions of Tons)

	1990			1995		
	Full Control	.55 Floor	.77 Floor	Full Control	.55 Floor	.77 Floor
Appalachia	-20 (-4.8%)	-13.5 (-3.2%)	-4 (-1.0%)	-26 (-5.4%)	-16 (-3.3%)	-2 (-0.4%)
Midwest	+42 (+12.1%)	+37 (+10.6%	+25 (+7.2%)	+83 (+20.5%	+56 (+13.8%)	+32 (+7.9%)
West	-27 (-4.1%)	-23 (-3.4%)	-20.5 (-3.0%)	-70 (-7.9%)	-54 (-6.1%)	-46 (-5.2%)
Total	-5	-4	-4	-14.0	-14	-16
Western Coal consumed in East	-21.5 (-25.6%)	-23.5 (28%)	-17 (-20.3%)	-63.5 (52%)	-53.5 (43.8%)	-43 (-35.4%)

new plant to use substantially more of the available air quality increment than the full control option, assuming that low sulfur coal would be used in either case. Where the relevant choice is between full control on high sulfur coal and partial control on low sulfur coal, however, increment consumption would be affected only to a minor extent.

The Best Available Control Technology (BACT) determination, however, which the States must make in permitting new sources, provides the opportunity to impose controls more stringent than those required by NSPS. Thus, if NSPS allows a larger portion of the increment to be consumed, this can be overridden by the States in making the BACT determination. EPA suggests, however, that the sliding scales would put greater strain on the BACT process and would result in more litigation and delay in power plant siting than would exist under full control. In addition, the agency is concerned that a less stringent NSPS will add to pressure to relax state implementation plans and to require less strict BACT. This is already occurring in some Western states.

In regions where low-sulfur coal would not be used if full control were required, the emission rates would be approximately the same under the full control and sliding scale alternatives. The sliding scales would not therefore allow new sources to use any more of the available increment than the full control option.

At locations where low sulfur coal would be burned under any NSPS option the sliding scales clearly would allow greater increment consumption than the full control option. The effect on potential for growth within PSD areas, however, is determined by the size of the opportunity cost associated with consuming additional increment in the vicinity of the power plant. If there is little or no opportunity cost, the positive contribution to growth potential resulting from low electricity rates would dominate, and therefore the sliding scale options would maximize potential for growth.

Finally, under any NSPS option that may be adopted, EPA will be required to provide methodology and models to test for potential violations of PSD increments (Class I or otherwise).

5. Incentives to Advance the State-of-the-Art of Pollution Control Technology

The full control and sliding scale options differ only in the level of control required for low- and intermediate-sulfur coals. They impose the same control requirements on high-sulfur coal. Clearly then, for high sulfur coals, all of the options have the same technology-forcing impact.

In addition, because the sliding scale options require less than 90% removal on low sulfur coals, they provide some flexibility in the development of new and more cost-effective technologies (e.g., new scrubbers, improved pre-treatment

processes, cleaner burning processes). If the facility falls short of achieving 90% reduction using a higher sulfur coal, the facility can shift to a lower sulfur coal and continue to operate under an emission floor. Given the substantial capital costs required in the construction of a steam-electric plant, the risk of falling short of the 90% reduction requirement under the full control option may prevent utilities from undertaking R&D programs which would otherwise advance the state-of-the-art.

6. Impact on the Availability of Low Sulfur Coal

Movements in delivered coal prices provide a good indication of coal availability. The DOE/EPA projections of delivered prices for low sulfur coal, in particular, to electric utilities are relatively insensitive, however, to the choice of the performance standard. Table 9 indicates that under the 0.55 sliding scale option, delivered prices are only slightly higher than under the full control option in the key industrial area comprising the Middle Atlantic and East North Central regions. The same degree of insensitivity to choice of the performance standard could be expected to hold also for prices paid by industrial users. In short, the results do not indicate an availability problem under any of the options analyzed.

Table 9

Delivered Prices to Electric Utilities, 1990
(Dollars/mmBtu)

	High Ceiling			Low Ceiling		
	0.77	0.55	Full Control	0.77	0.55	Full Control
Middle Atlantic						
Coal Type A 1/	1.88	1.82	1.79	1.88	1.79	1.79
Coal Type B 2/	1.50	1.49	1.45	1.50	1.47	1.45
East North Central						
Coal Type A 1/	1.70	1.68	1.67	1.70	1.67	1.67
Coal Type B 2/	1.49	1.47	1.45	1.49	1.46	1.46

1/ Coal with sulfur content ranging from 0.0 to 0.63 lbs. sulfur per million Btu.

2/ Coal with sulfur content ranging from 0.64 to 0.83 lbs. sulfur per million Btu.

Conclusion

EPA's analysis of alternative NSPS options represents one of the most thorough analytical efforts ever undertaken by a regulatory agency in preparation of a final rule. The RARG, therefore, had available to it high quality data and information in performing its review.

Based on the available modelling results, the full scrubbing option would impose greater incremental and total costs than the sliding scales. Though total nationwide emissions are lower under full control than under the sliding scales, the emissions differences (and therefore differences in health impacts and other benefits) shrink substantially when emissions are weighted by regional population densities. The RARG urges EPA to consider exposure and health information, either from the RARG or from more sophisticated modelling efforts used and developed at EPA, in reaching a final decision on the form of the NSPS.

3.

The EPA results, as set forth in Table 3 of the RARG Report, show that the present value cost increases (billions of 1978 dollars) above the current NSPS range from $12.9 billion to $23.1 billion through 1990 and $25.8 to $43.6 billion through 1995 for the various options analyzed by EPA. Thus, on the basis of the EPA results, the effect of this regulatory proposal would be to raise the overall level of prices in the economy by 0.6 percent to 1.1 percent by 1990 and by 1.2 percent to 2.1 percent by 1995. While these shifts in the price level may be offset by price effects of increased benefits (lower health costs, etc.) the size of the potential price impact from this one regulatory action could be considerable; and the results do not suggest that there will be significant differences among the analyzed options in benefits.

Addendum

The data necessary to compute the exposure indices for the East/West option (under the Low Ceiling) were obtained on the last day of the comment period. The results are illustrated in Chart 3 and indicate that despite apparent differences in cost, the exposure indices for East/West, the 0.55 sliding scale, and full control are very nearly the same.

EXECUTIVE OFFICE OF THE PRESIDENT,
COUNCIL ON ENVIRONMENTAL QUALITY,
Washington, D.C., January 12, 1979.

Memorandum for Bill Nordhaus.
From: Ed Strohbehn.
Subject: CEQ Comments on New Source Performance Standards (NSPS) RARG Reports.

We compliment the general quality of the New Source Performance Standard (NSPS) RARG Report. And we support RARG's effort to encourage the development of properly constructed human exposure indices that relate the health effects of pollutant emissions on people for alternative emission standards.

We have two general concerns with the final RARG report:

There is no discussion of the analytic accuracy of the modelling results, particularly about whether cost differences among alternative standards on the order of one percent are significant;

The report suggests that the simple exposure index developed for the report (which omits consideration of nonlinear effects of emissions and the effects of linkages between emissions and human receptors such as atmospheric chemistry) should play a more significant role in the current decisionmaking process than is warranted by the quality of the index.

A. ANALYTIC ACCURACY

The RARG Report finds that in 1990 the difference in the percentage of total utility costs that are allocated to meeting NSPS requirements between the full control option (1.4%) and the least expensive sliding scale option (.83%) is .66%; in 1995 the difference is 1.01% based upon full control option cost of 2.50% and least expensive sliding scale option costs of 1.4%. These analytic results are based on computer simulations covering 10- and 15-year projections.

There is no discussion in the report of the relative accuracy of the data being fed into the model or of the expected error range of the model. It seems quite likely that differences on the order of one percent or less are well within the expected error range of the model. Accordingly, results that differ by only one percent are essentially not different results.

A recent study titled "The Value of the Econometric Approach to Forecasting Our Energy Future" by Lawrence S. Mayer of Princeton University's Department of Statistics, Center for Environmental Studies, performed under a contract with the Office of Energy Programs, Department of Commerce, is instructive. Among his conclusions are:

"Econometric energy models are best treated as policy tools which generate order of magnitude estimates for our energy future . . ." (p. 18).

"(I)n most econometric energy models the variance of the forecasted value is usually ignored and thus no estimate of the uncertainty or unreliability of the forecasts is given. . . . It is our guess that if the total variation associated with the typical econometric forecast of an energy variable were known it would be so large as to render the forecast unusable from the policymaking and policy analysis perspective." (p. 21).

B. EXPOSURE INDEX

The exposure index used in the RARG Report is a simple linear index that compares SO_2 emissions with county populations and sulfate emissions with populations in the nine census regions. The RARG report exposure index omits consideration of:

The effects of linkages between emissions and human receptors, e.g. atmospheric chemistry; climatology; baseline air conditions;

All environmental consequences which are not linear with SO_2 emission levels e.g. threshold health effects;

Many regulatory and policy consequences of various SO_2 emission levels, e.g. consumption of prevention of significant deterioration (PSD) increments.

Although the RARG report acknowledges that its exposure index "is used to illustrate the type of analysis that should be undertaken," the report relies on the index for more than illustrative purposes. The extent to which the RARG report suggests that its exposure index is useful in this decisionmaking process is greater than we believe is warranted by the index itself due to the important factors omitted from the index.

Senator LAXALT. Mr. Ashford, you are next on the list that has been provided me.

STATEMENT OF NICHOLAS A. ASHFORD, ASSISTANT DIRECTOR, CENTER FOR POLICY ALTERNATIVES, MASSACHUSETTS INSTITUTE OF TECHNOLOGY

Mr. ASHFORD. Thank you. I am very pleased to be here today to offer comment on the Regulatory Reform Act. I share with you the conviction that regulatory agencies, like other governmental institutions, should be held accountable for interventions in the private sector. Senate bill 1080 represents, in my view, a refreshing departure from previous attempts to impose a strict cost-benefit test upon Government regulations. At the same time, it requires that the agencies perform some analyses of the expected impacts that their major actions might bring about.

In my remarks today, I will suggest some minor changes in the language of the bill that will not compromise the goal of improving agency decisionmaking but will avoid some likely though unintended, effects of it. The pertinent provisions can easily be redrafted.

I would also like to share with you some of the experience I have had in performing very complex regulatory impact analyses, and tell you where I think the problems are and where possible abuse that you do not intend may crop up.

First, with regard to some specific language in the bill, in section 2(16), we deal with the issue of what constitutes a major rule. Regulation may bring about both costs and benefits—both economic costs and economic benefits as well as health benefits.

The definition of a "major rule" ought to reflect the fact that major economic benefits might offset regulatory costs. New products might arise from banning a certain product. Thus, while one sector may lose economically, another sector may gain greatly.

Therefore, I would propose that the definition of a "major rule" be any rule that causes an annual net effect on the economy of $100 million in costs and benefits. We do not want to impose economic analyses on the agencies if it is clear that economic benefits would accrue from a regulation.

My second suggestion also pertains to the definition of a "major rule". Any regulation that internalizes the social costs of production may be expected to result in increased costs, prices, and wages. These increases should not be viewed as inflationary, provided there are increases in benefits as well. Therefore, in my view, a criterion for what constitutes a 'major rule' would be better expressed as a substantial increase in costs or prices without substantial increases in benefits, for a reasonably significant market. Again, I am not referring to gross costs, net costs.

In terms of the analysis that is required at the proposed rulemaking stage, the description of benefits, costs, and reasonable alternatives to a proposed rule must necessarily be recognized as preliminary in nature. I have sat through countless hearings on proposed rules. Much of the information upon which an Agency relies in promulgating a final rule is, in fact, developed in the hearing process and obtained by the agency subsequent to its initial analysis. The Regulatory Reform Act should encourage improved decisionmaking, but this goal will not be well served by

insisting that a complex analysis be performed prior to the time when the most important information may come to light. We do not want to have a complex analysis at the beginning and that is what concerns me about the present drafting.

Finally, requiring that a proposed rule be cost effective is a laudable guideline, to be sure. However, it should be recognized that the various enabling statutes require that certain groups of people, such as children, the aged, and the infirm, receive special attention. These special groups may be more expensive to protect than the ordinary citizen, yet we would not deny them protection simply because they are expensive to protect. Equity and fairness in regulation is as important as the most efficient use of economic resources. Senate bill 1080 should explicitly recognize equity goals as well as cost-effective requirements.

This bill, should be clear about encouraging the agency to rely not only on written material identified in the notice of proposed rulemaking, but also on material presented in the hearings and made part of the rulemaking record. This dynamic interaction is part of the administrative law process and it has worked very well, I think, in the past.

I believe that these proposed minor changes will help the agencies achieve the goal of better decisionmaking and accountability without bogging them down in needless delay and without restricting their exercise of the legitimate discretion given them by the Congress.

With your permission, I would like to submit for the record testimony I have previously delivered on the usefulness of cost-benefit analysis in decisions concerning health, safety, and the environment. I do not want to repeat it here, but in that testimony I have offered guidelines for performing these kinds of analyses in an even-handed and fair way.

I believe the difficulty in performing good analysis has not been fully appreciated. Economic analysis, technology assessment, and risk assessment—three different tasks—are really all part of the so-called regulatory impact analysis.

There are at least three disciplines involved: The science of risk assessment, the technology of knowing what an industry is capable of achieving, and the economic impact of the regulation.

I do not think, however, that economists have emerged as the new mandarins or that they have a monopoly on the thinking in this area. For that reason, I am very, very cautious about an OMB or any other single-discipline-dominated organization performing these reviews.

During the previous administration, I went on record as opposing a similar review by a group of scientists in the Office of Science and Technology Policy. Neither scientists, nor lawyers, nor economists have a monopoly on social judgment. I do not believe that is where the review ought to come from. I think it ought to stay with Congress in energized oversight activities. I am probably in the minority here, but I believe that the judicial review process has, in fact, worked very successfully.

I have personally looked at all of the court of appeals cases in the environmental law area—I teach environmental law at MIT—I

believe science is not the problem in the court cases. I believe there are other problems that have nothing to do with impact analyses.

These are difficult social policy questions, and, frankly, I think to tamper with the judicial review system by constructing a science court and OMB review behind the scenes is not very democratic. I worry about the tyranny of the experts. I believe in pluralism, and I think Congress does, too.

In order to carry out the intent of the proposed bill, the agencies must be given adequate resources for high-level personnel and research. Otherwise, they will be handicapped in carrying to this work.

If this bill goes through—and I support its main thrust—I would heartily recommend language in it that specifically authorizes funds for hiring personnel to do for specific analyses. These analyses cannot be done easily. They are difficult, and if they are going to be done well, they will to have to be well funded.

I will be glad to answer your questions during the question period. Thank you very much.

Senator LAXALT. Thank you very much, Mr. Ashford. Without objection, your prepared text will be included at this point.

[Mr. Ashford's prepared statement and his statement presented to the House of Representatives follow:]

PREPARED STATEMENT OF NICHOLAS A. ASHFORD, PH. D., J.D.

My name is Nicholas A. Ashford. I am Associate Professor of Technology and Policy and Assistant Director of the Center for Policy Alternatives at the Massachusetts Institute of Technology. I serve as a public member and Chairman of the National Advisory Committee on Occupational Safety and Health, which advises and monitors the actions of both the Department of Labor and the Department of Health and Human Services in carrying out the Occupational Safety and Health Act. I also serve on the Science Advisory Board of the Environmental Protection Agency, which serves a similar function for the agency in carrying out many pieces of legislation, including the Clean Air and Water Acts, pesticide legislation, and the new enacted Toxic Substances Control Act. Today, I am appearing in a personal capacity and not on behalf of MIT, the advisory committees, or the regulatory agencies.

I am particularly pleased to be here today to offer comment on the Regulatory Reform Act. I share with you the conviction that regulatory agencies, like other governmental institutions, should be held accountable for interventions in the private sector. S. 1080 represents a refreshing departure from previous attempts to impose a strict cost-benefit test upon government regulations. At the same time, it requires that the agencies perform some analyses of the expected impacts that their major actions might bring about.

Neither regulatory reform, nor inflation reduction, nor industrial growth is necessarily inconsistent with sound regulatory policy, but the critics of toxic substances control and safety regulation would have us believe that we must choose between our health and our jobs, or between environmental quality and a higher standard of living, or between product safety and competitiveness in international markets.

In my remarks today I will suggest some minor changes in the language of the bill that will not compromise the goal of improving agency decision making but will avoid some likely, though unintended, effects of it. The pertinent provisions can easily be redrafted.

SECTION 2(6)(A)(i)

A regulation may bring about both costs and benefits. The definition of a major rule ought to reflect the fact that economic benefits may offset regulatory costs. Therefore, I would propose that the definition of a major rule be any rule that causes an annual net effect on the economy of $100,000,000 in costs and benefits.

SECTION 2(16)(A)(ii)

Any regulation that internalizes the social costs of production may be expected to result in increases in costs, prices or wages. These increases should not be viewed as inflationary, provided there are increases in benefits as well. Therefore, a criterion for what constitutes a major rule would be better expressed as a substantial increase in costs or prices without substantial increases in benefits, for a reasonably significant market.

SECTION 3(C)(II) (A), (B) AND (C)

The description of benefits, costs, and reasonable alternatives to a proposed rule must necessarily be recognized as preliminary in nature. Much of the information upon which an agency relies in promulgating a final rule is developed in the hearing process and obtained by the agency subsequent to its initial analysis. The Regulatory Reform Act should encourage improved decision making, but this goal will not be well served by insisting that a complex analysis be performed prior to the time when the most important information may come to light.

SECTION 3(C)(III)(D)

Requiring that a proposed rule be cost-effective is a laudable guideline. However, it should be recognized that the various enabling statutes require that certain groups of people, such as children, the aged, or the infirmed, receive special attention. These special groups may be more expensive to protect that the average citizen, yet we would not deny them protection simply because of this fact. Equity and fairness in regulation is as important as the most efficient use of economic resources. The bill should explicitly recognize this fact.

SECTION 3(e)(4)

The bill should be clear about encouraging the agency to rely not only on written material identified in the notice of proposed rule-making but also on material presented in the hearings on the proposed rule or made part of the rule-making record.

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I believe that these proposed minor changes will help the agencies achieve the goals of better decision making and accountability without bogging down the agency in needless delay and without restricting the agencies' exercise of the discretion given them by Congress.

With your permission, I would like to submit for the record testimony I have previously delivered on "The Usefulness of Cost-Benefit Analysis in Decisions Concerning Health, Safety, and the Environment" in which guidelines are offered for performing analysis in an even-handed and fair way. I believe that the difficulty in performing good analysis is not fully appreciated. Econmic analysis, technology assessment, and risk assessment are complex tasks. In order to carry out the intent of the proposed bill, the agencies must be given adequate resources for high-level personnel and research budgets to carry out the necessary work. I would urge the Congress to provide for these resources in their appropriations. Otherwise, the requirement for analysis will merely be a barrier to agency action of any kind.

THE USEFULNESS OF COST-BENEFIT ANALYSIS IN DECISIONS CONCERNING HEALTH, SAFETY, AND THE ENVIRONMENT*

by
Nicholas A. Ashford, Ph.D.; J.D.

My name is Nicholas A. Ashford. I am Associate Professor of Technology and Policy and Assistant Director of the Center for Policy Alternatives at the Massachusetts Institute of Technology. I serve as a public member and chairman of the National Advisory Committee on Occupational Safety and Health, which advises and monitors the actions of both the Department of Labor and the Department of Health, Education, and Welfare in carrying out the Occupational Safety and Health Act. I also serve on the Science Advisory Board of the Environmental Protection Agency, which serves a similar function for that agency in carrying out many pieces of legislation including the Clean Air and Water Acts, pesticide legislation, and the newly enacted Toxic Substances Control Act. Today, I am appearing in a personal capacity and not on behalf of MIT or the advisory organizations.

I am particularly pleased to be here today to address the usefulness of cost-benefit analysis in decisions concerning health, safety, and the environment. In the last few years, I have carefully examined the records of the regulatory agencies concerned with these problems and have developed a detailed methodology for evaluating the impact of regulatory decisions. This research was performed under the sponsorship of the Council on Environmental Quality and the Environmental Protection Agency and will soon be published.

Although I have spent much time developing a comprehensive methodology for environmental decision-making, I have come today to offer words of caution about the potential misuse of analytical techniques in this area. My remarks will address both methodological flaws in the state-of-the-art of cost-benefit analysis and the possible political misuse of the results.

In my comments today, I would like to make the following six major points:

- There are important differences between economic regulation and environmental or safety regulation which must not be overlooked in constructing evaluative criteria.
- There are serious problems in calculating both the costs and benefits of proposed regulations, but the problems are different.

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*Based on Testimony presented before the Subcommittee on Oversight and Investigations and the Subcommittee on Consumer Protection and Finance of the Committee on Interstate and Foreign Commerce, U.S. House of Representatives, July 30, 1979.

- The comparison of costs and benefits within a cost-benefit framework is beset by serious difficulties. Cost-benefit analysis deceptively appears as a neutral methodology.

- It is crucial to distinguish between using cost-benefit analysis as a decision tool and using it as a decision rule to guide agency action or evaluate agency performance.

- It is important to realize that some regulatory reform efforts are undemocratic attempts to reorient legislative mandates in which the balance between environmental protection and economic burden has already been struck by the Congress.

- It is essential to recognize the hidden dangers in the present Congressional proposals to require regulatory impact analysis -- even those which are motivated by a pure heart.

Differences Between Economic Regulation and Regulation of Health, Safety, and the Environment

Economic regulation seeks to improve the working of the market for goods and services by encouraging competition, economic efficiency, and the diversity of available goods and services. Regulation addresses itself to this goal by attempting to ensure that the price mechanism operates efficiently to allocate goods and services properly among economic sectors and between producers and consumers. Economic regulation, properly carried out, thereby is expected to reduce the price of goods and services it seeks to regulate.

Health, safety, and environmental regulation attempts to ameliorate the adverse consequences of market activities, and technology in general, by reducing the attendant social costs. This regulation attempts to internalize the social costs of production by ensuring that the prices of goods and services reflect the true costs to the society. This means that prices in many cases can be expected to go up. Charles Schultze, in his now famous work with Alan Kneese entitled Pollution, Prices, and Public Policy, has cautioned us not to regard price rises which internalize social costs as inflationary.

The requirement that all price rises be viewed as inflationary by the early Presidential directive of Gerald Ford ignored the crucial distinction between economic and environmental regulation. With economic regulation, price rises may well be inflationary and an indication that the government efforts need to be examined. On the other hand, with environmental regulation, price rises may be a measure of success. We must be careful not to use inappropriate criteria as facile indices of regulatory activity. Environmental regulation is not really an instrument of economic policy; it is an instrument of social policy concerned with the distribution of effects that result from industrial activity. Therefore, environmental regulation cannot be judged by economic criteria alone.

Inflation is a phony issue in the national debate over environmental, health,and safety regulation. This is so not only because price rises are not necessarily inflationary, but also because actual estimates of the effects of regulation on the Consumer Price Index by several groups, including the President's Council on Wage and Price Stability and the President's Council on Environmental Quality, place the effect at well below 1% (0.2 - 0.75%) in a time of double-digit inflation.

Problems with Estimating the Costs of Regulation

It is often assumed that, because the costs of complying with regulation can be easily monetized, they are reliable estimates of true costs. Unfortunately, there are many instances in which the costs are not only uncertain, but also unreliable. Agencies depend to a large extent upon industry data to derive estimates of compliance costs. I do not believe I am being too unkind in questioning the bias of those estimates. The regulatory agencies themselves do not have access to the information concerning alternative products and processes, and resultant costs, which will enable them to come up with the best estimates of the costs of compliance. In addition, compliance cost estimates often fail to take three crucial issues into account: (1) economies of scale which inevitably arise in the demand-induced increase in the production of compliance technology; (2) the ability of a regulated industrial segment to learn over time to comply more cost-effectively -- what the management scientists call the learning curve; and (3) compliance costs based on present technological capabilities ignore the crucial role played by technological innovation, which yields benefits to both the regulated firm and to the public intended to be protected. Indeed, environmental regulation has been called "technology-forcing" by the courts and by analysts. The costs of compliance should not be based on static assumptions about the firm and its technology. Otherwise, a large overestimation will result.

An examination of the minimal effects of the OSHA vinyl chloride standard on the private sector is a striking example of how different the actual economic impacts can be, compared to ominous pre-regulation predictions, on the part of some analysts, of the economic demise of the industry.

Problems with Estimating the Health, Safety, and Environmental Benefits of Regulation

The state of the art in estimating the numbers of cancers or cases of chronic disease prevented -- or even injuries -- is in its infancy. Many health professionals believe that there is no safe exposure to a carcinogen as a result of the accepted view of the mechanisms of cancer causation. Safe levels for chronic toxins which are not carcinogens are often derived from either acute human exposures or high-dose animal experiments. The extrapolation techniques to lower doses for chronic human exposure are

imperfect. Therefore, benefit calculations for a particular maximum exposure level allowed under regulation are often not very meaningful. Theories of accident prediction do not serve us much better. We scarcely need reminding of the unanticipated risk which attended the incident at Three Mile Island, or the failure to predict design defects in the DC-10. Both costs and benefits of regulation are beset by uncertainty; however, the uncertainty attending the benefit calculations is usually very much larger.

It is fair to say that the state of the art in benefit estimation is much less developed than the methodologies for calculating compliance costs. In addition, there is no organized interest group which systematically pursues the benefit estimations in the same way in which the costs of compliance are researched. The tendency by analysts to rely on hard numbers places the estimation of benefits on insecure ground. Softer numbers are harder to believe.

Finally, it must be realized that the benefits derived from direct regulation are only a part of the benefits that can be derived from the regulatory process. Indirect, or leveraged, benefits are derived from the pressure of regulation to induce industry to deal preventively with unregulated hazards, to innovate, and to find ways to meet the public's need for a cleaner, healthier environment while maintaining industrial capacity. To put it another way, the positive side effects accompanying regulation need to be included in a complete assessment of the effectiveness of the regulatory agency's strategies. An example of leveraging is apparent in the observation that chemical companies are now routinely conducting short-term tests on new chemicals for possible carcinogenic activity, even though no general regulatory requirement exists.

Problems in Comparing Costs and Benefits Within a Cost-Benefit Framework

Even if we could accurately estimate the amount of disease or injury prevented by regulation and the compliance costs of doing so, the tasks of (1) monetizing health benefits which may accrue far into the future (or even monetizing current safety benefits from reducing accidents) and (2) comparing those benefits to current compliance costs are fraught with difficulty. A human life or a lost limb does not have an established unique market value. Payments to workers to assume risky occupations prior to their being injured (an ex ante valuation) are different than the values placed on the injured workers by their families after the injuries have occurred (an ex post valuation). Which valuation is correct? The work of Fischhoff, Kasperson, Kunreuther, and others amply demonstrates the inability of people and firms to consistently value and assume long-term, low probability risks. These characteristics of risk assumption leave a market valuation of the benefits of regulation in great doubt.

There is another crucial problem with regard to valuation. The person who values or is willing to assume a risk, assumes that risk in a way which reflects the bundle of economic goods he/she comes into the marketplace with. It is naive to talk about workers who sell their wages off for their health as if that were something that were derived from first principles. A worker sells his wage off for his/her health cheaply if he/she does not have a large bundle of economic goods. On the supply side, the selling price is determined by the whole set of economic goods the worker has. If you think it is unfair for poor people to sell their wages off more cheaply than wealthy people, then you do not like the working of the market. If you do not care, then you are willing to allow the working of that market mechanism. It comes down to a fundamental issue of the distribution of wealth. You cannot avoid that issue. Economic efficiency reflects the maintenance of the current economic arrangements, and decisions made by the market are themselves value-laden. You cannot be indifferent to the distribution of wealth, and the fact is that the distribution of wealth determines at what price risk is assumed. To ignore equity is to consider equity irrelevant. Deciding what a life is worth by market criteria is value-laden itself.

Some analysts today still insist on expressing health, safety, and environmental benefits in monetary terms, although this is changing. The successor index to evaluating a change of net social welfare in dollars is the benefit-to-cost ratio, e.g., the number of fatalities prevented per dollar expended. The problem with this index is that it can never really be applied. The benefits of regulation include deaths prevented, diseases and injuries prevented, pain and suffering prevented, hospital costs prevented, etc. The benefit side of the equation itself is composed of many elements of different character. How do we decide how many serious injuries are equivalent to one death?

Other problems exist in comparing costs and benefits which raise doubts as to the usefulness of using traditional cost-benefit analysis as a decision-making tool in the regulatory area. Already discussed was the problem of correctly estimating compliance costs, the problem of monetizing the benefits and the problems of dealing with these kinds of valuations in the face of great uncertainty. An additional problem is discounting, over time, both the benefits and the costs. There are three different approaches to the discounting of non-monetizable benefits, such as the reduction of adverse health effects:

- o discount the health benefits at the same discount rate used in the monetary benefit or cost calculations;
- o discount the health benefits but at a lower discount rate than that used in the monetary benefit or cost calculations;
- o do not discount health benefits at all.

The first approach would apply the traditional present-discounted-value criterion to non-market items. The approach has the advantage of allowing parallel treatment of all costs and benefits. Any positive discount rate would value one year of health impairment saved in an early year higher than one year of impairment saved in later years. For example, if the discount rate is 7%, then one year of health impairment prevented today would be equivalent to 1.4 person-years of health impairment prevented in five years, or two person-years of health impairment prevented in 10 years, or 7.7 person-years of health impairment prevented in 30 years.

The second approach would allow for discounting of non-monetizable benefits, but at a lower discount rate. This approach can be defended in terms of a belief that certain amenities, such as health, become more valuable relative to other goods in this society as time passes and the standard of living improves. The following relationship would separate the factors affecting the present value of health impairment prevented in year n:

$$\frac{x(1+\varepsilon)^n}{(1+r)^n}$$

where:

x = metric, expressed in person-years of health impairment prevented in any one year

ε = fractional annual increase in value of health impairment prevented

r = annual discount rate

For small values of r and ε, this is equivalent to:

$$\frac{x}{(1+r-\varepsilon)^n}$$

Thus, the "effective" discount rate $(r-\varepsilon)$ will be less than the discount rate used for monetary benefit or cost calculations. (Note, that in principle if the society's valuation of health benefits increases rapidly, the effective discount rate for benefits could even be negative!)

The third approach would not discount non-monetizable benefits but simply leave them expressed in natural units with a note as to the time-distribution of their realization. The desirability of this approach can be reached from two considerations.

First, there is a question of the appropriateness of applying a discount rate to consequences of an action which has significant beneficial effects on future generations.* Clearly, any positive rate of discount will discrimi-

*A complete adoption of this argument might not allow for discounting of costs where the benefits are received currently and the costs are incurred in later generations.

nate in favor of choices that involve adverse impacts on earlier generations, but not on later ones. The benefits of environmental, health, and safety regulation often extend beyond the current generation who bears the monetary prevention costs. If the decision-maker is concerned with intergenerational equity then an argument could be made that the appropriate social rate of discount is zero (not including inflation).

Secondly, the "benefit" of removing a person now from risk of future damage, which is irreversible, inevitable, and non-arrestable once the risk exposure occurs, can be considered to be a present benefit --and quantified, for example, as the benefit of removing those presently at risk from future harm.

The manner in which the discounting problem is handled can alter the comparison of benefits and costs and render the use of a benefit-to-cost ratio as a decision rule highly suspect, even when used to decide between alternative regulatory strategies on health investments.

The present value of the net effects of any given regulation, or the rank ordering of the effects of alternative regulatory regimes, can change markedly depending upon the discount rate used in the cost-benefit calculation. For example, using a discount rate of zero for future health benefits (i.e., not discounting future health benefits) may make a regulatory choice tenable while using a discount rate for health benefits comparable to the discount rate for capital expenditures may show a proposal to be undesirable.* Further, since the consequences of many regulatory actions may be to impose compliance costs today in order to bring about health benefits far into the future, the choice of a discount rate can make one regulatory option look better or worse than an alternative, depending on the magnitude of the discount rate. Since there is no consensus on what that rate should be, the policymaker's preferences for a particular regulatory option can, but should not, be hidden in the choice of a discount rate.

An even more serious limitation of a simple comparison of costs and benefits is that it ignores the equity implications of the fact that the costs and benefits are often borne by different groups of people and firms. It should be noted that the aggregation of costs and benefits without consideration of equity is value-laden itself. It is a decision to ignore equity.

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*The problem is exacerbated when a market/institutionalized "price" exists for the health benefit. For example, an asbestos-using firm may either install a ventilation system today to get rid of asbestos or instead pay compensation costs thirty years from now when a worker develops cancer. What should the rational owner of a firm do? The owner can have the use of his money for thirty years, send a worker's children to school, bury him in a gold coffin, and still be ahead financially. Will traditional economic analysis provide a correct answer?

Finally, the comparisons of costs and benefits of a regulation must in turn be compared against what might have happened in the absence of that regulation. For example, if we were to estimate the benefits and costs of adopting a safety standard for a consumer product, we must ask whether the producer industry might not have made the product somewhat safer in the absence of regulation in response to increasing products liability suits in the courts. In this example, it would not be correct to attribute to regulation either all of the costs expended or all of the benefits conferred. What alternative scenario the evaluator chooses can, of course, make the actual regulation look better or worse. Unless we have an alternative universe that we can even begin to define for analytical purposes, evaluations of the effects of a regulation are on very shaky ground. These inherent limitations of cost-benefit analysis render these techniques highly suspect for social decision-making.

The Limitations of Cost-Benefit Analysis as a Decision Tool

What emerges from an examination of federal health, safety, and environmental regulations is that a rational decision-making process does, in fact, exist. The regulatory mandates require application of considerably more sophisticated and appropriate decision rules than those which have been naively suggested as regulatory reforms by some critics. The factors which enter in are: (1) how serious the hazard is, (2) who are the recipients of the costs and benefits, (3) what costs of regulation are imposed on the beneficiaries of the regulation, and (4) how informed and voluntary is risk assumption.

In general, it appears that agencies do consider the distributional and social cost consequences of regulation. For example, when given the choice between two alternatives of either increasing the life expectancy of 10,000 workers/consumers by one year or increasing the longevity of 1,000 workers/consumers by eight years, an agency may choose to avoid the more tragic event. It may opt for the latter alternative although the number of man-years saved is not maximized. When given the choice between two alternatives of either protecting 10,000 workers/consumers from a .1% chance of death or of protecting 100 workers/consumers from a 8% chance of death, an agency may similarly choose the second course even though health benefits are not maximized. In making these choices, the decision maker considers the concern and loss that society feels when the more tragic events occur. Because health benefits are not maximized or because no unique decision rule exists does not mean these decisions are irrational.

Similarly, there is a requirement on the part of an agency concerned with health and safety for minimizing equity regret. Whenever a person is not

fully compensated for a loss, a question of equity arises. Also, when a person is forced to incur losses that others are not selected to incur, this too is unfair. An agency may seek to avoid unfairness. For example, it is conceivable that asbestos might be banned from use as a brake lining with the result that more lives are lost on the highway (due to less braking effectivensss) than are saved in asbestos manufacturing operations. The asbestos workers are, however, a non-voluntary, selected group exposed to harm that others in society are not forced to incur. Community ties and family relations may restrict the workers' job mobility for generations and prevent them from leaving the group. Further, if asbestos workers are already a disadvantaged group in society, an additional equity consideration is brought to bear. A consideration of equity along all these lines might justify the increase in the loss of lives on the highway in fairness to the asbestos worker.

The fact that both costs and benefits may be characterized by different degrees of uncertainty has already been mentioned. Clearly, comparing point (single) estimates of costs and benefits is incorrect. Costs and benefits streams must be expressed as distributions, a demand not usually possible from the data -- especially for benefits. If the distribution of risks (health benefits which might be achieved by regulation) contains an especially sensitive subgroup of potential beneficiaries -- e.g., children -- then equity considerations may lead an agency or society to more highly value the regulation for them, even though they represent a small subset of those at risk -- at the tails of the risk distribution.

The decision rule which environmental, health, and safety agencies try to follow is clearly a concern for equity to workers, consumers, and society -- and the desire to minimize the regret of not regulating a particular activity. This is accomplished by choosing among different hazards to regulate and by choosing a level of protection for a specific hazard which avoids small probabilities of large harm. While not necessarily maximizing the number of lives saved, these decisions are not clearly irrational -- unless rationality is defined tautologically as a maximizing rule.

Unfortunately, these decisions are necessarily complicated. A search for a facile decision rule would in reality absolve regulators from accountability rather than force them to articulate the hard choices.

Regulatory decision-making must go much further than making a trade-off analysis which includes only short-term cost, benefit, and distributional effects traceable directly to a specific regulation. The indirect payoff due to leveraging the private sector to deal with unregulated hazards, the longer-term changes in the legal environment, the effects on technological innovation, and the proper treatment of uncertainty need to be factored in, if a complete rationale is to be developed for regulatory decision-making.

There are no facile rules of thumb, no quick fixes, no simple indices of correctness. Until evaluation methodologies can be sufficiently well developed to deal with these additional considerations, it may be unwise to impose upon the regulatory decision makers a requirement to undertake regulatory impact analyses that are overly quantitative and restrictive. What can be entered into a cost-benefit equation is only a small part of the picture. Efforts to improve regulatory decision-making at this time might be better focused at ensuring that the government, workers, consumers, and industry have better access to information as to the nature and extent of health hazards, and information as to the technological capabilities of the regulated industrial segments in being able to respond to regulatory controls.

Undemocratic Attempts to Reorient Congressional Mandates in Environmental, Health, and Safety Legislation

My testimony so far has focused on the technical difficulties of evaluating regulatory decisions. I feel compelled to caution that some regulatory reformers are not trying to improve the decision-making process, but rather are attempting to reorient Congressional mandates embodied in the different environmental, health, and safety legislation.

There are a number of different benchmarks which the decision maker might use, and hence be evaluated against, to arrive at a particular strategy. They include economic efficiency, cost-effectiveness, health-effectiveness, distributional consequences (equity), and specific legislative mandates embodied in various pieces of legislation. In some legislation, the discretion as how to "balance" the various considerations is broad; in others, it is more narrowly defined. In many instances, criticism of a particular decision to regulate is really a criticism of the balance struck by Congress in empowering an agency to act in a certain manner. For example, attacks on the proposed ban of saccharin or on the standard for occupational exposure to benzene are really attacks on the legislative mandate. By asserting that a standard is not cost-effective or that it is too expensive, the critics are attempting to force an evaluation of the proposed regulation against different benchmarks.

A more serious concern, however, is that assessment of agency economic impact analysis by groups such as the Council of Economic Advisors or the Council on Wage and Price Stability may really be attempts to reorient various legislative mandates to their own point of view of what is desirable. I believe that it is certainly undemocratic, if not dangerous, for a society to let any one group of people, whether scientists, lawyers, or economists, decide that they have a game plan to set national priorities. We cannot be too cautious as to a possible "tyranny of the experts". An open process, without post-hearing maneuvering on the part of influential technical experts, is absolutely essential in this difficult area.

Proposed Congressional Bills to Provide for Regulatory Impact Analysis

A purpose of the proposed legislation is stated to be that the agency decision-making process should be rational and systematic. If we realize that the health, safety, and environmental agencies have been operating under a rule of minimizing the regret of not regulating a particular hazard, the presumption that the agency decision-making process has not been rational and systematic loses ground. The paradigm forced upon us by the "economic rationalists" to expect agencies to maximize health or environmental payoffs may very well lead to the use of inappropriate criteria.

The definition of a "significant rule" based on an annual effect on the economy of $100 million is a biased criterion. It argues that the cost implications alone determine whether or not an impact analysis needs to be done. It is quite possible that a $100 million regulation with significant offsetting health benefits deserves much less scrutiny than a $50 million regulation with much smaller payoffs. The $100 million rule is an artificial one. [Using compliance costs alone to make up the list of allowable regulations under a "regulatory budget" constraint would likewise be a defective procedure.]

Even though some bills provide that no judicial review is permitted regarding the adequacy of an agency's compliance with the regulatory impact analysis requirements, this does not mean that the analysis will not be subjected to judicial review as a part of evidence submitted in hearings on one of the proposed standards. Thus, the regulatory impact analysis will most assuredly invite more opportunity for contentious and adversary interaction among industry, labor, public interest groups, and government.

The appealing requirement that an agency prioritize its areas for action could lead to serious consequences for the effectiveness of regulation. Establishing and publicizing an investment strategy that prioritizes agency activity by hazard creates a license for industry to neglect areas that it might otherwise improve. For example, no one can seriously believe that it would be sound social policy for the Internal Revenue Service to announce that it will audit returns for six major items and ignore the remainder. The success of an administrative agency depends on far more than its specific enforcement activities. The agency signals, which change general behavior by leveraging voluntary preventive actions by firms and can stimulate technological innovations, are far more significant than its limited specific enforcement record.

Furthermore, regulatory agencies are not investment banking firms; they are politically responsive administrative agencies. They cannot ignore petitions under their legislation for protection from a particular hazard simply because that hazard is not next in line in its priority scheme.

Placing a watchdog role over the administrative agencies in the Administrative Conference, Office of Management and Budget, or other organizations is inviting a further deterioration of the ability of the regulatory agencies to carry out the Congressional mandates free from Executive interference. Neither direct nor indirect Congressional or Executive veto of regulatory initiatives is desirable. Serious thought should be given to leaving the agencies to account for themselves primarily in the courts, in oversight hearings of the Congress, and through other facets of the Congressional process. If regulatory impact analysis is to be required by the Congress, it must go much further in minimizing the potential for misuse and political abuse.

Finally, let me suggest that we do not have a real crisis in regulatory acccuntability. Rather, regulation is starting to work. The bill for previously ignoring environmental, health and safety problems has simply become due.

Senator LAXALT. Mr. White.

STATEMENT OF LAWRENCE WHITE, PROFESSOR OF ECONOMICS, GRADUATE SCHOOL OF BUSINESS ADMINISTRATION, NEW YORK UNIVERSITY

Mr. WHITE. Thank you, Senator. I am pleased to be here before this subcommittee.

I think all of us here and all of the people on the previous panels agree that regulatory reform is important and that sensible regulation can improve the workings of a market economy. But ill-conceived, poorly structured, or excessive regulation can seriously waste this Nation's resources in efforts to pursue social goals that may well be well-meaning but are simply impossible or too expensive to achieve.

Senate bill 1080, I think, represents a reasonable, sensible effort at improving the regulatory process. It asks agencies to consider the costs and benefits of their regulations, to consider alternatives, to consider the uncertainties and margins of errors involved, and then to defend their choice among alternatives and explain how and why the benefits from the proposed rule justify the costs. It also asks for periodic review of rules and for a calendar of prospective rules.

It is simply good, sensible public policy to ask agencies to consider costs and benefits, to consider alternatives, and to defend their choices. There is no other sensible way.

These costs and benefits can be estimated. It has been done in the past in some instances. I participated in a number of these efforts while I was with the senior staff of the President's Council of Economic Advisers. It can surely be done in many more, if not most or all, instances.

There are always uncertainties involved, but one can deal with those uncertainties. One can put reasonable bounds on the uncertainties. One can ask about reasonable worst cases. One can ask

what are the consequences, what are the costs if we guess wrong, if the world turns out to be not exactly the way we estimate it to be but is at one bound or at the other bound.

Uncertainty is, unfortunately, one of the phenomena that is present in all aspects of life. We have to deal with it in everyday life. We do deal with it in everyday life, and I think we can deal with it in regulatory proceedings also.

In the end, choices do have to be made, resources are involved, and we want those choices of the use of resources to be made in the most socially beneficial fashion.

The kind of approach that I think this bill calls for can be illustrated by a constrast that I saw 2½ years ago while I was at the Council of Economic Advisers concerning, at the time, the proposed OSHA regulation concerning the exposure of workers in lead smelting and using industries to metalic lead in various aspects of the workplace.

The defense that OSHA provided for their regulation and which they used to defend lots of other regulations was of the following kind: They would tell the horror stories of what would happen to individuals at extremely high levels of lead exposure. We all know that lead is really nasty stuff at very high levels of exposure.

On the basis of that, they then tried to justify a lowering of a lead limit from something that was way below those very high lead exposure levels to something that was even lower. There was no effort by OSHA at the time to provide any justification or any estimates of what the benefits would be from the change from that very low level to a yet even lower level.

I would contrast that with a study that Professor Ashford did at just about the same time which specifically looked at the likely health consequences for workers exposed at the existing lead exposure level and what might well be achieved at the yet lower proposed level.

It appeared from Professor Ashford's analysis that there would be a significant reduction in the number of health risks that workers would be exposed to—kidney disorders, nervous system disorders, birth defects—as a consequence of both male and female exposure to lead.

At the time, I was reviewing the analysis for the Council of Economic Advisers and was basically a layperson in terms of this technology. I found the Ashford analysis quite convincing, whereas the OSHA approach of telling horror stories to justify lowering an already low standard was not at all convincing. I think the Ashford approach is something that the bill would encourage, and the original OSHA approach would be something that the bill, I hope, would discourage.

Overall, I think the act is a sensible step forward, but I think it is important to realize that it is not the final step. In the end, our society and our political system must recognize that our economy has limited resources. We have multiple goals. If we cannot satisfy all of them simultaneously, we must make choices.

We live in a world that can never be wholly risk-free or hazard-free, and we would sacrifice too much of our other goals in efforts to pursue the goal of a hazard or risk-free world.

Thus, other regulatory legislation which says that costs do not matter, which says that controls should be pursued to the maximum extent feasible regardless of costs, which says that there should not be a balancing or trade-off, must ultimately be changed.

Thank you, Senator.

Senator LAXALT. Thank you very much, Mr. White.

[Additional material submitted by Mr. White follows:]

REFORMING REGULATION: PROCESSES AND PROBLEMS

(By Lawrence J. White, New York University)

CHAPTER 16—CONCLUSIONS

The previous chapters have provided a number of case studies of regulatory actions and the Executive Office's efforts to deal with them. This chapter will try to distill the lessons that can be learned from these experiences. First, the characteristics of the regulators and the regulatory process that have important consequences for the development of sensible regulation—primarily social regulation—will be summarized. Next, the strengths and achievements and also the weaknesses of the Executive Office's efforts to deal with regulation will be described. Finally, after a review of recent regulatory reform proposals, some recommendations for future public policy will be offered. the primary focus of this chapter will be on social regulation.

THE REGULATORY PROCESS

Dichotomizing the world

Perhaps the most salient characteristic of the regulatory process is that regulators (and the legislators who created the regulation) are looking for simple decisions, for certainty, for a dichotomous world in which yes-no answers can be given to problems that in reality are very complex and uncertain. They are uncomfortable with uncertainty, with probability distributions, with a world that is continuous rather than dichotomous.

The case studies have illustrated a number of the regulatory efforts to dichotomize the world. The national ambient air quality standard system (Chapter 4) is based on a threshold concept: air quality levels below the standard are "safe"; air quality levels above the standard are "unsafe." Thus, the regulatory task is to determine this safe level and then institute the proper controls so that this safe level is achieved. This kind of process has obvious political appeal. But it is worth reemphasizing that, if the real world does not contain these safe-unsafe critical points, this appearance of complete safety will be a chimera, and the pursuit of it represents misguided public policy that will likely have excessive net social costs.

The continuous nature of the real world may express itself through four paths. First, there may not be any thresholds for individuals. Even small doses of pollutants may have their effects on the wear and tear on humans, increasing slightly the probability of illness and/or shortening slightly the expected lifetimes of individuals. Individuals may vary in susceptibility, but there is no safe dose for anyone. As we noted in Chapter 4, this is the present model of carcinogenic pollutants that EPA and other regulatory agencies have adopted. It may well be that further research on other pollutants, with more precise measurement methods, will lead to the same conclusion.

Second, even if there are thresholds for individuals (one could hypothesize a repair mechanism within humans that eventually becomes overwhelmed by an excessively large dose of a pollutant), these thresholds are likely to vary widely across different individuals. There will almost always be individuals (the young, the old, the otherwise sick, the allergic) whose thresholds will be very close to a zero dose of the pollutant. Thus, despite the existence of individual thresholds, the world becomes continuous in terms of the aggregate dose-response relationship across the entire population. There is no safe threshold (short of zero) that applies to everyone.

Third, even if there is a safe threshold that applies to everyone, the stochastic nature of meteorological events implies that there can never be complete certainty that the threshold will not be breached. Even if pollutant emissions are kept to low (but nonzero) levels, so that the average level of pollutants in the ambient air is below the threshold level, there is always the possibility that particular meteorological conditions will create high ambient air pollutant levels that will exceed the

threshold, at least in some localities. The lower the average level in the ambient air, the less likely this is to occur, but the probability is always present. Thus, instead of a dichotomous safe-unsafe world, the world becomes one of a continuous set of probabilities that unsafe levels will be reached.

Finally, as long as pollutant emissions (even at comparatively low levels) occur in relatively concentrated doses at the point emission, there will always be small local areas that will exceed the threshold. Place the monitor close enough to the emission point, before the pollutants have had a chance to disperse, and high reading will surely occur. Someone will be risk. EPA cited local carbon monoxide problems as its justification for idle standards on trucks (Chapter 6) and high roadside particulate levels as part of its justification for tight controls on diesel particulates (Chapter 7). Again, the world loses its dichotomy. Less emissions mean fewer people at risk in the immediate vicinity of the emission point, more emissions imply the opposite.

EPA acknowledged the existence of the first three arguments for continuity in its approach to setting the NAAQS for ozone (Chapter 4). But it never truly integrated these factors into its decision. The Clean Air Act (the title itself suggests something about Congress dichotomous view of the world!) forced it into the charade of finding a safe threshold.

Another area in which regulators try to dichotomize the world is in the setting of specific control standards on firms. The regulators what only to know whether specific standards will or will not be achieved by a specific date. They tend to impose an over-simplified engineering view on the world: Technology either will or will not be available. They are not interested in the probabilities that technologies will or will not be available or the likelihoods that in-use problems will develop even if the technology is "available." Indeed, the enabling regulatory legislation in virtually all cases uses terms such as "practicable," feasible," "available," or "achievable." The legislation does not include terms such as "reasonable probability." EPA's decision on heavy-duty truck emission standards (Chapter 6) and on diesel particulate standards (Chapter 7) and NHTSA's decision on fuel economy standards (Chapter 8) were all couched in terms of certain availability.

Third, most regulatory standards are in terms of "achieve this level or else. . . ." A near miss is no better than complete failure; overachievement is no better than just meeting the standard. This kind of regulatory standard meshes nicely, of course, with the view that there are safe-unsafe critical points in the world. Only recently, and only on a few standards, have penalties begun to replace "do it or else . . ." standards.

A fourth area in which regulators tend to dichotomize is the treatment of hazardous chemicals, especially carcinogens. In the view of many regulators, either chemicals are safe or they are not safe. If they are not safe, the full regulatory treatment should be applied. No considerations of potency or exposure are introduced to modify the required response. As mentioned in Chapter 9, OSHA's initial proposal on worker exposure to carcinogens embodied this approach. The delany Amendment's response to carcinogenic food additives exemplifies it. And the initial draft of the dumps and spills bill (Chapter 10) was written in the same way: EPA had the power to undertake complete containment and cleanup actions irrespective of the degree of hazard involved. An even simplier version of this theme was EPA's initial effort in the chemical premanufacturing notice case (Chapter 9): Make no distinctions at all and require complete informaton on all chemicals. (There is one encouraging exception to this pattern, however: EPA's proposal with respect to regulation of airborne carcinogens, in which potency and exposure are explicitly taken into account. EPA's scientist's linear dose-response model for exposure to carcinogens, mentioned in Chapter 4, appears to have played an important role in developing this regulation.)

The desire for dichotomous decisions is understandable. The decisions do become simpler. The decision makers do not have to worry about explicit, complex tradeoffs. They can ressure themselves and their constituencies that complete safety has been achieved, that regulatory controls will certainly be put in place at the required time. It is a pity that the world is more complex and that these reassurances are almost certainly false.

Regulatory treatment of costs

Congress has largely shied away from asking for regulatory agencies explicily to weigh costs and benefits in their regulations. Instead, Congress frequently specifies in legislation only that the necessary technology be "practicable," "feasible," "available," or "achievable." Even when costs are explicitly mentioned, the legislation at

best will indicate only that costs are to be taken into account. The regulatory agencies have interpreted these words (feasible, etc.) as permitting any standards that the industry "can afford." The usual test of what is feasible, for example, is a level of technology (e.g., to achieve emission controls or fuel economy standards or safer work environments) that will financially push the industry to the point at which some of its members are close to financial failure or (for a multiproduct firm) would decide not to produce that product. Thus, there is no consideration of costs until factories are on the brink of closing or jobs are being lost; at that point the process stops. To paraphrase Winston Churchill, this might be described as "squeezing industry until the pips speak." NHTSA's legal philosophy underlying the fuel economy standards (Chapter 8) embodies thus approach, as does OSHA's policy on worker exposure to carcinogens and EPA's approach to water pollution under the Clean Water Act. It used to be fondly hoped that somehow these costs would be borne by "business." There is now a much wider recognition that regulatory costs are usually going to be passed onto consumers in higher product prices (and it is the higher prices and reduced consumer demand that may lead to the demise of a company or a product).

This "what the industry can afford" criterion is quite different from the criterion that an economist would choose: increase the stringency of regulation until the marginal social benefits are equal to the marginal social costs. The former criterion might lead to the same regulatory outcome as the latter only if (1) the marginal benefits from the regulatory action are very high over the full range of possible stringency (in which case, why stop when one or two companies are forced to fold?) or (2) the social distributional weights are such that those who receive the benefits from the regulatory action are weighted heavily in the social calculus while those who bear the costs are weighted lighted or not at all. If neither of these conditions is met, the affordability criterion will lead to different (usually greater) levels of stringency than would the cost-benefit criterion; if (as most economists would argue) the cost-benefit criterion is the proper one, then society's resources are being misallocated and/or wasted.

Further, the regulatory agencies consistently underestimate the prospective costs of their regulations. They want to minimize the apparent costs that they are imposing on the regulated industries. Since the regulated industries can be expected to overstate the costs, the disparity between the regulatory agencies' estimates and the industries' estimates does not automatically throw public doubt on the accuracy and credibility of the former. There are no accounting audits or penalties for agency understatement. There have been no follow-ups or retrospective surveys of cost estimates. The agencies have no inactives to change their ways.

A problem with which neither the Congress nor the regulatory agencies have yet come to grips is that the regulators cannot all simultaneously impose a "what the industry can afford" set of regulations on the same industry. A single industry may have to meet air pollution, water pollution, solid waste disposal, and workplace safety standards. Even if one accepted the philosophy that there is a certain sum that can be exacted out of an industry's hide (beyond which closures occur, etc.) this sum would still have to be allocated among the regulatory areas. There currently is no means of making this allocation. A real risk exists that each regulatory agency will ignore or underestimate the costs that are being imposed by other agencies and assume that the sum available to finance its requirements is far larger than actually is the case. The simultaneous imposition of all these requirements could well have much more serious consequences for the industry than expected. The Regulatory Council (see Chapter 2) is expected to investigate this problem.

Technology forcing

Many of the regulations are designed to be "technology forcing"; that is, the regulators try to force the industry to develop technologies (that otherwise would not be developed) to meet the regulations. They estimate the feasible level of technology (if it is suitably forced) at some future date and set the standards accordingly. Frequently, the regulators use as evidence technologies that are in the research stage but that (they claim) can be brought to production by the requisite date. The EPA diesel particulate standard (Chapter 7), the EPA heavy-duty truck testing and enforcement procedures (Chapter 6), and the NHTSA fuel economy standards (Chapter 8) embody this approach. The technology forcing approach, especially when coupled with standards that have the form of "meet the standard or else we will close you down," may encourage delay and inefficiency; important firms in regulated industries may delay the development of practicable technology and then, in effect, "dare" the regulators to close them down.[2] The fuel economy stand-

[2] See the reference in chapter 3, note 5.

ards case brings out a somewhat different, longer-run consideration. Companies may be reluctant to undertake research if they fear that any findings that they report will shortly be thrown back at them as stiffer regulatory requirements for a few years hence. If firms in supplier industries (who hope to get the supply contracts when the stiffer regulations are imposed) are the only ones doing research in a number of areas, the research effort and consequent technological progress in these areas may well slacken. Ironically, technology forcing regulation may contain the seeds of its own undoing.

Admittedly, this is an oligopolistic view of the world. The firms in a competitive industry confronting a regulator would each hope to discover the new technology on which the regulators would then base standards, since the firm would hope to gain in market share by being able to meet the standards when some of its competitors could not (or it could hope to earn large royalties from licensing the technology to its competitors). But there are enough oligopolies in regulated areas, in which firms are likely to take the industry view rather than the competitive view of the consequences of regulatory-relevant research, that these consequences should be given more serious examination.

Risk aversion

In the health-safety-environment area, regulators are likely to opt for risk-averse, politically safe regulatory strategies. This approach is likely to mean extra degrees of safety and of controls required for industry. Regulators are most likely to be politically embarrassed and raked over congressional hearing coals when accidents happen, as in the Three Mile Island nuclear reactor incident in March 1979 or the American Airlines DC-10 crash in May 1979. The extra costs imposed on industry and ultimately on consumers by tighter regulations, even if they are ultimately more socially costly, are less likely to generate the specific and focused political criticisms of a major crash, accident, disaster, or epidemic that might have been avoided by tighter regulation.

The aftermath of the May 1979 DC-10 crash provided a good example. Following the crash, the Federal Aviation Administration delayed grounding all DC-10s until it had enough information to suggest that there might be a general problem with all DC-10s. In the congressional hearings that followed, FAA was severely criticized for not grounding the DC-10s sooner, despite FAA's protestations that its decisions at the various times were appropriate in the light of the information available at those times. It is likely that FAA will be quicker to ground planes after crashes in the future, despite the inconveniences imposed on travelers.

One might ask, How can traveler inconvenience be compared with the risk of lost lives in a crash? But, as was pointed out in Chapter 3, we as a society apparently consider that the inconvenience of a 45 mph speed limit more than offsets the lives that would be saved from the fewer and less serious crashes at that speed. We have declined to build pedestrian underpasses at every busy intersection, and we do not station an ambulance on every block.

This last point brings out another aspect of the political environment in which regulation operates: Chronic, low-level social costs, even deaths, do not attract the same political attention (and heat on regulators) as do occasional but more noteworthy accidents. An annual traffic toll of over 50,000 deaths attract comparatively little political attention, because it occurs in isolated bits and dabs; a plane crash that kills 300 people attracts much more attention. A colleague at CEA calculated that the coal mined for burning in electric utilities is accompanied by roughly 90 deaths of miners per year in mine accidents. These losses attract little attention; a nuclear reactor accident that kills no one attracts much more.

THE EXECUTIVE OFFICE'S EFFORTS

The achievements

The Executive Office's efforts at the reform and better management of social regulation—E.O. 12044, the Regulatory Analysis Review Group's filings, the COWPS filings, CEA's and COWPS's scrutiny of regulations—have had an effect in improving the quality of the regulations that have been proposed and promulgated. The agencies now know that their major proposals will receive close scrutiny by CEA and COWPS. The RARC and COWPS filings have received attention in the press. No agency likes to receive public criticisms that make it appear misguided or foolish. The agencies are preparing their regulations more carefully, providing better analyses, scrutinizing costs and consequences more carefully. Cost-effectiveness is becoming a more accepted concept, as is the wisdom of performance standards over design standards. There is now general recognition that consumers will ultimately pay for the costs of regulation.

These are generalities of course, and there are still many exceptions. The millennium certainly has not arrived. CEA and COWPS cannot claim victory and retire from the field. But progress has definitely been achieved.

The pressures from the EOP are also strengthening the groups within the agencies that are interested in more sensible regulations. Mirroring the divisions concerning regulatory policy across the federal government are the divisions within the agencies or departments themselves. The agencies almost always have an office with responsibility for policy evaluation (as compared with the offices with direct operating responsibility for proposing and enforcing regulations), and the staff in these offices are frequently more inclined to take a balanced view of specific regulations. If their criticisms of operating divisions proposals are subsequently supported by the EOP, their ability to influence the shape of future regulations must be enhanced.

Evidence for these effects is found in the general slackening in the pace of new regulatory proposals and promulgations. Agencies are taking more time in the preparation and analysis of proposals. As the basis for setting ambient air quality standards, EPA's criteria documents for pollutants, for example, are far more comprehensive than they were a decade ago, and EPA's overall level of documentation is much more impressive and careful preparation times are lengthening, as are the times between proposal dates and final promulgation dates. Indeed, one major regulatory agency, the Occupational Safety and Health Administration, did not promulgate a major final rule in the 14 months between November 1978 and Janaury 1980 and did not propose a major new regulation during an even longer period.[5] There was a six-month period, in the spring and summer of 1979, in which many people thought that RARG had ceased functioning. But the "problem" was simply that there were few new major regulations to review.

Also, legal deadlines are being missed more frequently as agencies discover that they simply cannot develop an adequate basis for the required regulations in the time Congress has allowed. As noted in Chapter 7, despite the Clean Air Act's requirement of particulate standards for all vehicles for the 1981 model year, EPA is applying its light-duty diesel particulate rules only to the 1982 model-year vehicles, and it had earlier announced that particulate standards for heavy-duty trucks would not be required until the 1983 model year. EPA's heavy-duty truck emissions standards for hydrocarbons and carbon monoxide (Chapter 6) were originally supposed to apply to the 1983 model year; the final rule delayed application until the 1984 model year. In the future Congress will have to allow more time for the development of regulations.

Further evidence is found in the ozone episode (Chapter 4). EPA, through its own processes, did propose an ozone NAAQS that was less stringent than the existing one and subsequently, again largely through its own processes (though the EOP's sentiments were clear by then), did promulgate a final standard that was yet less stringent. The agency may not have gone as far as many would have liked, but similar behavior, even as recently as three or four year ago, would have been highly unlikely.

As another example, EPA in July 1979 issued an NPRM for HC and CO emissions for light-duty trucks for 1933.[6] Its provisions are virtually identical to those in the heavy-duty truck proposal (Chapter 6). An earlier version of the light-duty truck proposal, however, also contained a provision that would have tightened NO_x emissions in 1983, two years earlier than required by the Clean Air Act. EPA's internal forces—without any intervention by the EOP—succeeded in excising that provision.

Finally, regulatory analyses accompanying major regulations now routinely acknowledge that the costs of regulation will be passed on to consumers in the form of higher product prices. At the news conference following the announcement of the administrations's spills and dumps bill (Chapter 10), EPA indicated quite explicitly that it expected the excise taxes on chemicals to be borne ultimately by the consumers of chemicals.

Again, the millennium has not arrived. There are still too many cost-ineffective regulations; design standards still appear; there are too many claims of "the regulations pay for themselves, therefore they are costless"; the regulators almost always understate the costs of regulation; too many regulators are reluctant to quantify the benefits; and all the problems described in the first part of this chapter still persist. Further, some of the agencies' improved performance is probably due to legal

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[5] Part of the reason hiatus may have been OSHA desire to wait and see how its regulation on workers to benzene fared in the Supreme Court. The regulation had been overturned by the Circuit Court of Appeals in October 1968. See *American Petroleum Institute et. al.* HA, 581 F. 2d. 498 (1978).

[6] Federal Register 2, 1979, pp. 40784—40795.

reversals in the courts when their evidence and support for regulations were not adequate. Nevertheless, the EOP's efforts are definitely having an effect.

The strengths and weaknesses

The EOP's greatest strength is clearly in the area of cost-effectiveness. CEA and COWPS economists can analyze overall regulatory packages and suggest alternative ways of achieving the same effects at lower costs to society. The corporate averaging proposal for diesel particulates (Chapter 7) and the selective information proposal for chemical premanufacture notification (Chapter 9) are examples.

Further, CEA and COWPS can serve to check the more extreme regulatory proposals: the standards that offer vitually no benefits (although some argued that EPA's final ozone standard, even at 0.12 ppm, was an example of a standard with virtually no benefits), the cost estimates that are badly understated, the legislative proposals that will have serious distorting effects on the economy. Even here, CEA and COWPS cannot check or stop all, but they can have some effect on most of the proposals.

Finally, they can support and reinforce the individuals who do perform solid analyses within the regulatory agencies. The snail darter case (Chapter 11) is an example of this.

The glaring weaknesses of CEA and COWPS is their staffs' comparatively small size and lack of complete detailed technical knowledge (e.g., engineering data, cost data) on many issues. Even with the help of the Office of Science and Technology Policy, they will always be at a great disadvantage vis-a-vis the regulatory agencies in arguing over details. The staffs are simply too small and cannot hope to acquire a mastery over the details of all the regulatory issues with which they must deal. Inevitably they are going to be caught between regulatory agency engineers saying "The technology is available, it's easily applied, and it's low cost" nd industry engineers saying "The technology is unproven, it has high risks, and it's horrendously expensive." This conflict was most apparent in the Ohio local coal dispute (Chapter 5) and the fuel economy standards dispute (Chapter 8). The EOP can focus the discussion and narrow the range of disagreement, and occasionally a staff member will have special expertise on the basis of which he or she can provide independent estimates. But in many cases the EOP will be caught in the middle, with no arbitrator to which it can turn.

Unfortunately, it is these details on which the marginal decisions on regulatory standards hinge. Whether to have a somewhat more lenient or a more stringent standard will usually depend crucially on these estimates of costs and effectiveness. Thus, although the EOP may be able to deter the grossly misspecified standards, it will be at its weakest in the discussions and negotiations over marginal changes. The same principle applies, of course, to the details on technical issues such as testing procedures, as in the heavy-duty truck emissions case (Chapter 6).

The regulatory agencies could well decide to exploit this weakness. If they conclude that the final levels of standards are going to be the outcome of a bargaining process with the EOP, they may initially propose standards that are more stringent than the agency would otherwise find satisfactory and then compromise to their desired level. The EOP will have "prevented" the more egregious standards from being established but will then have lost on the details. Also, the agencies may try to achieve more through tightening the technical procedures surrounding standards (e.g., testing procedures, averaging times, durability requirements), while leaving the standards unchanged. Finally, to avoid the scrutiny of the RARG process and the application of E.O. 12044, agencies may break their regulations into smaller pieces that fall below the $100 million tripping point.[7]

The preceding paragraph has described what might be called an adversary or collective-bargaining model of the determination of final regulations: The parties start far apart, knowing that each expects the other to compromise toward a middle ground. The description earlier in this chapter of the achievements of the EOP was characterizing an accommodation model: Agencies do not like to be mauled in public or to lose face by being pushed to positions they have opposed. The process of EOP review and management of regulation is still new enough that it is difficult to predict which model will prevail. It is possible that aspects of both will coexist: The agencies could well decide to accommodate the EOP on cost-effectiveness issues but adopt the collective-bargaining model on the levels of standards.

A similar failing, which had definitely been exploited by the regulatory agencies, was the EOP's weakness on another set of technical details—the legal ones. The

[7] There was some speculations within the EOP that this was one of the reasons why EPA chose to issue separate regulations on toxic water pollutants over the 1979-1981 period for each industry involved.

regulatory agencies were able to say, "Our hands are tied; the law *requires* us to do the things we have proposed," relying on legal opinions by their general counsel offices. Lacking legal expertise, the economists in CEA and COWPS were not able to offer a suitable rebuttal. As noted in Chapter 5, however, by March 1979 this situation had changed, with the appointment of a new General Counsel of COWPS, who has effectively become the general counsel to the EOP's regulatory management effort.

RECENT PROPOSALS AND SOME RECOMMENDATIONS ON REGULATORY REFORM

Before offering some recommendations with respect to the regulatory management effort, it is worth reviewing the major proposals for dealing with the regulation "problem" (often ill defined) that have surfaced in the past few years. They fall into four groups.

Reform the Regulatory Procedures

Usually suggested by lawyers, this approach usually entails changes in rules for public representation at hearings during the public comment period, providing more time for public comments, improving notification procedures, requiring various kinds of inpact statements by the agency, changing the standards for review by the courts, and so on. Its proponents believe that somehow the "public interest" will prevail if only the right procedures are found. This is reminiscent of the Ash Report of a decade ago,[8] which concluded that the major problems in economic regulation were largely those of procedures and the personnel of the agencies. The Ash Report was mistaken,[9] and so are those who believe that procedural changes will solve the problems of social regulation. If—as much of this book has argued—the problem is mainly that there are too many instances of regulations that generate large social costs without commensurate social benefits, procedural reforms will have little or no effect. The procedural reforms may help maintain a public sense of fairness and legitimacy in the regulatory process, and so they should not be discouraged.[10] But one should not expect much from them either.

Sunset

This proposal, embodied in former Senator Edmund S. Muskie's S. 2 bill in the 95th Congress, would require regulatory agencies periodically to review their regulations and programs; presumably, the agencies would "sunset" (rescind) those that are ineffective or excessively costly. Unfortunately, like the previous proposal, it wholly misses the mark. To the extent that the personnel of the regulatory agencies genuinely believe in the value of their regulations (and have strong constituency support), sunset will achieve little. As with zero-base budgeting, which was popular a few years ago, this concept appears to be fine in principle but will fall far short of target in the real world. It is noteworthy that the debate in the Senate on S. 2 was almost entirely in terms of generalities—"sunset will mean the demise of programs that do not work, that have grown unresponsive and ineffective"—with virtually no specific programs mentioned. Only the Civil Defense Agency (with an annual budget of only $90 million) was named specifically.[11]

Reexamination of programs should certainly not be discouraged. Occasionally some improvements may occur, as in the ozone case (Chapter 4). But one should not expect wholesale improvements in regulatory results from sunset proposals.

Regulatory budget

This proposal, first suggested by the Department of Commerce and embodied in Senator Lloyd Bentsen's S. 3550 in the 95th Congress, would establish an annual budget for the costs that the regulatory agencies impose on society.[12] It uses the

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[8] The President's Advisory Council on Executive Organization, *A New Regulatory Framework: Report on Selected Independent Regulatory Agencies* (Washington, D.C. G.P.O., 1971).

[9] See B. G. Noll, *Reforming Regulation* (Washington, D.C.: Brookings Institution. 1971).

[10] The Carter administration's regulatory reform bill. S. 755, consists largely of procedural reforms, plus the enactment of E.O. 12044 into law and its extension to the independent agencies. Giving E.O. 12044 the force of law should strengthen it, and its extension to the independent agencies is surely a step in the right direction.

[11] See *Congressional Record—Senate*, October 11, 1978, pp. S18166-S18220.

[12] See C. C. DeMuth, R. H. Shackson, E. O. Stork, and A. W. Wright, "The Regulatory Budget as a Management Tool," commissioned by the Joint Economic Committee, U.S. Congress, 96th Congress, 2nd session, May 29 1979; C. C. DeMuth, "Constraining Regulatory Cost—Part II: The Regulatory Budget," *Regulation*, 4 (March-April 1980): 29-44; and R. Litan and W. D. Nordhaus, *The Regulatory Budget* (Washington, D. C. Brookings Institution, forthcoming).

analogy of the federal budget. The executive branch would propose and the Congress would pass annually a budget limiting the costs that regulatory agencies could impose on the sectors they regulate, in a fashion similar to the way in which Congress currently limits the amounts that regulatory agencies can spend. (The regulatory budget focuses solely on costs and ignores benefits, but so does the current federal budget.)

The proposal has the advantages of forcing the regulatory agencies to internalize the social costs of regulation. The agencies would have to allocate their regulations carefully and would have a strong incentive to minimize the regulatory costs involved in achieving their goals. The federal government as a whole would be in a far better position to consider the total social costs of all regulatory proposals in setting the annual regulatory agenda. Also, the concept recognizes that, even if regulation is benefical, its costs should be controlled and allocated over a number of years. Again, the federal budget analogy is useful. Although Congress believes that its spending programs are useful, it does not try to cram all construction projects, for example, into one year but instead spreads them over a number of years.

Unfortunately, the regulatory budget would mean a large increase in the administrative burden of the Executive Office and in the legislative burden of the Congress. An entirely new budget process, almost as large as the current one, would have to be established, with a new or expanded OMB and new congressional committees. Further, the cost figures themselves would be very difficult to establish. Unlike the current fiscal budget, in which the dollar figures themselves are largely indisputable, the regulatory budgets' dollar figures would be subject to very wide ranges of judgment, even if a standardized methodology were imposed on all agencies. The regulatory agencies would have an even stronger incentive to underestimate the costs that they impose on the economy. The monitoring burden on OMB would be substantial.[13]

Legislative veto

This proposal would require congressional approval for major regulations. One version, embodied in S. 2011 in the 95th Congress (sponsored by 6 senators), would require that major regulatory rules (e.g., those with impacts of over $100 million per year) receive concurrent resolutions of aproval from both Houses of Congress within 60 days of promulgation before becoming effective and that other regulatory rules would be rendered inoperative if either House passes a resolution of disapproval within 60 days of promulgation. Other versions would not require explicit approval but would render major regulations inoperative if one or both Houses passes resolutions of disapproval within 60 days of promulgation.

This approach would put Congress squarely into the middle of the regulatory process.[14] It would greatly increase the oversight burden of Congress. It would mean a major shift of the power over the content of regulations to Congress and away from the executive branch. Further, the Carter administration has argued that the legislative veto provisions are unconstitutional.[15] In essence, they provide Congress with a way of achieving outcomes by majority vote that are not subject to presidential veto; that is, Congress could repeatedly reject (by majority vote) proposed regulations until it got the one it wanted. Under the normal constitutional legislative process, a two-thirds majority is required to override a presidential veto and hence to achieve outcomes independently of the President. (Despite this opposition, the legislative veto currently exists in a few laws; it is not, however, a widespread practice.

Not one of these four proposals is likely to have much effect on regulation in the next few years. The first two simply will have little effect, even if the necessary laws are passed; the last two are too radically different from current procedures and are, in any case, unlikely to be put into effect on a broad basis in the near future.

Accordingly, it is worth considering some less global but probably more constructive suggestions for improving the regulatory management effort begun by the Carter administration. Again, these deal mainly with social regulation.

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[13] As noted in Chapter 6, however, if noncompliance fees at marginal cost were instituted, and if the regulatory agency would prefer compliance, then the agency would no longer have an incentive to understate costs.

[14] See A. Scalia, "The Legislative Veto: A False Remedy for System Overload," Regulation, 3 (November–December 1979): 19–26.

[15] See the testimony of John W. Harmon on S. 2011 before the Subcommittee on Administrative Practice and Procedure, Committee on the Judiciary, U.S. Senate, 95th Congress, 2nd session, September 13, 1978.

Legal input

The process begun in March 1979 whereby the COWPS General Counsel serves as legal counsel to the EOP's regulatory effort must be expanded and strengthened. This expanded legal input means that there will be more interagency legal disputes that the Department of Justice will have to arbitrate, as it did in the Ohio coal case (Chapter 5). It will probably also mean more conflicts within the EOP. The COWPS lawyers will undoubtedly want to do more to affect the substance of regulatory management policy than just write briefs; the economists will undoubtedly resent this. Unfortunately, the history of conflict between lawyers and economists in Washington is far longer than the history of their cooperation. Nevertheless, from this economist's vantage point, this probable conflict is a price worth paying. The regulatory agencies' frequent cries of "our hands are tied by the law" cannot be allowed always to go unrefuted.

Task forces

CEA and COWPS must make sure that they are represented on all interagency task forces, even those that ostensibly are dealing only with "technical" matters. There are few government policies that do not have microeconomic implications. The task forces that deal with them should have a voice of sensible microeconomics represented on them. The absence of CEA and COWPS on the initial task force to study dumps and spills (Chapter 10) was a failing that should not be repeated. OMB and DPS, as the coordinators of administrative policies, must ensure this representation.

Pre-NPRM activity

CEA and COWPS must involve themselves to a much greater extent in the shaping of proposed regulations *before* they reach the stage of the notice of proposed rulemaking. By the time regulations have reached the NPRM stage, they are largely shaped and the levels set. The agency has put its face and prestige on the line, the proposal and its numbers begin to take on lives of their own. Changes become more difficult to effect.

Regularizing pre-NPRM involvement by the EOP will not be easy. Occasionally, we heard from regulatory agencies, in response to EOP critiques of NPRMs, the comments, "Where were you when we were formulating it?" The fuel economy standards case (Chapter 8) was basically a pre-NPRM efect in which EOP involvement was not resisted. But more often we heard, in response to efforts to involve ourselves in pre-NPRM proposal formulation, "Stay out! Let us make our own decisions." The regulatory agencies will surely resist any regularized EOP involvement. Although currently there are frequent opportunities for informal EOP contributions, these are sporadic. And, given the heavy "fire-fighting," duties of the CEA and COWPS economists in dealing with current "crises" with short deadlines, it is difficult for them to find the time to initiate involvement in the longer range development of regulations when crises are not involved and there are no short deadlines. Regularizing this involvement (i.e., making it a generally understood responsibility of the EOP) would effectively force the EOP staff to find the time.

It is not clear how this involvement could be regularized. One possibility would be to extend the OMB clearance and coordination process (see Chapter 2) to NPRMS. If general administration agreement is advisable when agencies make public statements through legislative proposals and testimony in congressional hearings, why not also require it when agencies make public statements through the publication of NPRMs? This clearance procedure would give CEA and COWPS an opportunity to review the NPRMs before they are published (in the same way in which they currently review agency legislative proposals and testimony). The clearance procedure would not necessarily regularize EOP involvement yet earlier in the process, which is vital, but it would be a start.

Reviewing appeal briefs to the Supreme Court

Regulations are increasingly likely to be appealed to the courts by the affected parties. The important cases are, of course, appealed to the Supreme Court. The Justice Department serves as lawyer for the agencies in appeals and, in cordination with the agencies' general counsel offices, develops the briefs for the Supreme Court. The content of those briefs can help to determine not only the decisions in the specific cases, but sometimes also the general legal interpretation of broad regulatory issues. For example, OSHA, in its appeal of the Fifth Circuit's reversal of its regulations on worker exposure to benzene (see note 4), wanted to argue that regulatory agencies generally should not be required to specify the benefits of their regulation. The EOP, though not sympathetic to the specific OSHA regulation at issue, did recognize the legitimacy of OSHA's right to appeal the case and to resolve

legal uncertainties surrounding its regulations, since other circuits had ruled in OSHA's favor on other regulations. But the EOP wanted the argument narrowed as much as possible and not generalized. The EOP became aware of the appeal brief comparatively late in its development but was able to effect some changes; earlier involvement would have been better.[16]

Regularized EOP review of appeal briefs on regulatory issues to the Supreme Court would be desirable. Again, an OMB clearance process seems appropriate. The Justice Department would undoubtedly object, arguing that these are technical questions and that an OMB clearance procedure would "politicize" the process of writing briefs. But, again, these briefs are to some extent statements of an administration's intended policies. They should not be left solely to the lawyers of the affected agency and DOJ. They deserve review.

EOP manpower

The size of the EOP staff devoted to regulatory management is inadequate. The day-to-day work is mainly borne by the CEA and COWPS staffs, with only occasional help from the other agencies within the EOP. A dozen economists and two or three lawyers at COWPS the EOP. A dozen economists and two or three lawyers at COWPS (which also has responsibility for filings on the public record of independent regulatory agencies) and three economists at CEA are not enough. They cannot properly deal with the full panoply of regulation that they now confront. If any of the previous four suggestions are heeded, the workload will increase measurably. An increase of both the COWPs and CEA staffs devoted to regulation would not be amiss, and OMB must become more involved in regulatory management issues.

Clarifying the role of the EOP

The legitimacy of the EOP's efforts to manage executive branch regulation must be clarified. If the President is to be held responsible for the regulatory activities of his administration, he and his advisers must have the clear power to manage that regulation and influence the decisions. When conflicting national goals (e.g., environment, energy, inflation, employment) are involved, as they inevitably will be in any major regulation, there must be someone to coordinate and to decide on the relevant trade-offs that are to be made. If multiple regulations all affect the same industry or sector, someone must decide how hard each regulation will bite. The EOP should play this role. Many in Congress may object that Congress is the proper body for determining the tradeoffs and priorities. But Congress has shown little awareness in the past of the need to make these choices, and a legislative body is unlikely to have the flexibility and capabilities to sustain a management effort. At its base, though, this is an argument over how the power of control over regulation should be divided between the executive and legislative branches. Inevitably, this power must be shared. Congress passes the necessary laws and directs specific actions, but the EOP must have the power to take advantage of the flexibility inherent in most legislation.

This EOP management role must imply extensive post-comment period activity by the EOP in rulemakings. Again, EOP activity here must be acknowledged and legitimized. If court decisions rule otherwise, new legislation must be sought, The possibility of a President who is held responsible for his administration's decisions but who cannot affect those decisions (except through the extreme action of dismissals) is an anomaly that should not be allowed to persist.

The previous six suggestions have been aimed at strengthening the particular procedures of the Carter administration's regulatory management effort. There are also broader policy measures that should be pursued.

Noncompliance fees

As a substitute for "meet the standard or else we will shut you down" regulations, noncompliance fees should be sought wherever possible. The flexibility they provide is invaluable, and, as indicated in Chapter 6, they also provide the right incentive for the regulatory agencies to estimate accurately the costs of regulation. Where these fees are currently in the law but have not been implemented, as was originally the case in heavy-duty truck emissions (Chapter 6), the EOP must press hard for their implementation; where they are in the law but anyone taking advantage of them technically violates the law, as in the fuel economy standards (Chapter 8), the law violation aspect must be removed; and where they are absent from the laws, the EOP should press hard for amendments to include them.

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[16] EOP intervention in the writing of DOJ briefs has occurred in other administrations. See W. Safire, *Before the fall* (New York: Ballantine, 1977), p. 726.

Amending legislation

Even the best regulatory management effort can achieve only limited results if legislation instructs or encourages regulatory agencies to ignore costs and benefits. If legal interpretations that this is the intent of the legislation (e.g., important parts of the Clean Air Act, the Occupational Safety and Health Act, the Clean Water Act, the Energy Policy and Conservation Act) persist, the EOP must eventually press for amendments to these acts that would call for consideration of both costs and benefits and for a balancing of the two. These amendments need not call for universal cost-benefit analysis (although this author, for one, would not shy away from such a call). But legislation that encourages the opposite is clearly bad public policy and will ultimately stand in the way of effective regulatory reform. It will not be politically easy to propose amendments that may lead to more dirt and less safety. But the social costs of doing otherwise appear too high.

Economic regulation

Little space has been devoted to recommendations for dealing with economic regulation, because the proper policy is clear: deregulate. The securities, banking, trucking, and airline industries represent a welcomed start that should not be allowed to lose momentum. The maritime industry decision (Chapter 12), unfortunately, was in the opposite direction. It will be difficult for the Carter administration to reverse itself; a reverse * * * have to wait for a new administration. But rail transportation is * * * a prime candidate for deregulation, as is most of telecommunications. Further deregulation of trucking should be pursued. Natural * * *at the wellhead and crude petroleum are currently scheduled * * * completely decontrolled by the mid-1980s. Deregulation of the * * * under of the petroleum-gasoline industry should be pursued * * * the costs of the Department of Energy's price and allocation regulations (Chapter 14) are too high now and are likely to grow. Regulations of the agricultural sector by the Department of Agriculture is another important target.

CONCLUDING COMMENTS

Regulatory reform and management are still comparatively new concepts. There have been inconsistencies in the Carter administration's efforts, and mistakes have been made, especially in the energy area. There are still glaring weaknesses. The reform efforts could be strengthened, or they could wither. It would be a pity if the latter were to occur. Both economic regulation and social regulation play such important roles in the American economy that their reform and management should not be neglected; the social costs of ill-conceived or badly structured regulation are too high. The reform efforts should be strengthened.

Senator LAXALT. Mr. Crandall.

STATEMENT OF ROBERT W. CRANDALL, SENIOR FELLOW, THE BROOKINGS INSTITUTION

Mr. CRANDALL. Thank you, Senator.

It is a pleasure to be here and to notice a change in opinion and spirit on matters pertaining to regulatory policy. A few years ago, had we had this debate, certainly the economists up here might have been called worse than mandarins. [Laughter.]

It is nice to know that we hold such an exalted status now.

I come to praise you for drafting a bill of this sort but, at the same time, to warn that I think this only begins to get at the problem.

I think the problem with the regulatory system which we have right now extends far beyond what you can address in this committee; that is, it goes to the very essence of the regulatory strategies built into the specific statutes for the various agencies, and I think we have to get on to a review of those statutes.

Many of these statutes require of the agencies a regulatory policy—regulatory tasks—which they simply cannot perform and to which they probably cannot adapt regardless of the procedures for regulatory analysis.

The complexity of the regulatory mandate and the necessity of prescribing detailed engineering standards for many different sources of hazard, for all different types of industrial equipment and industrial sources, is simply an impossibility. When you superimpose upon that a requirement for rational analysis, I fear that the agencies may even get further bogged down.

But for major rules, which this bill addresses, I believe that a regulatory analysis of this type is certainly required and certainly deserves the full attention of the Congress.

The second thing that one has to recognize, I think, in the discussion of regulatory reform and regulatory analysis is that the essential problem which is not addressed in the bill and perhaps cannot be addressed in any legislation is one of dealing with uncertainty, as Professor White has suggested.

There is no regulatory agency in the health and safety area that has a very good mechanism for dealing with probabalistic events—with uncertain events. They have not been forced to deal formally with such uncertainty. I think that sometime in the future we shall have to come to grips with the question of how we deal with uncertain scientific information.

The great advantage of this bill requiring regulatory analysis, requiring a detailing of both the costs and the benefits, is that it at least requires regulators to put down in black and white the prospective benefits and the prospective costs for all to see. From there on, it is simply a matter of arithmetic, which most of us can perform without any particular expertise, to determine whether the regulations seem sensible or not.

In fine tuning this requirement, the problem of uncertainty makes it very difficult to specify precisely how costs should be compared with benefits.

I must disagree with Professor Ashford on a couple of things: One, that science is not the problem. In our continuing research in this area and in conferences which we have held at the Brookings Institution with health scientists, regulators, lawyers, and economists, the conclusion which is usually reached about most regulations is that the greatest source of uncertainty comes from the dose-response relationship, the safety relationship, and the health relationship—that is, from the basic, underlying, scientific information.

For example, what is the potential exposure of human beings to cancer through ingesting saccharin? No scientist could give you a very precise answer to that. It is an extremely difficult question to answer because of the nature of the experimental evidence obtained from huge doses on rats of successive generations.

The problem, I think, is how to translate scientific uncertainty into some sort of sensible rules in the regulatory process.

Second, I would not like to see this bill changed so that the qualification of a major rule is based upon the net costs or net benefits. If any regulation makes sense, then that benefit should be positive. Presumably, if the Government is intervening through the regulatory process, there should be some sort of externalities of the sort which Professor Ashford refers to.

The question really is whether the costs are greater than or less than the prospective benefits. It makes sense to look at that only

when the magnitudes become very large on either side. It is often very difficult to know, in advance how these are balanced out under alternative rules, but one can at least make some estimate of whether a regulation qualifies as a major rule for performing the analysis.

In my written testimony, which I submit for the record, I divide the problems of doing a cost-benefit analysis essentially into three parts. One is the detailing of the health or safety prospective benefits; and, second, the placing of a value on those; and, third, the estimation of costs.

All of those procedures are subject to considerable uncertainty, but, as I suggested, the first of those is subject to the greatest uncertainty, and we should understand that. It is not that cost-benefit analysis is an imperfect tool. It is as perfect as arithmetic is. The problem is that the underlying information which goes into cost-benefit analysis is imperfect. Unfortunately, we deal in an uncertain, imperfect world, and we have to grapple with that uncertainty.

Finally, let me conclude by saying that I applaud your attempt to build into the bill an attempt at retrospective examination of existing regulations. I would suggest, perhaps, that you give some thought to the question of how to examine the way in which not only specific regulations but specific programs have worked out within agencies. For instance, reexamining the best available control technology standard for controling particulate matter from blast furnaces at steel mills is not a particularly interesting exercise. The real question is: Has the air pollution program reduced the level of particulates, and has that reduction in particulates improved human health?

Thus far, we have very little evidence that any of the new health-safety programs has improved human health or safety. Perhaps this is because we have had limited experience with them. Most of these programs are no more than 10 years old. But that excuse will begin to wear thin over time, and it is about time we got on with the job of reexamining the programs themselves to determine whether we are getting any benefits at all. We know we are incurring substantial costs, but are we getting any benefits at all?

Thank you, Senator.

Senator LAXALT. Thank you very much, Mr. Crandall. Without objection, your prepared text will be included at this point.

[Mr. Crandall's prepared statement follows:]

Prepared Statement of Robert W. Crandall

Mr. Chairman, it is a pleasure to appear before the Subcommittee on Regulatory Reform to testify on S.1080. I appear to offer my perspective on some of the provisions of the Bill, but my testimony should not be interpreted as reflecting the viewpoint of the Brookings Institution, its staff or Trustees.

I shall address myself only to the question of whether it is desirable to require cost-benefit analysis of health, safety, and environmental regulation. My perspective is that of an economist who has studied regulation and served in a variety of capacities within government. I have served on the staff of the Federal Communications Commission and have had several posts in the Council on Wage and Price Stability under Presidents Ford and Carter. This experience has convinced me that rational, quantitative analysis can assist in making difficult regulatory decisions. While these decisions will always be clouded by uncertainty, there are clear benefits from attempting to quantify the range of this uncertainty.

Candor requires me, however, to point out that I am not a lawyer, and that I do not know how to structure a regulatory analysis requirement which will not further ensnarl the regulatory process in lengthy delays and endless appeals. Clearly, rational decision rules cannot work well if they simply lead to further delays in rulemaking and greater opportunities for court appeals. Some regulatory agencies already have such an impossible mandate that imposition of new procedural safeguards may only create a larger backlog of unpromulgated or unenforceable rules. Reform in these areas will require not only a movement towards rational decisionmaking processes, such as those addressed in S.1080, but a fundamental shift away from detailed engineering-based regulations for each source of potential harm to human health or safety.

Cost-Benefit Analysis

Defenders of the current regulatory approach for health, safety and environment often argue that a comparison of the costs and benefits for individual regulations is desirable but impractical. Cost-benefit analysis is seen as too imprecise a tool to be used in important decisions, such as health-safety actions. Were cost-benefit analysis a more precise tool, they argue, it might be more appropriate for regulatory decisionmaking.

Implicit in the argument against cost-benefit analysis is the view that regulatory decisions involve the delicate weighing of alternative outcomes and important social values by a regulator. To say that the regulator cannot be guided by formally-derived measures of costs and benefits, however, is to say that the regulator is not to be required to reveal the precise basis for his decision. His own intuitive cost-benefit analysis is to be trusted over a formal analytical statement even though he is not required to write it down in any rigorous fashion.

What are the potential problems in using cost-benefit analysis for regulatory decisions? Basically, such analysis of health-safety regulation requires three distinct empirical exercises:

1. the estimation of the prospective improvement in health and safety due to the regulation;
2. the translation of the estimated health-safety improvements into a measure of value; and
3. the estimation of the total societal costs of implementing the regulation.

In general, the first of these tasks is the most difficult, the second is the most controversial and the third is generally the most straightforward exercise. It is the first exercise, however, the specification of the prospective improvements in health or safety, which generally derails any attempt to proceed with rational quantitative analysis in the regulatory process.

(1). Health-safety benefits. A careful review of the scientific evidence which underlies most health-safety standards can be discouraging to even the most ardent proponent of regulation. There are rarely sufficient studies to reach strong conclusions concerning the threat to humans. Epidemiological studies cannot correct very well for all other possible contributing causes of a disease or threat to very high doses of a substance. Clinical studies may be impractical or impossible to design with adequate controls for other influences which contribute to the health-safety risk. Different studies may yield contradictory conclusions.

In the face of such uncertainty, the regulator generally cannot be given a precise estimate of the prospective improvement to health or safety which results from a given regulation even if it were certain that the regulation could achieve the desired reduction in exposure levels. For instance, even if the Administrator of EPA could be sure that hazardous-waste regulations would reduce human exposure to some carcinogens by a given amount, he could not be sure how much the actual incidence of cancer would be reduced. Health scientists might be able to give him a range of estimates expressed in probabilistic terms, but he would find it difficult to cope with such information. He might find it inexpedient to explain in public that, for example, there is a 10 percent probability that the regulation will help no one, a 10 percent probability that it will reduce cancer rates by at least 2 percent in the exposed population, and an estimated 80 percent probability that the results will be somewhere between these two extremes.

Confronted with a wide range of estimates, each offering a wide range of probable outcomes, the regulator is reluctant to embrace any quantitative methods which portray the prospective benefits in the form of a probability distribution. But to fail to require him to produce such an analysis is to allow him to fasten upon any piece of the puzzle

to defend a regulation that has been decided upon through intuitive judgment or external political pressure. For instance, although EPA could produce very little analysis which showed that many people were subject to even the mildest health risk from a concentration of 0.15 parts per million of ozone in the air, it cited one recent unreplicated study of six exercising healthy males that gave some evidence of reduced pulmonary function at 0.15 PPM to defend a 0.12 PPM standard. It did not stress the numerous studies which found no effect at such concentrations; nor did it attempt to place the attendant uncertainty of the effects at 0.15 PPM in perspective. What if we knew with absolute certainty that the effects occurred at 0.15? Would the decision have been the same? What if the uncertainty were 100 times as great, but there was still one study out of thousands which showed a mild effect at the 95 percent confidence level? Would the decision still be the same?

Cost-benefit analysis cannot be precise if the prospective benefits from a regulation are not known with precision. Nevertheless, the regulator needs and the public should demand an analysis which presents the range of possible outcomes. The public is frequently barraged with new studies which show some probability of an increased risk of cancer from exposure to foods, drinking water, or airborne pollutants. It should be given information on the entire probable distribution of outcomes. Surely, a sensible regulation can only proceed from a formal documentation of such risks in a useful analytical framework.

(2). The value of the benefits. Without a doubt, the most politically controversial aspect of cost-benefit analysis for regulatory decisionmaking is the valuation of reduction in early death or excess morbidity. The concept of a "value of life" has become a formidable stumbling block in going forward with such an analysis, but the emphasis, I fear, has been misplaced.

Clearly, any regulator making a decision on a health and safety issue which involves the risk of premature death is trading off dollars of regulatory costs for protection of lives. As long as he does not reduce the risks to zero, he cannot avoid such a trade-off. Rational decisionmaking requires that the decisions result in a similar cost per additional reduction of risk for similar populations and similar types of risk. For instance, I would not want safety officials reducing my chance (and others' chances) of a fatal accident by, say, 0.001 percent per year at an incremental cost of $1 billion by building highway dividers if the same $1 billion could be spent to reduce my chance (and others' chances) of a fatal accident by 0.005 percent per year through improved road surfaces.

Economic theory and empirical economics cannot be used to place a value on life, per se. They can be used, however, to see how individuals value reduced risk of premature death in their driving behavior, their food consumption, their smoking habits, or their choice of occupation. These exercises in measuring the trade-off between risk and private consumption are not easy, nor are they likely to result in uniform results across the entire population or across different categories of risk. Some people are more risk averse than others. One would expect the less risk averse to be deep-sea divers, and the more risk averse to choose less exciting occupations. Similarly we know that people take greater risks with their automobiles than they appear to be willing to allow the F.A.A. to take in their regulation of aviation safety. Nevertheless, there are rich possibilities for measuring these trade-offs made willingly by informed people.

Regulators need not be concerned that cost-benefit analysis will require them to assume too low a value of "life" or the risk of premature death. It would be a major improvement upon current practice simply to state the prospective incremental cost of additional reductions of risk as the standard in question is tightened.

Alternatively, the regulatory analysis could place a value on the reduction in risk which is equal to the largest value used by any other governmental agency, or it could provide a range from the range of values used by other agencies. As long as the value is stated in terms of reduction in exposure to risk, the decisionmaker (and the public) can be fully informed of the prospective benefits from the regulatory choices without having to suggest that human life can be reduced to a dollar value.

(3). Regulatory costs. Estimating the compliance costs for a proposed regulation is perhaps the simplest aspect of a cost-benefit analysis. Engineering analyses can generally establish the range of compliance options available to various firms. In some cases, a regulation will actually prescribe the technology to be used. Unless the technology represents a radical departure from current practice, the costs of meeting a regulatory standard can be estimated with reasonable accuracy. However, radically new technologies are more difficult to cost out in advance.

Clearly, it is very difficult to anticipate the full adjustment of technology and markets to regulation. New methods of complying with a regulation at sharply reduced costs may be found. Substitute products may be developed. Economies in the production of control equipment may lead to lower compliance costs. On the other hand, many of the indirect costs of regulation will probably be missed or underestimated in the preparation of a cost-benefit analysis. The increase in the price of goods substituting for the regulated product may be difficult to measure in advance. Delays may occur in building control equipment because of bottlenecks created by the regulation. More importantly, the rate of investment in new plant and equipment may slow, creating large indirect costs to the economy.

The indirect costs of regulation are frequently ignored and usually underestimated. Virtually any regulation which places tighter

standards on new sources than old sources will reduce the rate of investment in the affected industries. This will occur not simply because firms' discretionary cash flows are reduced, but because the economics of building the new equipment or producing the new product will be unfavorably affected by the regulation. New power plants are surely discouraged by EPA's new-source performance standards. Consumers postpone their replacement of old automobiles as more control costs are loaded on new ones. Old drugs last longer as their replacements are delayed by the FDA. The indirect costs of these disincentives to invest in new plants and to produce new products cannot be measured with precision. We cannot easily measure what we are failing to do because of regulation. Nevertheless, some estimates of indirect costs can and should be made. While these estimates are likely to be biased downward, they can be included in cost-benefit analysis.

Cost-Benefit Analysis in Perspective

Some would have us believe that uncertainties make cost-benefit analysis useless for a regulatory decision. But uncertainty exists in every human decision. Consumers, businessmen, and other government decisionmakers face uncertainty daily, but they do not foreswear rational analysis because of it.

Investment decisions made by private businesses are classic example of decisions made under uncertainty. The cost of the investment, the productivity of the new facility, the demand for the product, the price of labor used in the facility, and the rate of obsolescence of the facility cannot be predicted in advance. Yet, the businessman's investment decision is generally framed in rigorous analysis of the internal rate of return on the project, its payback period, or its ability to surpass a hurdle rate. Sensitivity analyses are performed to determine the potential exposure to risk from the

project. Alternative investments are compared with the project under consideration. Despite considerable uncertainty, major investment decisions are not left solely to the intuition of operating officers or the chief executive of a corporation.

Similarly, major government projects are freqently subjected to thorough cost-benefit analyses. Water projects generally require detailed analyses of benefits and costs. The benefit of flood control, recreation, drinking water supply or electricity output are included in such analyses. Uncertainty clearly enters into such an analysis, but estimates are produced nonetheless. Bridges, dams, and highways can be and frequently are subjected to similar analyses.

Why then do we question if cost-benefit analysis can be used in regulatory decisionmaking? If the answer is that all of the parameters involved are much more uncertain, the public and the regulator should be aware of this fact. If it is because regulatory decisions involve lives, then the answer should be that we ought to be even more careful to allocate our resources to this type of regulation in such a manner as to get the most protection for the dollar. But if it is argued that it is wrong to trade off dollars of costs for lives or health, then one must ask how any regulatory decision can be defended since no such decision ever attempts to reduce the risk to a zero level.

Procedural Delays and Regulatory Analysis

One of the most important problems with our current regulatory structure is that it is hopelessly complicated and subject to endless delays. With OSHA or EPA responsible for setting so many individual standards, defending them from court challenge, and enforcing them, they inevitably fall behind statutory deadlines and fail to enforce very vigorously. New procedures loaded on to existing burdens might serve to slow the regulatory process from a crawl to a standstill. The requirement for cost-benefit analysis might produce just such a result

if it were applied to all regulations and if it were subject to full judicial review.

In my opinion, S.1080 attempts to avoid this problem by limiting the cost-benefit requirement to major rules and limiting the basis for court appeals of the analysis. As an economist, I am all too aware of the possibilities of endless debates between economists over the precise potential effects of any change in policy. It would not be in the public interest to have these debates become part of a regular ritual of court appeals of the thousands of regulations promulgated by federal agencies each year. As long as the bill is understood to be limited to major rules and if the regultory analysis can only be appealed on limited grounds, the benefits of the cost-benefit analysis should outweigh its cost. But the Committee should be certain that it is not encouraging important new sources of delay in an already too cumbersome regulatory process.

In conclusion, I support the basic approach of S.1080 which will require regulators to attempt to measure the impacts of alternative decisions. This is not to say that any amount of additonal economic analysis is unequivocally a good thing. There is obviously a danger that at some point the benefit from additional analysis will be less than its cost, but I do not believe that we are even close to this point in present regulatory practice. In addition, it is possible to think of decisions which should not be subjected to cost-benefit analysis for moral or ethical reasons, but few regulatory decisions fit into this category. Regulators are continually trading some benefits for others in today's world. Those sacrificed for greater health or safety are "costs" while those gained are "benefits". It seems inconceiveable that an express recognition of this fact and a formal registering of all of the costs and benefits would not improve the quality of life.

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Senator LAXALT. Incidentally, if the bells ring again, you may lose a chairman, but I am going to authorize counsel to conclude this. We will have this in the record, of course, and I will make certain my colleagues see it.

Mr. Ashford?

Mr. ASHFORD. I would like to offer two different kinds of remarks, if I may. One is that for Senator Ribicoff we had undertaken a study from the economic impact statements prepared by the agencies themselves of what benefits were hidden, because they were not explicit benefit requirements required to be calculated at that time, in the analysis.

In a Government print that is called "The Benefits of Health, Safety, and Environmental Regulations," there is substantial evidence of countless benefits that have arisen from the various regulatory programs. I am not saying they were all good regulations; I am just saying there have been substantial benefits.

Second, I am very flattered that you like the lead work that we did at MIT, but I want to correct something for the record, that is relevant to this bill. The work we did was contracted for by OSHA, itself. You make a distinction between OSHA's analysis and the analysis we did. In point of fact, OSHA had two lead hearings, and as a result of the first hearing OSHA realized how much it did not know. New information from industry came to light, and questions arose which OSHA could not get answered except by exercising its subpena power. The agencies really do not want to use their subpena power, because it is viewed as intervention in an offensive way. OSHA contracted with the MIT group to do the analysis, so to say that it was not OSHA's analysis is not quite fair. OSHA sought the outside expertise that it needed.

That brings me to a point I did not address directly. This bill, curiously, wants to restrict the analyses to ones that are done by an official of the agency, and to relegate to contractors, like Brookings or others the data collection. These analyses are really difficult to do. We did them for lead but I am not sure we could do them for the carcinogens. In fact, in the generic cancer policy, the carcinogens that have been the most recognized—vinyl chloride and asbestos—have a range of uncertainty at any particular exposure level of three orders of magnitude—a factor of a thousand. So, when I say science is not the problem, I do not mean that science is certain. I mean that you inevitably have uncertainty, and there is not a thing you can do about it. Given that uncertainty, how does a legislator act in trying to protect the public? That is the difficult question.

Senator LAXALT. Thank you, Mr. Ashford.

Mr. Freeman.

Mr. FREEMAN. It seems to me that instead of having a rebuttal we are having harmony and concurrence. On only a few issues do we differ. I would like to pick up on one of them. That is to say that I think that going from gross to net would be a bad thing because, if it is going to cost me $100 million and you are going to get $150 billion of benefit, I think we need the analysis, even though maybe I should incur those costs.

The second point is this: To come back to judicial review and your objection to it because you do not believe in the tyranny of experts——

Mr. ASHFORD. Excuse me. I do not object to judicial review.

Mr. FREEMAN. I thought you did.

Mr. ASHFORD. Oh, no. I am on the record as favoring judicial review, very clearly.

Mr. FREEMAN. If you look at the *Weyerhauser* case and compare it with the *Appalachian* case and you look at what the presumption of validity that was followed in *Weyerhauser* did in terms of practical commonsense by saying you do not look at whether the Water Act is doing any good to the water, and you look at the *Appalachian* case which says that, after all, benefits means benefits to people, you see the real advantage of that.

I do think the point you made last, however, was a good one, and I would like to concur in it. That is, I do think it is wrong to limit the analysis here to people inside the Agency.

My experience, representing industry before EPA, is that EPA has had a lot of good experts—a lot of them outside contractors. I have good outside experts. When you get two groups like that together, the area of disagreement over facts can be narrowed considerably, and it can be made a lot more professional, and the disagreements really narrow down to policy points.

Mr. NASH [acting chairman]. Mr. Nordhaus, welcome. I am sorry we lost our chairman just as you walked in. Do you have a statement you would like to make?

Mr. NORDHAUS. I have some remarks, which I would be happy to make now or later when the chairman gets back—preferably the latter.

Mr. NASH. I think there are a number of votes taking place right now, so perhaps you could make it now.

STATEMENT OF ROBERT R. NORDHAUS, PARTNER, VAN NESS, FELDMAN, SUTCLIFFE, CURTIS & LEVENBERG

Mr. NORDHAUS. My name is Robert Nordhaus. I am a lawyer in Washington, formerly an employee of the Federal Energy Regulatory Commission where I served as general counsel. I am here stating my personal views on the legislation that the subcommittee is holding hearings on.

I would like to raise a couple of issues about the larger impacts of this legislative proposal on the functioning of the Government. It seems to me that some of the issues with respect to health, safety, and environmental regulation have been raised and, I imagine, in my absence, probably adequately canvassed.

What I would like to point out is some of the other areas that this bill will impact. The Federal Government is a large and diverse enterprise—perhaps a little too large. It does a lot of things besides regulation.

The bill in its present form applies to any rule which meets the test of the amended APA, and the major rule requirements apply to rules which meet its test whether or not they deal with regulation, as such.

One of the important changes the bill makes in the APA is the deletion from section 553 of the exemption from notice and com-

ment requirements for public property, loans, grants, and contracts. One of the things the bill will do—and I do not know whether this has been discussed with the subcommittee—will be to bring most major administrative changes in a number of these programs within the scope of the major rule requirements.

For instance, it is quite possible that administrative changes in the food stamp program, Federal medical insurance programs, some other types of welfare programs, crop insurance programs, student loan assistance, and loan guarantee programs all will be subject to the cost-benefit analysis requirements.

I am not any particular expert in these areas, but it seems to me that among the things that the subcommittee should do is get some notion of the impact of the legislation in these areas from the agencies concerned.

Second, in the area that I am familiar with—energy regulation—I think there are a number of perhaps unanticipated problems that may arise. There are a number of different types of energy regulation that go on now in the Federal establishment. Some of them are akin to the type of regulation that EPA and OSHA conduct.

However, many of the energy regulatory agencies are bottleneck agencies in the sense that nothing can be done until they approve the particular course of action that industry proposes. It is certainly true of the NRC in that you do not build a nuclear powerplant until you get, first, a construction permit, and then you do not operate it until you get a license.

The NRC has a licensing process which, as I understand it, takes about 12 years from the proposal to build a plant to its receipt of an operating license. From what I understand of this area, one of the best hopes for speeding up this process is through greater use of informal rulemaking.

I would think that the subcommittee would wish to find out what the impacts of the requirements that the bill newly imposes on informal rulemaking will be, for instance, on the NRC.

Looking at the agency that I am most familiar with, which, again, is a bottleneck agency in the sense that its statutes require the regulated entities—electric utilities and gas utilities—to come to the agency for permission to enter into business transactions or to construct facilities, and which traditionally has operated in a case-by-case mode, the delays that have been associated with the agency's performance of its functions are not likely to go away unless the agency has the ability to use informal rulemaking as a supplement to its case-by-case procedural mode.

That Agency is a small Agency by the standards applicable to most of the Federal Government. It is not likely to be able to gear up for the types of cost-benefit analyses, for instance, that are required by this bill and still be able to perform all of its other functions.

I would think that that Federal Energy Regulatory Commission would have some difficulty functioning under these new rules, and that difficulty would be fairly promptly reflected in an increase in the delays that have been plaguing that Agency for many years in disposing of its cases.

Again, it seems to me that this is one of the areas where the subcommittee should conduct fairly careful investigation to make

sure that the legislation will not make things worse from the point of view of the efficiency of regulation and from the point of view of making it less burdensome on the business community.

Mr. CYNKAR [acting chairman]. Thank you, Mr. Nordhaus. Without objection, your prepared text will be included at this point.

[The prepared statement of Robert Nordhaus follows:]

Prepared Statement of Robert R. Nordhaus

Mr. Chairman, thank you for the opportunity to appear before the subcommittee this afternoon to discuss S. 1080, the Regulatory Reform Act.

Before I begin my substantive comments, I wish to note that the views I will be expressing are personal views. They do not necessarily represent the position of the agency of which I was formerly General Counsel, the Federal Energy Regulatory Commission. Nor do they represent the views of any of my law firm's present clients who may have an interest in this matter.

Much of the testimony this subcommittee has taken has focused on difficulties and problems connected with Federal health, safety, and environmental regulation. In my testimony this afternoon I would like to focus on another area -- energy regulation -- and discuss what I see as the bill's impacts on the natural gas and electric utility industries.

The economic viability of these two industries is essential to any strategy to reduce our strategic vulnerability to oil import interruptions and to reduce the $80 billion annual drain on our resources attributable to oil imports. The electric utility industry will require up to $400 billion in new investment in the next 10 years to meet projected load growth and to replace obsolescent oil fired capacity. The natural gas industry now accounts for about 25 percent of primary energy production. It holds the potential to provide an increasing share of our primary energy needs over the next 20 years if existing impediments to producing, transporting, and marketing natural gas can be removed.

Large segments of both of these industries are likely to remain subject to Federal regulation indefinitely. Under the present statutory timetable (which Congress may accelerate), most producer sales of natural gas will be deregulated in 1985. However, interstate pipelines will remain subject to Federal rate and certificate regulation, and the regulatory mechanism

applicable to electric utilities is likely to remain in place in some form for many years.

If these industries are going to be subjected to Federal economic regulation, it is essential for both the industries health and the public's need for reliable and reasonably priced energy, to assure that regulation assists rather than hinders energy development. I would like to examine the effect of S. 1080 from this perspective.

The Federal Energy Regulatory Commission, which has the principal responsibility for natural gas and electric utility regulation at the Federal level, operates under two statutes dating from the 1930's -- the Natural Gas Act and the Federal Power Act -- supplemented by two statutes enacted in 1978 -- the Natural Gas Policy Act and the Public Utility Regulatory Policies Act. The Commission's role under the Natural Gas Act and the Federal Power Act is much different from, say, EPA's under the Clean Air Act. The Commission generally does not reach out under these statutes and impose regulation on industry through rules of general applicability. Rather, electric and gas utilities must, under these statutes, apply to the Commission for certificates and licenses, and must make rate change filings. These statutes require filings with, and in many cases approval by, the Commission in order for the regulated entity to initiate, or make any change in, the regulated service.

By way of example, under the Natural Gas Act a natural gas pipeline cannot begin an interstate wholesale sale of natural gas without Commission approval. It cannot change its rates without filing with the Commission. A rate increase to which the pipeline's customers object generally will not become final without Commission approval. The pipeline cannot abandon service once it has begun, without prior Commission approval. Finally, the pipeline cannot construct, modify or abandon any of its facilities without prior approval of the Commission.

Needless to say, the Commission gets a lot of paper -- some 75,000 filings in FY 80. Returning to the pipeline example, almost 4,000 of these were applications or rate filings by gas pipelines. Most of those were purely routine and were disposed of promptly. Others, such as those involving curtailment plans or liquified natural gas facilities, were hotly contested and involve enormous economic stakes. But what is true in all of the proceedings involving facilities or new service is that, whether routine or not, the applicant cannot proceed without Commission authorization. This system imposes very considerable filing and litigation costs on the natural gas pipeline industry. Improvement in the process is required; moreover, any breakdown in the existing system would impose enormous costs on both the industry and the public.

The Commission has a limited staff and already crushing case-specific workload. It must have the tool of informal rulemaking available to it in order to improve its regulatory process and to readjust that process in response to statutory changes or changes in the industries it regulates. If a substantial proportion of the agency's rules end up classified as major rules, the agency's rulemaking process may simply be overwhelmed by the analysis and cross-examination requirements of the new section 553.

Let me point out what this means in practice to an agency which wants to prescribe a major rule. At the notice of proposed rulemaking stage, the agency must, in addition to what it does now under the Administrative Procedure Act, (1) describe the benefits of the rule and persons likely to receive them, (2) describe the costs imposed by the rule and persons likely to bear them, (3) describe reasonable alternatives, and (4) explain how benefits justify costs and why the proposed alternative is the most cost-effective. Costs and benefits must be quantified. The above steps must be repeated whenever the agency makes a "significant change" in the proposed rule.

A comment period of at least 60 days must be provided, which must be extended another 30 days under certain circumstances. Opportunity for oral presentations and, in some cases, cross-examination must be provided.

When the final rule is promulgated, it must describe the alternatives considered and why each was rejected, and contain a supporting memorandum of law, explanation of the substantial support in the rulemaking for any factual conclusions, a description and comparison of costs and benefits, and a determination that benefits justify costs and that the most cost-effective alternative was chosen.

Any agency misstep in this process can result in invalidation of the rule, if the opponents of the rule make the requisite showing that the agency was arbitrary or capricious or that substantial support is lacking for the asserted or necessary factual support for the rule.

Compliance with these requirements will result both in drain on agency rulemaking resources and in delay roughly comparable to that which results from preparing an Environmental Impact Statement. For FERC, an EIS added at least 6 to 8 months to a rulemaking proceeding. These problems will be exacerbated by the limitations in the bill on contracting out preparation of the analysis.

Agencies which are strapped for money or personnel or which need to act quickly are likely simply to abandon informal rulemaking as a tool for improving their regulatory process to the extent that such rules are likely to be classified as major rules.

This result may be particularly troublesome for agencies involved in rate regulation. Rate regulation in many respects is a zero-sum game. Rate benefits for utilities are price increases for their customers. Given the enormous sums of money involved in energy regulation, any rule which results in rate increases for gas pipelines or electric utilities is likely to

result in substantial increases in prices or costs to their customers, and to trigger the major rule requirements under the bill. On the other hand, a rule which results in a rate rollback may not be as clearly within the ambit of "major rule," since there is no increase in prices or costs. (It could be argued, however, that compliance with the requirements of a rule reducing rates would be a cost of compliance to the utility, and thus be covered.)

Let me give an example of the type of rulemaking that would be impacted by these requirements. Natural gas producers for a decade have complained that the Commission's allowances for gathering of natural gas are too low, because they are based on cost data from the early 1960's. The Commission can deal with this acknowledged deficiency either through an informal rulemaking, which would set the allowances according to a formula, or by case-by-case determinations for each of the thousands of producers who claim their costs exceed the present allowances. If the Commission chose the informal rulemaking route, the rule would be a major rule. Even a minimal change in the allowances would increase costs to interstate pipelines and end-users by $500 million -- by any standard a substantial increase in costs.

In a case like this, the agency could well choose the course of case-by-case determination (which would be substantially more burdensome to industry), or simply postpone the matter indefinitely.

The Commission's electric rate regulation procedures face similar problems. In FY 1977, the average electric rate case took 40 months from filing to Commission opinion. This period has been reduced somewhat -- to 30 months -- since then. In 1980, the Commission's then Chairman submitted to Congress a study of decisional delay in electric rate cases, which concluded that the Commission could reduce the period necessary to decide an electric rate case to 12 months if a concerted effort were made to reform the Commission's administrative process. The report identified a series of steps that the Commission could

take to achieve this result. Some of the steps involved better management and changes in procedural rules. However, among the key steps recommended were a series of substantive rules which would set uniform filing requirements for utilities seeking rate increases and would settle recurring issues (such as the procedure for computing rate of return) which were litigated again and again in individual cases before administrative law judges. Under the bill many of these rules would be considered major rules either because they increased rates to the utilities' customers or because they adversely affected competition for retail business between the utility and its wholesale customers.

It is apparent to me that for an agency like FERC to reform its regulatory process through internal change, it must use informal rulemaking. Many of these informal rulemakings would be major rules. If the Commission wanted to carry out these reforms in any reasonable period of time, it could not meet the requirements this legislation mandates for major rules without a large increase in its legal and technical staffs. Such an increase will not be forthcoming in this era. I can only conclude that S. 1080, if enacted in its present form, will have very serious adverse consequences on the efficiency of the regulatory process and ultimately on our efforts to carry out our energy policy objectives.

I would like to add the observation that this legislation applies government-wide. The Committee should give very careful consideration to the bill's impact, not only on agencies like FERC, but also to its impact on, for instance, the Nuclear Regulatory Commission. Industry estimates indicate that getting a nuclear power plant constructed and licensed takes about 12 years. Informal rulemaking may be a key element to simplifying and expediting the licensing process. While the requirements of the bill will not make rulemaking as drawn-out as the present licensing process is, they may make it infeasible to use it as a tool for expediting that process.

I believe that the Subcommittee may also wish to evaluate the bill's impact on Federal contracts, and on grant, loan, and benefit programs. The bill amends 5 U.S.C. § 553 to subject rulemakings under these programs to the notice and comment procedures of § 553 for the first time. In addition, the cost benefit analysis requirements of the bill will apply to major rules under these programs. The result will be that major administrative changes in the food stamp program, medical insurance programs, student loan insurance programs, or General Services Administration contracting and purchasing may become subject to the requirements of the new section 553. I am not clear whether this result is intended. In any case the Subcommittee may wish to obtain detailed agency views on this matter.

Mr. FREEMAN. Could I respond briefly to Mr. Nordhaus, at least as far as the Nuclear Regulatory Commission is concerned?

Mr. CYNKAR. Go ahead.

Mr. FREEMAN. I was practicing before that Commission when the *Calvert Cliffs* decision came down. In those days, the agency really did not proceed by rulemaking. It did everything by case-by-case adjudication, and all the safety, and licensing, and environmental issues that followed were essentially handled in adjudicatory proceedings in individual licensing cases.

There was some dispute in those days about whether the Atomic Energy Act really required full adjudicatory procedures at the licensing stage, but the agency interpreted the act as doing so, and so it followed that interpretation, and that was what took place.

When we had to do a NEPA statement in each of those proceedings, and when all of the generic health and safety issues had to be debated there, and we had 15 or 20 of those licensings going on throughout the United States and only a limited number of experts, this really brought the agency to a complete standstill. It was not NEPA but the Commission's failure to use rulemaking.

A number of us urged the Commission to go to generic rulemaking, and they did. In the first two of those rulemakings—the emergency core cooling system rulemaking and the as low as practical rulemaking—the Agency decided to go to informal rulemaking, but it also decided to give everybody virtually unlimited rights to cross examination.

We had seven different parties in the emergency care proceeding, and therefore when any group of experts would come on the stand they would be cross examined by seven different teams of lawyers. It was a zoo, it was a circus. It was everything that a rulemaking

ought not to be. I would be glad to supplement my testimony with several Law Review articles on that subject.

Mr. CYNKAR. Without objection, they will be included in the record.

Mr. FREEMAN. After that, the Commission learned something, and in the subsequent hybrid rulemaking—the uranium fuel cycle rulemaking—the agency adopted a number of our suggestions, and, in effect, it proclaimed what became the International Harvester rule.

In that case, unfortunately, the environmentalists did not do their homework, so they did not get the right to cross examination, and so they went to the Supreme Court to see whether they had a constitutional right to cross examination, the Court said they did not.

If your bill had been passed at that time, and if your major rule proceedures had been in effect, we would have had very limited cross examination rights. All those procedural issues would have been eliminated. We would not have had to go to the Supreme Court and wait through that decision, its remand back to the circuit court, its remand back to the Commission, and find out 6 or 7 years later that the Commission's original rule was all right after all.

I think, based on my experiences there, what you are doing here builds on the mistakes that were made in the past, at least as far as that agency is concerned.

Bear in mind that the NRC has had to do these economic, regulatory analyses under the name of NEPA statements for all its major rules for a decade. I do not think it is going to change things at these or at other agencies, except to make things a little better.

I think the problems with the present NRC go to its will, not to its procedures.

Mr. NORDHAUS. Could I respond?

Mr. CYNKAR. Mr. Nordhaus, could I just ask you to hold your response in abeyance for a second?

Mr. NORDHAUS. Certainly.

Mr. CYNKAR. As the clock moves on, there are certain basic questions that I would like to have addressed, and hopefully you can weave your response to Mr. Freeman into your observations on this point. But I think there are certain issues that we would like to get on the record.

As you know, S. 1080 provides a requirement that in the statement of basis and purpose an agency has to make a determination concerning its final rule—namely, that it reasonably determines that the benefits of the rule justify its costs, and that, of the alternatives that are identified in the rulemaking, the rule is the most cost-effective. A number of questions have been raised, and arguments have been joined on both sides, concerning that determination.We have heard most of the testimony some of it on the benefit-cost justification. But I would like to throw out this point for your discussion.

Many have challenged this determination, especially cost effectiveness, as either being meaningless or impossible—impossible in the sense that an agency can describe the tradeoffs, can describe effects, can describe one side of a ledger or the other side of a

ledger or both; but that the process breaks down when, in the phrase of one person, one tries to leap the gap between the benefits data and the cost data. In short, the effort of comparison either is impossible or inherently requires quantification, and since certain significant effects are beyond quantification, the enterprise is useless. That is one way the cost-effectiveness standard is challenged.

Senator Laxalt asked a question earlier, borrowing a phrase from one of the witness' statements—the statement challenging the idea of cost effectiveness as being essentially meaningless because "there is no consensus as to how to value continued good health, clean air and water, or maintenance of the ecological balance." So, there is no national consensus, there is no national policy about weighing benefits and costs across the board, and therefore the standard in this legislation is meaningless.

With that, I will be quiet and let you proceed in any way you want.

Mr. Ashford.

Mr. ASHFORD. As I read the bill, the laudable part of it and why I am able to endorse its thrust—and without this feature I would not be able to endorse it—is that it does not, in fact, demand that the benefits exceed the costs. I do not know how you determine whether 25 lives are of such a benefit that they exceed $100 million in compliance costs. I do not know how to do that calculation, but, fortunately, this bill does not ask for that. This bill says that the benefits should be reasonably justified by the costs. That is a value judgment which does not require explicitly quantifying human life in terms of dollars, and that is why the bill is good.

Cost effectiveness has been defined by the witnesses here as the decision to protect lives and do it in the most inexpensive least burdensome way possible. That is what cost effectiveness is.

The criticisms that you have heard have been directed at a legitimate point, and that is, nowhere in this bill should we ever require that benefits and costs be expressed in dollars and compared to get a net value. That is what is being criticized, and as long as this bill does not do that, you have my support.

Mr. FREEMAN. I would like to comment on it from the legal point of view. In the rulemaking which we have just finished—and that has just run the gauntlet at the U.S. Court of Appeals for the District of Columbia in an opinion which is an exhibit to my testimony—the revised new source performance standards for coal-fired generating plants—the agency, in effect, was required under the Clean Air Act, to do a regulatory analysis. Your bill, in effect, writes that requirement for regulatory analysis into the laws across the board. EPA also did a statement of basis and purpose. In it; it explained the rationale for its rule, and as part of that incorporated by reference the final economic analysis—the econometric model studies—which ICF had done for the Department of Energy and EPA. It is true that that study, while quantifying costs and quantifying reductions in emission limitations that would be obtained in terms of gross loadings of SO_2 into the atmosphere, did not go further and quantify those reductions into social benefits.

Interestingly enough, as I pointed out in my prepared testimony, the comments prepared by the Council on Wage and Price Stability

criticized that and said that EPA should have looked at health benefits. There the question was: Were there any health benefits?

Amazingly enough, I agreed with EPA that the health benefits were de minimis because of that particular standard. That particular standard was a technology-based standard where the emission would, in every event, be lower than what was required to meet current Federal ambient primary and secondary standards—the health-based and welfare-based standards—plus the PSD increments, and therefore the incidental exposure that would come from those increases in SO_2 levels were de minimis.

So we did have to come to grips with that issue. But if we were dealing with whether there should be revisions of the ambient standard—the primary standard—it seems to me that while under the present act we could not take costs into account directly in setting the standard, everybody would like to know what those costs are going to be and what the social consequences and the benefits would be. That is just the kind of thing Congress ought to know this year when it decides whether or not to amend the Clean Air Act standards in that area.

Mr. CYNKAR. Mr. White.

Mr. WHITE. Thank you. I would like to say a few things.

First, I think that Professor Ashford properly made a good distinction between cost-benefit analysis and cost effectiveness.

In cost-benefit analysis, you basically try to convert everything into a dollar number and decide whether the discounted benefits exceed the discounted costs. A cost-effectiveness calculation sets a goal and then tries to find the most cost-effective or cheapest way of achieving that goal. It can further be extended to calculating the costs are of achieving alternative levels of a goal but then leaving it up to somebody else to choose the appropriate level; i.e., to do the implicit cost-benefit analysis which, in the end, always has to be done by somebody.

The important point is that it is never, in real life, the case that it is only 500 lives and you are arguing about $100 million to do it this way and $75 million to do it some other way. It is: Should we save 500 lines for $100 million, or 600 for $1 billion, or 650 for $10 billion, or 700 lives for $10 trillion? In the end, somebody has to decide: enough.

Let me argue this point in two ways. First, our society always does make implicit judgments about enough. Let me give you three examples.

At the time of the first Arab oil embargo in 1973–74, the Congress passed the 55-mile-per-hour national speed limit. It was primarily done to save gasoline. One of the nice benefits that we discovered as a side effect was that there was a reduction in the number of lives lost due to traffic accidents.

It is clear that, were we either to enforce that 55-mile-per-hour law more effectively now or to lower that 55-mile-per-hour to a 45-mile-per-hour speed limit, we would save yet more lives.

Why do we not do it? We do not do it because implicitly our society—our political system—is saying "enough." The costs involved in going from 55 down to 45 would not justify the reduction in the number of lives lost.

We do not build pedestrian underpasses under every major intersection in the major cities of our countries, even though it is clear that that would save lives—or really, delay deaths.

We do not station an ambulance on every street corner in the country, even though it is clear that that would save lives. Why? Again, our society is saying that it would cost too much.

So, implicitly, we are always making these decisions. The difficulty is that the political system feels uncomfortable about doing it explicitly—about laying out the numbers and saying: "Here is where we draw the line." But, inevitably, that has to be done.

The second thing I want to mention is that in most cases what we are really talking about is risk. We are talking about programs that are going to reduce or increase risk—the risk of a person being in a serious accident or the risk of a person coming down with a particular disease or sickness.

Over the last 10 or 15 years, economics has made, I think, some substantial gains in understanding the process of valuing risk. We all face risk every day of our lives. We cross streets in the middle of the block rather than at street corners. We choose more risky jobs rather than less risky jobs. We fly from New York down to Washington rather than walking. Many of us drive cars without buckling up our seatbelts. These are all cases in which we choose to expose ourselves to greater risk in return for something—a saving in cost, a saving in time, a greater convenience.

In the economics profession, we are starting to understand how to measure that—how to measure the implicit value of risk—and, thus, we can go from estimates of that value of risk to valuing a Government program which would reduce or increase risk.

As an example, take the saccharin problem. A ban on saccharin would reduce by a small amount the risk of, say, bladder cancer for any individual who otherwise would use saccharin. Let us say this reduction in risk is one one-thousandth.

We can make estimates of what the value of a reduction in risk of one one-thousandth is by looking at the way people behave with respect to risks in jobs.

Suppose we find that the value of a one one-thousandth reduction in risks is $500, and then we also decide that there are 20 million people who would be exposed to saccharin who are now going to have a risk of death reduced by one one-thousandth.

We can take the 20 million people, multiply it by one—for the one one-thousandth reduction in risk—and then multiply that by $500. We thus get an estimate of the aggregate value of the reduction in risk that has occurred.

Should the risk value be $500? Should it be $1,000? Should it be $10? Estimates may well vary substantially. Economics and other disciplines should and can try to improve those estimates and narrow the range of uncertainty. But it strikes me that, in principle, this is the right way to be thinking about these problems. They are problems in risk—in reducing or increasing risk and in valuing risk.

Mr. CYNKAR. Mr. Crandall.

Mr. CRANDALL. Let me address those two questions briefly.

On the absence of precisely identical alternatives for cost-effective analysis—alternatives which yield the same results in terms of

health or safety improvements—it is probably true that, if you wish to be sufficiently precise about it, there may be zero alternatives in many cases. If you do not wish to be quite so precise, there may be an infinite number of alternatives, and it may be hard to limit the range of alternatives. It is obviously up to the agency as to what are the alternatives and also over what range of alternatives they have any sort of mandate.

Second, I think there is a considerable interest on the part of some to prevent cost-effectiveness analysis. In the first place, if you look at almost any regulatory program, there is a very strong bias against new sources. That is, the regulatory agency is instructed by the Congress to set tighter standards for the new source or only to set standards for the new source and not for the old source.

That is not a cost-effective way to go about regulation in many cases, yet there are those who would argue that this forces technology even if it retards its implementation—a strange way to force technology.

There are others who would argue that they would just as soon apply the new regulation to that which is new since they own all of that which is old. We all understand the political reason behind that.

I think it is impossible for you to specify with any greater precision what the alternatives are to be. I think there generally are reasonable alternatives.

With respect to benefit-cost analysis, I would not expect this subcommittee to produce a bill which says that you must measure benefits in a precise way and make sure that they precisely exceed costs in dollar terms because it would be incumbent upon you to place a value upon some measure of reduction of risk, and it is not surprising that in legislation Congressmen do not wish to attempt to place a value on that for public dissemination.

Even more important, I think, is the fact that it is likely to produce misleading and incorrect sorts of analyses. When we start putting values on human lives, we begin to talk about certainty equivalents and we begin to suggest, perhaps, that with tight regulation we can produce immortality. In fact, as Professor White indicated, what we are talking about here is some probabalistic extension of life or some improvement in human health.

To try to reduce the value of dissimilar improvements in human health or dissimilar improvements in probability of living another month, year, or 10 years—to try to produce that in a statute, it seems to me, would be very difficult. I would prefer this to be left to the regulatory agency.

The nice thing about a provision such as the one in S. 1080 is that it requires the agency to write down its assumptions and then to reach a decision so that will not be very hard for congressional oversight committees to ask a regulator why he set the standard at 0.05 parts per million rather than .04 parts per million. When he details the costs of the alternatives it will not be very difficult for the committee to calculate the implicit value of reducing the risk involved.

Mr. CYNKAR. Thank you, Mr. Crandall.

Mr. Podesta.

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Mr. PODESTA. First, let me say that Senator Leahy had to catch a flight to Vermont and is sorry that he could not be here. He will be reading the transcript of this most helpful testimony.

We have prepared a number of questions, many of which have been touched on by one witness or another, and I would like to submit all of those questions to the whole panel, and if you feel you have anything to add, please feel free to respond in writing to the subcommittee.

I would like to hit two items that really have not been touched upon yet, but may create substantial burdens on the agencies in implementing this bill.

First, the bill requires that the notice of proposed rulemaking set forth alternatives to the proposed rule and a discussion of why the rule proposed was more cost effective than the alternatives set forth. Mr. Crandall has just been speaking about that.

Do you think it is necessary to require the Agency to set forth alternatives to the rule it proposed at the notice stage, or would it make more sense to allow the parties affected by the rule to raise alternatives during the course of the comment period?

Mr. WHITE. Let me address that. I think alternatives early in the stage really are important. I think they help structure an agency's thinking on these questions.

Also, at the time of the notice of proposed rulemaking the initial proposal frequently starts to take on a life of its own. If the agency is proposing a single number for a standard, in an important sense the agency, has tacked its flag to that number. Its prestige and "face" are on the line. So I believe that the maximum amount of flexibility ought to be introduced as early in the process as possible; urging the agency to think about alternatives very early—and that means at the proposing stage, if not earlier—is very important.

Mr. FREEMAN. On that, I would like to call your attention to the excellent discussion in Judge Wald's opinion, which is an exhibit to my testimony, starting at page 39, of how EPA did it in that rulemaking that I was talking about.

They really did an economic analysis of alternatives of three phases: First, the preproposal phase, the proposal phase, and the postcomment phase.

The preproposal phase is a very important part of rulemaking. The agency staff go out and try to get the facts. Generally where we have one of these complex questions which is going to be a major rule the regulators get involved, and the people who are interested in securing the special benefits of the regulation get involved, and the regulated get involved. They informally help suggest and shape the agency's list of alternatives.

Then the agency proposes the formal rule, and here again it also helps to again invite suggestions of different alternatives. I think the more alternatives the better, the more open the rulemaking the better.

I certainly also endorse the earlier comments—because I think this is very important, too—of permitting whatever is developed after the close of the formal comment period to go into the public record—for people to still comment on it—and to have that give

and take up to the final moment when the agency promulgates the rule.

On these complex issues we are talking about, the more facts the agency has the better, the more people who can get into that discussion the better, the more open that discussion is the better the rule is likely to be.

Mr. PODESTA. Mr. Nordhaus?

Mr. NORDHAUS. It seems to me that the agency should be encouraged or perhaps required to surface alternatives known to it at the earliest possible stage so that they can be the subject of comment. Surfacing alternatives also may engender variations of those alternatives or new alternatives that nobody has thought of.

I guess the one reservation I have about the bill in its present form in this respect is that I am not sure that it is a very useful exercise to require an agency to attempt to show at the proposed rule stage that the alternative it has chosen is the least-cost alternative or the most cost-effective alternative. It seems to me that that is an exercise that is better gone through at the final rule stage.

Mr. ASHFORD. We really have two different components. I, too, would agree that alternative ways of achieving the same social goal might not be addressed at the outset. I think this is one thing we are all in agreement on— it is important that the agency do that thinking. But I want to return to another issue connected to this alternatives business, and that is to make one more plea for a net cost filter system for what constitutes a major rule. Of course, we hope that in regulations the benefits exceed the costs, and therefore there would never be a net cost. That is not the way language is constructed. We are talking about costs on the economy-that is, those costs that can actually be monetized.

So a regulation might cost $100 million but save $70 million in absenteeism costs. I am not saying workers' lives should be valued in absenteeism costs; I am saying that, at a bottom line, you just ask what the firms will lose in terms of increased absenteeism. If $100 million is offset by $70 million and, on top of that, you get improved health effects, then I do not see why the Agencies should have to go through this contortion of calculation after calculation.

Mr. CYNKAR. Mr. Ashford, could I ask you a question right there?

Mr. ASHFORD. Certainly.

Mr. CYNKAR. One thing I do not understand about your position on net costs in the "major rule" definition is that it seems to assume the analysis. I would think that you would have to do the regulatory analysis in order to identify those various costs on either side of the ledger. Indeed, not just have the agency do the analysis, but one of the motivating ethics of S. 1080 is that you need to weave in oversight in order to ensure that agencies do a fair analysis, and that is accomplished by public scrutiny through the comment period plus the judicial review provisions which you endorse.

Do you not assume the analysis?

Mr. ASHFORD. No. You have the same problem on the cost side. How are you going to assume that the agency quite properly saw that the compliance costs were or were not higher than $100 million? The same defect exists. At some point you have to let go and

say the agency did or did not count the compliance costs correctly. The defect is no greater in the case that I am talking about. These are back-of-envelope calculations that are very, very easy to calculate.

I'd like to make another point. There is an ambient air lead standard, there is an occupational lead standard. If you do a major analysis rule on the EPA lead standard, you come up with $100 million or greater in compliance costs. OSHA's calculation might be the same. It turns out that, combined, the effects are not $200 million. In fact, there may be considerable savings by having one regulation imposed simultaneously with another, and this analysis does not take that into account.

You do not have to presuppose the analysis. Take benzedine dyes, which are dangerous materials. There are substitutes on the market that are not only safer but cheaper. There is a net economic benefit to forcing the change: Firm A will go out of business, Industry B will be revived. Are you going to say that we have to go through contortions of a major rule analysis in this context? I say no.

Mr. CYNKAR. Since the record does not reflect nodding heads and I am not enough of a Perry Mason to know how to describe that, I think Mr. White started nodding his head first, so we will let him go ahead.

Mr. WHITE. The reason you want a regulatory analysis is that something that is major—that is going to have a major impact on somebody—ought to be subject to this kind of scrutiny. Even though somebody else is going to benefit to an equal or greater extent, to the extent that there is a major impact on somebody—and $100 million is as good a major impact number as any other—you want to have this kind of scrutiny.

Mr. CYNKAR. Mr. Nordhaus.

Mr. NORDHAUS. Let me just mention one thing on this. It seems to me that if you use a net cost standard—in other words, there has to be a net detriment to the whole society before you do a regulatory analysis—you will never see one.

Your suggestion is that the test is a net economic cost, and if it turns out they are offsetting nonquantifiable benefits, then you still have to do the analysis?

Mr. ASHFORD. Right.

Mr. CRANDALL. I guess I have two responses to that. One is that I cannot imagine a regulatory analysis requirement that suggests you only analyze losers. Secondly, I cannot imagine a requirement that agency administrators, having found a winner, burn the analysis. You know very well they will ship it to their public affairs office.

Mr. ASHFORD. You are just not accurate here. There is intentional confusion. A net effect on the economy in terms of economic effects does not mean you identify the losers. We hope that there are substantial benefits of the nonmonetizable kind that will exceed the costs. If there are not, we do not have any business regulating, in essence.

But there may be economic compliance costs of $100 million or greater, which may be significantly offset by economic savings in

and apart from the benefits. Do not keep insisting, please, that we are talking about the losers, because we are not.

Mr. CRANDALL. Again, I do not understand the discussion. To monetize is to convert into currency. No one is suggesting that we convert lives into currency.

What Nick [Ashford] is suggesting, I guess, is that there are some benefits that you cannot value. What we are saying is that in the regulatory process, implicitly, you must value them, and to dodge that requirement in that way does not seem to me to be very useful.

It seems to me that this allows a lot of art to be inserted to avoid the requirement for analysis. I think that if we stay with $100 million, probably indexed, we will be in much better shape if we continue to make it apply to total costs or total effect on the economy.

Mr. FREEMAN. I would like to add one further comment. Since this legislation is not making substantive changes across the whole Government, we are not getting Robin Hood out of the Government. But we at least ought to get him out of the closet, and we ought to find out who is going to provide the money and what effect their providing the money is going to have through with these regulations.

I think what you have said here dramatically emphasizes the need for writing into this bill the suggestion of the administration this morning that the President be given express authority in this bill to open the closet and see what Robin Hood is doing.

Mr. WHITE. Let me add that when I was with the Council of Economic Advisers 2½ years ago, one constantly heard out of regulatory agencies the claim: "This regulation is costless. It pays for itself. All we are asking for is good housekeeping procedures, and the savings that they will achieve by keeping all the hydrocarbon emissions inside the plant rather than letting them out—and they will all get liquefied and turned back into useful products—will more than pay for the costs of the regulation." If you really believe that, why have the regulation in the first place?

Surely those profit-hungry entrepreneurs ought to be out there trying to figure out every angle to make a buck, and all you need to do is whisper in their ear, show them that this is a successful way to make a buck, and they will do it for you. Why have a regulation?

I am extremely suspicious of these kinds of "they will pay for themselves" suggestions, and that is why you have to look at the gross costs of these kinds of regulations.

Mr. ASHFORD. That is an important question, and let me tell you what the answer is. The answer is that you are insisting on doing a static analysis. Firms are locked into inertial positions where they are not innovating, and they are producing the same kind of technology. The history is against you, my friend. Vinyl chloride ended up saving the industry millions of dollars; that is what the facts show. They did not want to change their technology. The point is, if you only view compliance as off-the-shelf technology and turning valves and retrofitting, of course it is not going to be cost effective.

Herbert Simon received a Nobel Prize in economics for discovering that people do not maximize profits, but minimize commercial risks. His work is worth looking at.

Mr. PODESTA. I think we have one more question each. Again, anything else you would like to add for the record, would be fine.

My last question is this: The last Congress passed the Paperwork Reduction Act which is forcing agencies to review all their existing paperwork requirements. The Regulatory Flexibility Act was also enacted, which requires that agencies consider the impact of regulation on small businesses and seek less burdensome alternatives.

The Executive order requires agencies to assess in a very detailed way the costs and benefits of major regulations. S. 1080 would extend and expand the requirements of the Executive order.

Do you believe that the agencies have the resources necessary to fulfill all these duties and go back and review all of their existing major regulations in the next 10 years to determine whether they continue to be the most cost-effective alternatives available?

Would it make more sense to institute a petition system whereby a regulated party could come to the agency and suggest a more cost-effective alternative than the rule he or she is presently operating under?

Mr. ASHFORD. If you require that every major rule be reviewed, within 10 years you are going to bog the agencies down and they will come to a grinding halt. And I will tell you what the living example of that is. We have required the reregistration of pesticides in EPA. As a result, there are no more pesticides being registered or reregistered. The agency cannot even do the analysis. It has come to an absolute, grinding halt, and, as a result, the public is being subjected to tremendous toxic effects by those materials.

History is against you. The more regulations you have, the more you have to review, and at the same time resources are denied the agencies to do what I have indicated is already complex analyses. If you ever really want to hamstring the agencies, require review. You will do it in a very short period of time.

Mr. CRANDALL. I would disagree with that, but only mildly. I do not think they have the capacity generally to do the retrospective analysis. They did not have the capacity to do the analysis in the first place since they had to race to meet deadlines and, in the case of OSHA, to promulgate numerous safety standards, which they obviously had no time to analyze. In the case of EPA, they had to set thousands and thousands of point-source standards which they obviously could not possibly review.

I think requiring regulations to review their programs—as I mentioned earlier in my testimony—does make sense, and to make this requirement programmatic rather than oriented toward major rules.

At this point, though, maybe I ought to insert a plea that one provision in the bill be changed, and that is the provision that the analyses be done entirely internally and not by outside contractors.

I think much of the bad publicity which outside contractors have gotten for doing studies for these agencies is less a reflection on the contractors than on the agencies themselves. There is no reason to

believe that the resources within the agencies would be managed any better than the resources outside the agencies.

If one is concerned about enriching outside contractors—by the way, Brookings does not do any of this sort of analysis—one can handle that through the budgetary process. I think the requirement for internal analysis unduly limits the range of expertise and the range of talent available to regulatory agencies.

It would be very hard to get OSHA geared up with a serious economic analysis unit in 2 or 3 years, given its reputation within the economics profession. I think it is much better to let them hire the expertise in the form of outside contractors.

Mr. WHITE. I would endorse that last point.

As far as sunset and periodic review of major regulations is concerned, I agree with Nick Ashford that it could end up being a huge drain on the agency's resources. There is a possibility that useless rules might get dropped in the process, but I am somewhat dubious.

Sunset is somewhat like zero-based budgeting. It looks great on paper. But as soon as you look at the way it is going to come out in practice I think most of its glamor disappears.

I urge anyone who thinks that sunsetting will have substantial effects to take a look at the Senate debate on former Senator Muskie's bill—I think it was S. 2 in 1978. If you look at the record of the Senate debate, you will see that there is page after page after page of Senators praising sunset. They all assure us that it will mean an end to ineffective, inefficient regulatory programs.

In those multiple pages of debate, there is exactly one specific program mentioned—exactly one. It was the Civil Defense Agency, with a total budget of $90 million. It is great to talk about in generalities. When you get down to specifics, I am just not sure that the benefits of sunset exceed the cost. I am not at all sure.

Mr. PODESTA. Mr. Nordhaus.

Mr. NORDHAUS. My view on this is that agencies, in the foreseeable future, are going to have essentially fixed resources. Those that do not have the analytical capability now are going to have a very difficult time building that capability in the next few years.

For that reason, it seems to me that if Congress intends to impose additional analytical requirements on these agencies it should target the analysis very carefully or have a targeting mechanism, either in the executive branch or, as some proposals have it, in Congress, to require certain types of proposals to be analyzed at the time they surface on the regulatory calendar or at the time the NOPR comes out.

As to the sunset review or the periodic review of agency regulations, it seems to me that that is going to make the problem even worse for agencies that do not have the analytical capability now.

As I pointed out earlier, there are different kinds of Agencies. Some agencies, unless they can get their act together quickly and are able to change their present procedures through rulemaking, are not going to be able to serve the functions that they were set up to do. They are going to get in the way of the business community, they are going to get in the way of what Congress intended them to do, unless they are able to proceed with their business

without having to go through these rather numerous and time consuming steps that the bill would impose on them.

Mr. PODESTA. Mr. Freeman?

Mr. FREEMAN. I would like to just comment on one—I believe—implicit suggestion in your question, which I think is very meritorious.

I would first of all agree that any kind of rote review of rules is like asking the Agency to look in the mirror and say: "Mirror, mirror, on the wall, which is the fairest reg of all?"

What you really need is some way of establishing these priorities outside the Agency, and that does not mean putting all of its regulations in some big list. It just means requiring review of the really important ones as perceived either by other agencies or the President—who can use OMB. Let the President have some formal mechanism for saying: "I think you should take a look under these procedures here of regulations A, B, and C, because the EPA and the Defense Department are telling me that it is killing their plan to do X, Y, or Z." I think that would be a major step forward.

Second, I think if the regulated could look to somebody as well as Big Daddy to help them out, it would also help. That is, if there were some self-help mechanism provided, where the regulated could come in and petition and, upon making a certain demonstration, at least get some priority for review of rules under the substantial disciplines that this bill imposes.

I think that those two mechanisms—really, selective Presidential requirement of review, and some method by which the regulated can suggest a better way that is more cost-effective or will produce greater cost-benefits to the regulated—would be a huge step forward. I think that is 10 times better than setting up some sort of overall program that just makes everybody shuffle paper and say why they are good.

Mr. PODESTA. Thank you very much. I will send you those other questions.

Mr. CYNKAR. As with all our panels, there will be certain written questions which we will submit to you. As with all the others, if you could possibly respond by next Wednesday, it would be very helpful. Without objection, they will be included in the record.

Without objection, the statement of the National Rural Electric Cooperative Association and the letter from the National Association of Home Builders will be included in the record.

Also, without objection, a series of articles and other volumes which have been submitted to the reporter for the appendix are ordered inserted in the record.

With that, thank you very much. The hearing is adjourned, subject to the call of the Chair.

[Whereupon, at 4:50 p.m., the hearing was adjourned, subject to the call of the Chair.]

APPENDIX

PART 1.—PRACTICALITY PANEL DEBATE

The questions submitted by Senators Laxalt and Leahy are printed below, followed by the individual responses of three of the panelists. Questions were submitted to all five panelists. However, Messrs. Ashford and Nordhaus are not represented here. Unfortunately, their responses had not yet been received by the Subcommittee at the time this document was to go to print, August, 1981.

QUESTIONS SUBMITTED BY SENATOR LAXALT

1. Assuming that the President or his designee is given the authority to designate certain rules as "major," do you feel that the President or his designee should also have the power to waive regulatory analysis for certain major rules? If you support such waiver authority, please give specific examples (in addition to IRS rules) of rules for which such a waiver power would be needed. If you favor such waiver power, but with criteria set out in the statute, please elaborate on the details of such criteria. In addition, if you favor the addition of a waiver power, please explain why you do not feel that putting such discretion in the Executive inserts a major loophole in the requirements of S. 1080. Should the exercise of such a power be subject to judicial review?

Mr. CRANDALL. I do not see the need for a waiver provision. The regulatory analysis requirement should be designed to apply only to major rules, but it should not be applied to rate-making proceedings at independent regulatory commissions. Exceptions to the analysis requirement should be granted only in emergency situations and would not require Presidential discretion.

Mr. FREEMAN. Implicit in the wording of the question is that the President's waiver would exempt a "major" rule from the regulatory analysis requirement but not the "hybrid" procedural requirements of new § 553. I agree that the waiver should *not* apply to these "hybrid" proceedings. This still leaves the question of whether the waiver would also extend to the substantive cost-benefit and cost-effectiveness commands in new Section 553(c)(2)(D), as supplemented by new Sections 551(17) and (18). If Presidential waiver were to have that effect, to remove a wart it would cause a cancer. It would undermine one of the major purposes of the bill: to conform the substantive law to the President's command (Executive Order 12291) to Executive Branch agencies (and extend it to the Independent agencies) to adopt a new canon of statutory construction of resolving statutory ambiguities, and to filling in any statutory intersticies, in favor of cost-benefit justified and cost-effective rules.

There is a precedent in the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq) for such an "across the board" statutory command. Thus, these provisions in S. 1080 represent a generic response by Congress to the kinds of statutory construction and Constitutional problems that troubled courts, like the Supreme Court last term in the Occupational Safety and Health Administration (OSHA) benzene case *Industrial Union Department, AFL-CIO* v. *American Petroleum Institute*, 448 U.S. 607, 65 L.Ed 1010 (1980). There the particular statute was silent as to whether benefits, or the lack of them, should be balanced against costs. The Government argued that this silence was deliberate. But the Chief Justice, and Justices Stevens, Stewart and Powell said:

"[T]he Government's theory would give OSHA power to impose enormous costs that might produce little, if any, discernible benefit. If the Government were correct. . . the statute would make such a 'sweeping delegation of legislative power' that it might be unconstitutional. . . . A construction . . . that avoids this kind of open-ended grant should certainly be favored."

65 L. Ed. 2d at 1037, (footnote and citations omitted). Justice Rehnquist went further, stating that the statutory language in question was an unconstitutional

"standardless delegation" of legislative power. 65 L.Ed 2d at 1055. See also *Appalachian Power Co.* v. *Train*, 620 F.2d 1040, 1046 (4th Cir. 1980):

"To determine whether or not progress is reasonable, we repeat, it may be appropriate to consider water quality as a factor, that is to say as an item of evidence. Its sought for arbitrary exclusion by EPA is simply a too rigid a construction of the statute [Clean Water Act], and we do not believe it is justified. To hold otherwise ultimately can only result in regulation for regulation's sake, at which point, of course, a serious question of constitutional limitations would arise. We believe this useful statute deserves better treatment."

Thus, if in an effort to tidy things up a bit, Congress were to give the President an unlimited waiver of the substantive requirement set forth in Section 553(c)(1)(D), then the imperative need for Congress to supplement the organic statutes generically might be held to be so vague, because of the unlimited waiver, to be unconstitutional. This would leave agency actions pursuant to the New Executive Order in the current gray areas of the organic statutes much more vulnerable to reversal on judicial review. [1]

In order to avoid that anomalous result, any waiver should be specifically limited solely to the preparation of the regulatory analysis. [2]

If waiver is limited to the preparation of the regulatory analysis, the question presented is whether the exemption should be only temporal—that is only applicable to when the analysis has to be performed—since the rule still has to meet the statutory cost-benefit and cost-effectiveness criteria. But as the Bill now stands, the agency already would have the authority to postpone preparation of the analysis in emergencies under Section 553 (b)(1)(E) and (b) (3), so what would this limited Presidential waiver add as a practical matter?

I believe that a far better approach to the basic problem that the suggestion for a Presidential waiver provision seeks to address is to focus further on which types of rules under what organic statutes, should be or should not be major rules and thereby subject to the three major requirements of the bill. (See my answer to Question 2 for an analysis of those requirements.) Proposed Section 551(16)(B) already follows this approach and exempts specific categories from "major rule" classification. Certainly the White House can make a quick canvass of the Executive Branch and Independent agencies to see if additional categories should be added to the exemptions that now appear in Section 551(16)(B). At the same time, it should be emphasized that we are probably talking about a relatively small class of rules that need such scrutiny: rules that otherwise would meet the currently proposed statutory criteria for a "major rule." After receiving the White House's specific suggestions, the Subcommittee may well wish to expand the list of exempted categories in 551(16)(B).

To take care of any other exemptions which will appear to be needed from the inevitable, but now inscrutable, hindsight that will emerge after implementation of the Act, the Subcommittee might also include a provision for a Presidential Report to Congress six months after the effective date of the Act on exemptions granted and those still needed. This could serve as the focal point for an oversight hearing from which "technical amendments" could be reported adding any additional categories to Section 551(16)(B) that might have been overlooked. There is a general precedent for this in the 1977 "Technical Amendments" to the Clean Air Act.

Another alternative might be to include a general Presidential waiver provision from the regulatory analysis requirement [3] but also provide that it expire one year from the effective date of these amendments. Again oversight hearings could be held three or four months in advance of that deadline to see if further "technical amendments" to supplement the listed categories in Section 551(16)(B) were needed.

Mr. WHITE. Emergency rules should be allowed to have abbreviated regulatory analyses, with a more complete analysis provided later. This is a loophole, but a

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[1] See also my Answer to Question 4 for an explanation of how deregulation and efforts to promote greater cost-benefit justified and cost-effective rules can be torpedoed through court appeals unless the substantive supplement in 553(c) (2) (D) and 551 (17) and (18) and the "Bunpers" Amendment are both in effect.

[2] It would be better if this substantive law supplement in 553 (c) (2) (D) and 551 (17) and (18) could be separated from the "major rule" classification and applied across the board to coincide with the full sweep of the new Executive Order, which presently applies to all rules. Absent that broader Congressional directive, more appeals and more reversals of non-major rules issued pursuant to Executive Order 12291 are to be expected. I also believe that the limited rights to oral statement and cross-examination that would be afforded in new 553(d) (3) should apply in all rulemakings involving complex issues of material fact and thus they also should be decoupled from "major rule" classification.

[3] I emphasize again that it would be highly undesirable to permit any waiver of the substantive command in Section 553(c)(1)(D) because it would undermine E.O. 12291.

necessary one. I do not believe that the exercise of this power should be subject to judicial review.

2. Should the determination of what is a major rule be subject to some form of judicial review? If you believe that there should be some limited judicial review, please explain how such review should be limited.

Mr. CRANDALL. Tying up the regulatory process in appeals over the definition of "major rules" would serve no useful purpose. Regulatory analyses need not impede or slow the regulatory process; hence, no one should have the need to appeal except to block rational decisionmaking.

Mr. FREEMAN. If (1) the regulatory analysis provisions and (2) the "oral presentation—cross examination" provision remain tied together in § 553,[4] classification of a rule as "major" or "non-major" is determinative of three results: (1) Whether a regulatory analysis must be made; (2) Whether the Congressional substantive supplement of the organic statutes to coincide with the canon of statutory construction provided in paragraph 2 of the new Executive Order applies to the agency's decision and to any subsequent court review; and (3) Whether the rights to oral presentation and to limited cross-examination are available during the rulemaking.

Giving the President an express statutory right to designate, or order the agency to designate a rule as a major rule, gives the regulated what amounts to a partial alternative to judicial review with regard to the three "consequences" listed above. But as I indicated in my testimony before Senator Grassley's this subcommittee on May 14, 1981 and subcommittee on the Bumpers Amendment on May 15, 1981, while Presidential and Congressional oversight each have an important role is assuring reasonable regulation generally, reliance by the regulated on the President or Congress for such protection on a day to day, rule to rule basis is no substitute for the right to try to protect yourself. Judicial review, particularly when made more meaningful through the Bumpers Amendment, is the indispensable means of self-help. This is implicit in the concept of Due Process. It does not follow, however, that practical limits, like those discussed below, should not be placed on any statutory right of judicial review.

Accordingly, if express authorization for Presidential designation of a rule as a major rule is added, judicial review of the classification could be limited to an appeal of the final rule [5] thus barring interlocutory appeals [6] and even there only to show the rule was in fact a major rule under one of the statutory criteria and thus (1) the cost-benefits and cost-effectiveness supplement of Sections 553(c)(1)(D) and 551 (17) and (18) apply to construction of the organic statute or (2) that the rulemaking file is deficient with regard to a key factual finding (i.e. there was no substantial support in rulemaking file for the asserted or necessary factual basis for the rule) and thus, on reversal and remand of the rule, a right to cross-examination should be accorded if the criteria of 553(d)(3) are met.

Mr. WHITE. No.

3. When considering the definition of a major rule, most witnesses addressed subparagraph (i), dealing with $100,000 million in compliance costs. Do you feel that subparagraphs (ii) and (iii) are too vague to be practically useful? Are these subparagraphs necessary?

Mr. CRANDALL. There is a problem of circularity in the requirement. How can the costs or economic "effect" of a proposed rule be determined without an economic analysis? This requirement will force agencies to commission analyses if they believe that there is a substantial possibility of $100 million in costs to the economy. This is not a bad result, but it should be acknowledged. The requirements in (ii) and (iii) are vague and should probably be deleted. Finally, the $100 million requirement should be indexed or increased regularly to reflect inflation.

Mr. FREEMAN. Subparagraph (ii) and (iii) should be retained. They are helpful, though not as important as (i) because in many instances the criterion in (i) will automatically encompass them. Nevertheless, they do tie in with the definition of costs" in Section 551(17) and illustrate how secondary social costs are often imposed by rules. In view of the multitudinous past court fights over what costs may be considered under various organic statutes, (and, if so, how), inclusion of (ii) and (iii)

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[4] As noted earlier in footnote 2, I believe it would be preferable to have the substantive command of Section 553(c)(1)(D) and limited the procedural rights granted in Section 553(d)(3) extend to all rules and not just to major rules. This would leave only the regulatory analysis requirement applicable to "major rules" and if that were the case, the practical need for judicial review of that determination would vanish.

[5] As a practical matter, the expanded rulemaking file contemplated by S. 1080 would be needed for the court to apply the statutory criteria for a "major rule" to potential effects of the particular rule.

[6] Except where Constitutional or extraordinary jurisdictional issues are presented.

would head off such fights in the future (for examples of such fights, see my prepared testimony at pages 10 through 25 and also my answer to Question 4).

The importance of the additional criteria in (ii) and (iii), as well as the provision in proposed new subsections 553(C)(2) (A) and (B) requiring "a description of the persons or classes of persons likely to require such benefits" or "likely to bear such costs or adverse effects" and the reference in new (C) to "the need to accommodate differences between geographic regions" is illustrated in the enclosed article by Peter Navarro, "The 1977 Clean Air Act Amendments: Energy, Environmental, Economic and Distributional Impacts," Public Policy 121 (No. 2, Spring 1981 Exhibit 1). In the article,

"Four provisions-revised New Source Performance Standards (RNSPW), Prevention of Significant Deterioration, the 'local coal amendment,' and visibility stipulations-are discussed qualitatively. Two well-known coal forecasting models quantify selected impacts of the RNSPS. Except for a modest decline in sulfur dioxide emissions, the energy, environmental, and economic impacts appear to be significantly adverse. The distributional impacts suggest that Eastern coal and industrial interests, Western agricultural and tourist-oriented business interests, and environmentalists gain at the expense of Western coal interests, electricity consumers, utilities, and national policy goals."

Mr. Navarro concludes:

"The energy, environmental, and economic impacts of the 1977 Amendments appear significantly adverse in terms of stated policy goals. Petroleum import dependence is forecasted to worsen, with a collateral rise in the balance of payments deficit and continued exposure to the national security threat of an oil supply interruption. Fewer coal-fired power plants are built, while coal production shifts from Western surface mines to the less productive, more dangerous, and strike-prone Eastern deep mines. Although there is a modest decline in national S02 emissions, the cost of achieving that reduction more than doubles; emissions raise in the midwest and sludge production increases dramatically. Finally, incremental annual costs rise the capital requirements of the economy in an era of increasing capital scarcity while higher electricity rates and a rise in the cost of manufactured goods contribute to inflation.

Mr. WHITE. I think the paragraphs are useful and necessary.

4. One of the witnesses spoke of the different balances of regulatory benefits and costs set by Congress in other statutes. Has Congress set such "balances" in other statutes? If so, do those Congressional judgments in other statutes preclude the application of S. 1080's regulatory analysis? Please be specific in your references to provisions in other statutes.

Mr. CRANDALL. The fact that the NAAQS in the Clean Air Act preclude balancing of costs and benefits should not be grounds for not carrying out such analyses. When the results of these analyses are fully understood, Congress may wish to reconsider its decision to require no consideration of costs in setting the NAAQS. Other statutes, such as the Delaney Amendment or the OSH Act, contain similar provisions although no one is clear on what Congress meant in the OSH Act. These vague or potentially wasteful statutes should not constrain other committees from requiring analysis of regulatory options or actions.

Mr. FREEMAN. Some statutes are (1) silent or ambiguous as to whether or not costs are to be considered in rulemaking or (2) expressly, or by necessary implication, preclude the consideration of costs, or (3) specify that costs are to be considered generally but do not spell out precisely how, or (4) spell out how, (though in certain instances the specific statutory language may be cast under a cloud by conflicting legislative history). Specific examples of each type statute follow:

The Occupational Safety and Health Act of 1970 (Public Law 91-596, December 29, 1970, 29 U.S.C. 51 et seq.) is an example of an act that is silent on whether costs may be considered in promulgating occupational safety or health standards. See *Industrial Union Department, AFL-CIO* v. *American Petroleum Institute*, 448 U.S. 607 (1980).

Section 108(a)(1) of the Clean Air Act (42 U.S.C. § 7408), on the other hand, is a statutory provision which while silent as to whether costs are to be considered in setting primary ambient air quality standards, has been held to preclude the consideration of costs by necessary implication. See *Lead Industries Assn.* v. *EPA*, F.2d, (Nos. 78-2201 and 78-2220, D.C. Cir., June 27, 1980), cert. den. 49 U.S.L.W. 3493 (Jan. 12, 1981).

An example of the third type of statute described above is Section 111(a) of the Clean Air Act which provides:

"STANDARDS OF PERFORMANCE FOR NEW STATIONARY SOURCES

"SEC. 111(a) For purposes of this section:

"(1) The term 'standard of performance' means—

"(A) with respect to any air pollutant emitted from a category of fossil fuel fired stationary sources to which subsection (b) applies, a standard—

"(i) establishing allowable emission limitations for such category of sources, and

"(ii) requiring the achievement of a percentage reduction in the emissions from such category of sources from the emissions which would have resulted from the use of fuels which are not subject to treatment prior to combustion.

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For the purpose of subparagraphs (A)(i) and (ii) and a (B), standard of performance shall reflect the degree of emission limitation and the percentage reduction achievable through application of the best technological system of continuous emission reduction which (taking into consideration the cost of achieving such emission reduction, any nonair quality health and environmental impact and energy requirements) the Administrator determines has been adequately demonstrated. For the purpose of subparagraph (1)(A)(ii), any cleaning of the fuel or reduction in the pollution characteristics of the fuel after extraction and prior to combustion may be credited, as determined under regulations promulgated by the Administrator, to a source which burns such fuel.

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"(7) The term 'technological system of continuous emission reduction' means—

"(A) a technological process for production or operation by any source which is inherently low-polluting or nonpolluting, or

"(B) a technological system for continuous reduction of the pollution generated by a source before such pollution is emitted into the ambient air, including precombustion cleaning or treatment of fuels."

How costs were to be considered under this test, how the direct costs and indirect costs (such as scrubber sludge, other non-air quality environmental effects, and energy penalties) of various percentage removal alternatives were to be weighed against expected social benefits, was the subject of considerable controversy in the recent case of *Sierra Club* v. *Costle* (Exhibit 6 to my testimony, which is discussed in detail at pages 19–24 of my prepared testimony.) Further evidence of the continuing debate over whether or not the revised new source performance standards under Section 111(a), upheld in that appeal, are "worth the energy, environmental and economic price tags" appears in the article by Peter Navarro, "The 1977 Clean Air Act Amendments: Environmental, Economic, and Distributional Impacts. 29 *Public Policy* No. 2 (Spring 1981).

An example of the fourth type statute is provided by Sections 301 and 304 of the Federal Water Pollution Control Act. These sections provide that EPA shall set "best practical control technology based standards for discharges from existing plants under the following statutory criteria:

"SEC. 301(b) In order to carry out the objective of this Act there shall be achieved—

"(1)(A) not later than July 1, 1977, effluent limitations for point sources, other than publicly owned treatment works, (i) which shall require the application of the best practicable control technology currently available as defined by the Administrator pursuant to section 304(b) of this Act . . .

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"SEC. 304(b) For the purpose of adopting or revising effluent limitations under this Act the Administrator shall . . . publish within one year of enactment of this title, regulations, providing guidelines for effluent limitations . . . Such regulations shall—

"(1)(A) identify, in terms of amounts of constituents and chemical, physical, and biological characteristics of pollutants, the degree of effluent reduction attainable through the application of the best practicable control technology currently available for classes and categories of point sources (other than publicly owned treatment works); and

"(B) specify factors to be taken into account in determining the control measures and practices to be applicable to point sources (other than publicly owned treatment works) within such categories or classes. Factors relating to the assessment of best practicable control technology currently available to comply with subsection (b)(1) of

section 301 of this Act shall include consideration of the total cost of application of technology in relation to the effluent reduction benefits to be achieved from such application, and shall also take into account the age of equipment and facilities involved, the process employed, the engineering aspects of the application of various types of control techniques, process changes, non-water quality environmental impact (including energy requirements), and such other factors as the Administrator deems appropriate. . . ."

As pointed out at pages 11-19 of my prepared testimony, EPA has consistently maintained that it is precluded from considering social benefits (benefits to people from resulting effects on water use or aquatic life) under this test because of the legislative history of the Act. Some courts have agreed with EPA, e.g., *Weyerhauser* v. *Costle*, 590 F.2d 1011 (D.C. Cir., 1978), but others have not, e.g., *Appalachian Power* v. *Train*, 545 F.2d 1351 (4th Cir. 1976). It is also of interest that in the past Administration EPA persisted in its view despite contrary views of the House leadership:

"[T]he purpose of the [Federal Water Pollution Control Act of 1972] is to benefit the people. To the degree that it benefits the people of the country in cleaner waters and in the reduction of those things that are part of it, it achieves its objective.

"To the degree that it results in costing people more money than the benefit would be worth, it is not achieving the objective of the act.

"It was for that express purpose that we did have the Agency make an analysis of cost and benefits for each regulation, and for its determination of what constitutes best practicable technology.

"The use of the word practicable was deliberate. It was intended to convey the meaning that we desire the maximum benefits in clean, usuable water for people for each dollar expended by the people.

"The question of effluent reduction benefits quite clearly was intended to imply benefits that enure to people, cleaner waters, more waters, and a reduction of those elements in the water that inflict harm on the people."

Letter of the Hon. Jim Wright to George C. Freeman Jr., of April 9, 1975 (Exhibit 2).

In the real world, costs can be "considered" in several ways:

"1. Under a "cost/benefit" or "worth" test: Do the benefits equal or exceed the costs?

"2. Under a "cost/effectiveness" test: Does this alternative achieve the greatest benefits at the least costs when compared to other practical alternatives? This may also be expressed as: assuming a given quantum of benefits, will they be achieved in the best (least cost) way?

"3. Under an "affordability" test: Asuming the alternative under consideration passes muster under tests 1 and 2, can the [plant], [industry], [country] afford the costs?

Some of the courts have held that where statutes provide that costs be considered, it is implicit that the costs be "reasonable." Some courts have also inferred that Congress's use of terms like "best" also imply a "reasonable costs" criterion. The "reasonable costs" criterion has usually been held require that rules of general applicability meet tests 1, 2, 3 above for the class regulated (though not for every individual in a class when test 3 is applied).

The agencies and the courts have also had to wrestle with what kinds of costs and what kinds of benefits should be taken into account in decisionmaking. Are they "social" costs ("costs to the people") and "social" benefits ("benefits to the people") or something less. If something less where do you draw the line between what may or may not be considered? As I spelled out in detail in my testimony, sometimes it is argued "costs" do not include secondary costs; sometimes, it is argued that "benefits" are limited to effluent reductions without consideration of the resulting social effects.

One of the main purposes of new Executive Order 12291 was to eliminate conflicting approaches within Executive Branch agencies to statutory interpretation and application of these deversely worded statutes. Using his Constitutional authority to see that the laws are faithfully executed, the President has ordered all of the Executive Branch agencies to follow the following rule of statutory construction and application:

"SEC. 2. General Requirements. In promulgating new regulations, reviewing existing regulations, and developing legislative proposals concerning regulation, all agencies, to the extent permitted by law, shall adhere to the following requirements:

"(a) Administrative decisions shall be based on adequate information concerning the need for and consequences of proposed government action;

"(b) Regulatory action shall not be undertaken unless the potential benefits to society from the regulation outweigh the potential costs to society;

"(c) Regulatory objectives shall be chosen to maximize the net benefits to society;

"(d) Among alternative approaches to any given regulatory objective, the alternative involving the least net cost to society shall be chosen; and

"(e) Agencies shall set regulatory priorities with the aim of maximizing the aggregate net benefits to society, taking into account the condition of the particular industries affected by regulations, the condition of the national economy, and other regulatory actions contemplated for the future."

The President did not attempt to excercise his Constitutional supervisory powers over the independent agencies to require them to follow a similar rule in interpreting and applying statutes. And of course the President did not attempt to tell the courts how to interpret those statutes—only Congress can do the latter (which the Laxalt Bill would do in new Sections 553(C)(2)(D) and 551(17) and (18), as I discussed in my Answer to Questions 1 and 2).

Absent the enactment of the Laxalt Bill in substantially its present form and the immediate effectiveness of all its provisions, the following results are likely to ensue under Executive Order 12291:

"1. The Independent agencies may well continue to do 'business as usual.'

"2. When the Executive Branch agencies comply with the New Executive Order, either to revise or rescind existing regulations or to issue new regulations (in both instances complying with the order's canon of statutory interpretation) the regulations are likely to be appealed. The appeals are likely to be brought by persons opposing deregulation or who want stricter or more stringent regulations. Absent the further guidance to the courts from Congress provided in new Sections 553(C)(2)(D) and 551(16) and (17) of S. 1080, the following results are probable:

"A. If the agency has changed an earlier non cost-benefits or non cost-effectiveness interpretation of an organic statute, it will be handicapped by two judicially created doctrines: the doctrine of the 'presumption of validity' as to an agency's initial interpretation of its organic statute and the doctrine that when the agency departs from its previously established practice, it has the burden of persuasion in justifying the shift. These two doctrines combine where the agency is shifting position (either to deregulate or to reinterpret a statute so as to apply cost-benefits or cost-effectiveness methodology) to impose a very heavy burden of persuasion on the agency in an appeal of its new order.

"B. Only where the agency is issuing or revising rules under statutes not previously interpreted by it (or interpreted by it as mandating cost-benefits or cost-effectiveness which will be extremely rare), will the agency be aided by the presumption of valildity doctrine when its action is challenged on appeal.

"C. If the agency's action is challenged on the grounds that there is not adequate support for its factual findings, most court's (particularly the Court of Appeals for the District of Columbia, where many of the appeals can only be brought), will apply 'the substantial evidence' test under the currently applicable 'arbitrary, capricious etc.' criterion. Absent compliance with the expanded procedures of S. 1080, such evidence has a greater likelihood of being absent."

But if S. 1080 has been enacted and all its provisions made applicable immediately, the following results would obtain under the new Executive Order:

"A. If deregulation were occurring in a 'gray' area of statutory authority, the Bumpers Amendment shifts the burden of persuasion to the person challenging deregulation.

"B. If the agency rule were challenged on the legal issue that the agency's cost-benefits and cost-effectiveness interpretation of the organic statute was erroneous, under the Bumpers Amendment there would be no 'presumption of validity' accorded the agency's earlier non cost-benefit or non cost-effectiveness interpretation of the law.[7] Moreover, as to its new interpretation, the challenger and the agency would stand on equal footing before the court. Thus the Bumpers Amendment would back out the very heavy 'shift of position' burden imposed on the agency by existing case law. In addition where the new rule is a "major rule," revised Sections 551 and 553, by enacting into substantive law the principle of statutory construction enunciated in Executive Order 12291, amend the organic statutes mutatis mutandis

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[7] This would not be the result, however, where the agency interpretation had been upheld by the Supreme Court. As Senator Bumpers said in his April 20, 1981, statement in the Congressional Record (54204):

"While this amendment applies to the judicial review of questions arising under the existing and future organic acts of Congress where the general standards for judicial review as previously articulated in section 706 have been applicable, it is not intended either to change any settled judicial interpretation existing at the date of enactment as to the boundaries of a particular agency's jurisdiction or authority determined by a Federal appellate court, or to unsettle any res judicata or collateral estoppel effects of prior court decisions that have become final."

where those statutes do not preclude cost-benefit and cost-effectiveness methodology expressly or by necessary implication. Congress thus instructs the courts that when confronted with the appeal of a major rule, to resolve ambiguities in the organic statutes in precisely the same way that the Executive Branch agencies have already been instructed by the new Executive Order in issuing or revising all rules." [8]

"C. Where facts are crucial to the rule and in dispute initially, differences are much more likely to be narrowed or removed in the rulemaking under the procedures provided in S. 1080. I said in my prepared testimony, the likelihood that the agency's action being supported by substantial factual support in the rulemaking file will be increased by following the expanded procedures provided by S. 1080. This will mean better rules, less appeals and fewer reversals because of alleged factual inadequacies."

Mr. WHITE. Some parts of the Clean Air Act call for a limited amount of balancing [e.g., Sec. 202(a)(3)(A)(iii)]. Other parts forbid balancing [e.g., Sec. 109 (b)(1)].

5. Should a Ddregulatory rulemaking be subject to regulatory analysis?

Mr. CRANDALL. Yes. The benefits and costs of deregulation should be examined as carefully as the benefits and costs of new regulations.

Mr. FREEMAN. Yes, of course. The social effects agency actions will have, and not how we label them, should govern. At the same time we should note that there will probably be few deregulatory rules that meet one of the three statutory criteria in Section 551(16)(A).

Taking the first criterion, it is not likely, though, it is of course possible, that the effect of deregulation of one segment of the economy might increase the direct and indirect enforcement and compliance costs in another sector by more than $100,000,000 annually. One of the major controversies in EPA's implementation of the Clean Water Act was its initial position that its effluent limitations were to be imposed at the point of discharge without any "credit" for substances in the water taken into the plant. If such a policy were in effect, then deregulating the effluent discharges of one category sources might impose additional costs on another category that remain regulated. On a nationwide basis those costs might exceed $100,000,000 or more.

Criterion (ii) might be met where the prices of goods or services previously regulated are deregulated. Clearly deregulation of railroad rates by the ICC has had some of these enumerated effects.

Criterion (iii), for example, could easily be met by deregulation in the form of repeal of all burdens on imports.

Where a "deregulation" rule meets one of these three criteria, it is just as important to know what the facts are through the procedures included in S. 1080 as it is where we have a "regulatory" rule. Where the facts are critical, we need to know them, let the chips fall where they may. From the point of view of sound national policy, what our ultimate concern should be is what is best for the American people. Sometimes (although the occasions will be rare) that may actually require more regulation rather than less regulation. Deregulation, if it is to be lasting, must be based on solid, publicly disclosed facts and justified on cost-benefit and cost-effectiveness prinicples (just as surviving regulation should be).

My personal belief is that *deregulation* does not need a rigged deck to prevail. Indeed, the surest way to discredit it would be to try to rush ahead ignorant of the consequences. That's why we are in such trouble today with *regulation*.

Mr. WHITE. Yes! Absolutely.

6. Many have said that regulatory analysis should not be the sole criterion of a rule making. What impact should regulatory analysis, as provided in S. 1080, have on a particular regulatory decision? What other criteria should be guiding a regulator in addition to the regulatory analysis?

Mr. CRANDALL. The measures of cost and benefits should be the principal guides to regulatory decisionmaking, but regulators must exercise judgment concerning the uncertainty of the estimates. Since uncertainty and the costs of being wrong are not easily characterized, it would be difficult to specify a firm decision criterion for a regulator. Nevertheless, the benefit-cost estimates should be used to guide the decision. To say either that other considerations cannot be specified or measured is to say either that they are fuzzy or politically embarrasing. Imprecision and political deception should not substitute for hard analysis.

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[8] As pointed out in my Answer to Question 1, the Subcommittee should seriously consider what effects are likely to follow from its not giving further guidance to the courts on how to interpret the organic statutes when non-major rules are appealed. In my view, failure to back up the Executive Order 12291 in this regard will result in many more appeals and more reversals of efforts to deregulate or to otherwise lessen regulatory burdens..

Mr. FREEMAN. As I read S. 1080 no one wants to make the regulatory analysis "the sole criterion of a rulemaking." As I interpret S. 1080, the regulatory analysis requirement, together with the expanded notice requirements, the rulemaking file and expanded accessibility of information provisions, the oral statement and cross-examination provision, the statement of basis and purpose provision, all are intended to provide a procedural framework and a decisional methodology for promulgating major rules. The initial regulatory analysis and public notice alerts the regulated, and the public generally, as to the alternatives the agency has under consideration and their probable effects. This permits all who are interested in the final rule to come forward with information and opinions about those alternatives and to suggest other alternatives which they believe should be considered. The final regulatory analysis should reflect consideration of this public comment and further thought and analysis within the agency. The agency's final rule, to the extent not inconsistent with its organic statute (see my Answer to Questions 2 and 4), should be based on the key factual conclusions in the final regulations analysis, which in turn should be summarized in the statement of basis and purpose for the rule.

The agency's organic statute may spell out additional statutory criteria. In many instances, this may, however, amount to the equivalent of what is in 553(C)(2)(1) and 551 (17) and (18). See, e.g. *Sierra Club* v. *EPA* (Exhibit 6 to my prepared testimony) and my answer to Question 4.

Mr. WHITE. The regulatory analysis should illuminate all of the issues, quantify as much as possible, and indicate the full range of uncertainties and margins of error. There may be costs or benefits which cannot be quantified. They should be discussed to the fullest extent possible. Major alternatives should be discussed. And the ultimate choice should be defended in terms of both the quantifiable and non-quantifiable elements.

7. Some have supported a requirement for agency descriptions of the effects of a rule, but have at the same time opposed any requirement for an agency determination concerning the relationship of those trade offs. Do you feel such a determination (as in S. 1080, the benefits "justify" the costs, and the rule is a "cost-effective" alternative) is necessary to make regulatory analysis worthwhile?

Mr. CRANDALL. Yes. Anything else is fuzzy and useless. Agency "descriptions" are useless unless quantified.

Mr. FREEMAN. I believe that the determinations are necessary, in the national interest and should be required.

As a matter of policy, trade offs result inexorably when a rule is promulgated. Why not try our best—and require our regulators to try their best—to identify these trade offs in advance? As Alfred Kahn said several years ago when he was Public Service Commissioner of New York:

"The popular conception that we have to choose between economic welfare and environmental protection is simply wrong. Environmental values are economic values. And it is, in principle, just as important, in the interest of economic efficiency, to conserve our limited natural resources, to make wise and sparing use of our limited clean air, water, and living space as it is to economize in the use of labor and capital; and to use some of our limited economic resources to preserve or restore an acceptable environment is just as much a contribution to economic welfare as devoting them to travel, shelter, or national defense.

". . . It follows from this that it is equally essential that we understand that the values associated with what we think of as economic welfare are no less valid or important in philosophical, ethical, and esthetic terms than the values achieved by environmental protection.

"Neither one is more important than the other. And to the extent to which we pursue environmental goals, it must be subjected to the same kind of economic tests—that is, the same cost-benefit tests as the extent to which we supply the people of this country with food, housing, medical care, museums, education, police, fire protection. Or to turn to my own particular perspective as chairman of the Public Service Commission, in deciding how much we can afford to let people have of electricity, gas, water, or telephone service."

The reason some people oppose a requirement to quantify and balance the social costs and benefits of proposed rules and their reasonable alternatives is that they fear the results. Disclosure of these facts will have practical, and political, results. This exercise will change the substance of some rules—or it will result in changes in the laws under which they are being promulgated. In short, going through this exercise and spelling out the pros and cons of consequences in practical terms of what each alternative would or would not do for who, and at what price to be paid by whom, will get in the way of special interests and transcendential causes. Economic rationality is the enemy of dogma. Thus those who oppose disclosure and balancing often believe their particular cause is an imperative that should take

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priority over more democratically determined values reflected roughly in what the people are or are not willing to pay (in dollars or otherwise) for things.

One of the questions asked during the hearings on May 14 was: if an analysis showed that by adopting a rule that cost society a million dollars would save one life, should you adopt the rule? The answer has to be that you need to know more than that before you can make that decision. Among other things, you need to know if you could save that particular person's life by another alternative at a more reasonable cost. Since society has only limited resources, you also need to know if you could save more lives if the million were spent in some other way. You might also want to find out if those who pay the costs of the rule are different from those who would be the beneficiaries of the rule. You might also want to know how the quality of life or longevity of the payees might be adversely affected by the rule.

If we take federal ambient air quality standards as an example, we know that some are set on the basis of morbidity rather than mortality studies. There the inquiry is to determine at what ambient levels of what pollutants in the outdoor air will the suffering of persons afflicted with a specific disease or infirmity become perceptibly worse. To date, however, as the recent National Commission on Air Quality Report brought out, no one has paid any attention to the quality of the ambient indoor air where most of these people spend their time. Yet indoor climate and air quality control may be far more critical to their health. In periods of high temperatures and high humidity this often requires air conditioning. The economics of the production of electricity have some bearing on the availability of air conditioning to the ill, the old, the infirm. It could well be that a rule which substantially drives up the costs of electricity across the board in order to further lower ambient outdoor concentrations of a pollutant to protect susceptible people from aggravation of their symptoms, may make them far worse off indoors where they spend most of their lives. Aren't these the types of questions we should be asking and trying to answer in major rulemakings?

Mr. WHITE. Regulatory analysis can be useful even it only forces agencies to consider alternatives. But, ultimately, choices must be made, and they should be explained and defended by the agency. In this defense, they must indicate why they think the rule is worthwhile; i.e., why the benefits, however conceived, justify the costs.

8. Why not have a standard for rule making that a final rule should be the one that saves the most lives and avoids the most injuries, unless the agency offers an explanation to the contrary?

Mr. CRANDALL. Such a requirement makes no allowance for costs. Assume that OSHA could mandate $5 billion per year in control costs to reduce worker fatalities by 1,000 or $500 billion to reduce them by 1,001. Would any rational person suggest the latter option?

Mr. FREEMAN. With respect to almost any program of health and welfare legislation, the risks to human life can be reduced almost without limit with additional expenditures of money. Since additional expenditures can always bring about some reductions in risk, however minimal, a rule that required the Agency to select the alternative which saved the most lives or avoided the most injuries would require truly enormous expenditures. Since overall resources are limited, such expenditures even though they resulted in some improvement in public health and safety would also result in reductions in public welfare in other areas from which these resources were taken. In some cases, those reduced expenditures in other areas might actually increase risks to human health and life more than the savings of human life in the areas in which the funds were expended. In other cases, however, the trade-off would be between increased health and safety and other public goods which are also widely valued—increased education, increased opportunities for aesthetic or cultural experiences, better diet, more leisure time, less involuntary unemployment. See also my Answer to Question 7, above, and the testimony of Alfred Kahn attached as Exhibit 3 to my prepared testimony for examples.

Mr. WHITE. Saving (extending) lives and avoiding injuries cannot be the sole goal of regulatory activity. We could consume our entire GNP trying to save lives. At some point our society does (and should) say "enough!" We do not build pedestrian underpasses under every major urban street intersection; we do not station ambulances at every intersection; we do not lower the national speed limit to 45 mph.

Further, regulatory programs usually involve changes in risk; risk can be evaluated and rough dollar measure put on it. (We all take risks so as to save costs and gain convenience.)

Regulatory agencies must be asked to weigh risks and costs and try to find the right balance; they must not be instructed to try to eliminate all risks! It is too costly and cannot be done!

9. OMB or the Regulatory Relief Task Force operates without the procedural safeguards for fairness mandated by the Administrative Procedure Act. Is it wise to shape regulatory policy in a manner insulated from those procedures, through a mechanism like OMB or the Task Force?

Mr. CRANDALL. Congress should guide policy to prevent eratic swings in Executive-Branch procedures. Yes, a legislative mandate would be useful.

Mr. FREEMAN. This question is based on a hypothesis that I disagree with. It presupposes that it is unfair for the President to supervise Executive Branch agencies to see that the laws are faithfully executed through informal procedures. I do not agree. I believe the President can designate whatever agency or person he wants to help him carry out the Constitutional duties. Fairness in rulemaking and protection against the potential abuses of Presidential oversight or "intervention" in rulemaking is assured by provisions such as those in S. 1080 and in Section 307 of the Clean Air Act, as discussed in Judge Wald's opinion in *Sierra Club* v. *EPA*, Exhibit 6 to my prepared testimony.

Mr. WHITE. Regulatory management of executive branch agencies requires that there be some overall coordinating effort, either through OMB or some other group which ultimately is responsible to the President. But, also, the eventual outcome should have an adequate public record that is reviewable by the courts.

THE FOLLOWING QUESTIONS WERE SUBMITTED TO AND ANSWERED BY MR. FREEMAN. THE OTHER GENTLEMAN DID NOT RECEIVE THESE QUESTIONS.

Question.—In the past, some have suggested that all judicial review of rulemaking be vested in the Court of Appeals. Do you support such a change in jurisdiction? If so, please discuss the practical application of such a change. How would such a jurisdictional change affect post-enforcement review of rules? Don't the District Courts offer more opportunities for settlement than the more rigid procedures of the Courts of Appeals.

Answer.—As a general matter, I believe that appeal of all rules of general applicability should be vested solely in the Courts of Appeals (but as noted at pages 40–41 of my prepared testimony, not restricted to the Court of Appeals for the District of Columbia).

Under the regulatory analysis, expanded notice, rulemaking file and "hybrid procedures" provisions of S. 1080 applicable to rulemakings for major rules, an adequate record will exist for meaningful judicial review of factual questions under the Bumpers Amendment "substantial support" test. Under these circumstances there should be no need for assess to the district courts for utilization of their "trial type" procedures to supplement a nonexistent or threadbare record. That past need for a mechanism for supplementing the record for judicial review with factual material (with regard to the asserted or necessary factual basis for a rule) is in my opinion the only reason for requiring the time and expense of what in practice is a two- tiered appeal, first to the district court and then to the circuit court of appeals.

Moreover, major rules will virtually always be regulations of general applicability. While appeals of rules of general applicability often involve factual questions, the more important issues are likely to be question of law or policy. Going directly to the circuit courts of appeals saves time in getting a definitive answer to whether or not the rule is valid. In the case of major rules, time is often of the essence for practical business planning purposes.

The suggestion that appeal of "major" rules be vested solely in the courts of appeals would generally not affect preclusion of review provisions contained in a number of statutes, such as the Clean Air Act or the Clean Water Act. These acts forbid collateral review of a rule in subsequent enforcement actions. See, e.g. § 307(b)(2) of the Clean Water Act and § 509(b)(2) of the Clean Water Act. The unfairness of such provisions, and their possible unconstitutionality, has been noted by Mr. Justice Powell in the concurrence in *Adamo Wrecking Co* v. *U.S.*, 434 U.S. 275, at 289, 54 L.Ed 2d 538, 551 (1978). The further problem posed for the regulated by these 60 or 90 day "appeal or perish" provisions is in having to try to anticipate the general rule's applicability to you under all possible future circumstances. See also. *Appalachian Power* v. *EPA*, 477 F.2d 495, at 503 (4th Cir. 1973). In any subsequent enforcement action against you by the government, often years later, you have all the disadvantages of hindsight and no recourse for justice. When these formidable odds against the citizen are further increased by affording the agency's rule a "presumption of validity" as how it will thereafter be applied to all men in all seasons for years on end, the unfairness to the regulated of the present system is further increased.

The last part of this question appears to deal with case by case (company-specific type) "rules" rather than rules of general applicablity. This is characteristic of "old style" rulemaking, largely under pre-1960's statutes. Ordinarily where only one party is involved with an agency the rule is company-specific, "settlement" of the controversy is a realistic means for solving the dispute between the regulated and the agency. There a single district judge is more likely to encourage such a settlement than a three judge panel of the circuit court. But this is not the situation in an appeal of a rule of general applicability. Normally it is impossible to settle such an appeal. The multiplicity of the interests affected usually precludes it as a practical matter.

Finally experience with the U.S. District Court for the District of Columbia's supervision of agency rulemaking involving rules of general applicability under the so-called citizens suits provisions of the Clean Air Act has generally proved unsatisfactory. There has been no requirement that the regulated—or the potentially regulated—be given any notice of the suit. "Sweetheart" settlements have often been reached between the plaintiff and the agency without considerations of the interests of the regulated. Many settlements have also imposed court-ordered deadlines on the agency that have precluded meaningful subsequent participation by the regulated in the ensuing rulemaking. Particularly where Congress has imposed impatient, imperious, impossible deadlines on the agency, district court intervention in ongoing agency rulemakings through these "citizens suits" has in fact prevented the development of a full and complete record, not only for agency decision making but also for meaningful judicial review. For this reason, if the Subcommittee provides for exclusive review of major rules in the circuit courts of appeals, it should at the same time get the U.S. district court out of the business of trying to run such rulemakings at the agencies. This could be accomplished through an across the board repeal of citizens suits provisions in other statutes or else a prohibition on their application to major rules.

Question.—One witness contended that the regulatory situation was getting "worse." Does this mean that E.O. 12291 is not working? Why is legislation needed?

Answer.—In my opinion E.O. 12291 is a beacon of hope for rational government. Everything possible should be done to support it. As I indicated in my answer to question One, Two and Four, S. 1080 goes a long way in that direction but it could also go further.

It is too early to tell how well E.O. 12291 is working at one of the major administrative agencies where I practice: the Environmental Protection Agency.

At EPA, there have been delays in bringing in the new top political appointees. Ms. Gorsuch and Dr. Hernandez only took office about 10 days ago. Between that time and January 20, the agency was operated by acting officials who had served in the previous administration. As I pointed out in my prepared testimony, during that interim EPA continued to adhere to older policies that were inconsistent with the new Executive Order (see pages 13-16). This adherence to older "environmental imperative" principles by the holdover EPA officials, in instances such as the ongoing *Appalachian* case despite the cost-benefit and cost-effectiveness commands of Paragraph 2 of the new Executive Order, may simply reflect inertia at EPA. But it also may be attributable in part to the same kind of "pro-regulatory" inertia in advice to EPA from holdover officials in the Justice Department. That type advise from the Justice Department is reflected in the Justice Department memorandum dated 13 February 1981, on "Proposed Executive Order entitled 'Federal Regulation'" which accompanied the Vice President's Press Release of February 17, 1981, announcing the new Executive Order. The Justice Memorandum states, at pages 5 to 6:

"Substantively, the Order would require agencies to exercise their discretion, within statutory limits, in accordance with the principles of cost-benefit analysis. More complex legal questions are raised by this requirement. Some statutes may prohibit agencies from basing a regulatory decision on an assessment of the costs and benefits of the proposed action. See, e.g., *EPA* v. *National Crushed Stone Ass'n*, 101 S. Ct. 295 (1980). The Order, however, expressly recognizes the possibility by requiring agency adherence to principles of cost-benefits analyses only to the extent permitted by law."

For the reasons set forth at pages 14 through 16 of my prepared testimony, Crushed Stone stands for exactly the opposite of the proposition for which it is cited in the Justice Department memorandum. This illustrates how important sometimes "mind set" can be and how one person used to representing the regulated and another used to representing the regulators can look at the same thing and see something completely different.

Another illustration of the importance of perspective in legal analysis is the Administration's preliminary decision, voiced by Mr. James Miller in his May 14

testimony to oppose the heart of the Bumpers Amendment—the backing out of the judicially created presumption of validity of an agency's initial interpretation of the law. For the reasons set forth in my Answer to Question 4, the Administration's efforts to deregulate and to reinterpret the organic statutes in keeping with the cost-benefit, cost-effectiveness canon of construction set forth in Paragraph 2 of Executive Order 12291 would be helped rather than hurt by immediate passage of the Bumpers Amendment. Thus, I fear that the Administration may be getting the same kind of "regulator's reflex response" advice out of the lower reaches of the Justice Department and others over the Bumpers Amendment that the previous Administration received. In this regard, the copies of the enclosed exchange of views with the Justice Department and others over the Bumpers Amendment in the last Administration may be of interest: Letter of Larry L. Simms, Deputy Assistant Attorney General to the Hon. George E. Danielson, dated March 6, 1980 (Exhibit 3); Letter of George C. Freeman, Jr., to the Hon. George E. Danielson, dated March 11, 1980 (Exhibit 4); Letter of Stuart E. Eizenstat, Assistant to the President for Domestic Affairs and Policy, and James T. McIntyre, Jr., Director of the Office of Management and Budget, to the Honorable Peter W. Rodino, Jr., dated May 12, 1980 (Exhibit 5); Letter of Leonard S. Janofsky, President of the American Bar Association, to the Hon. Peter W. Rodino, dated May 13, 1980 (Exhibit 6); Letter of Benjamin R. Civiletti, Attorney General to the Hon. Peter W. Rodino, dated May 14, 1980, with an attached letter to Mr. Rodino from Alan R. Parker, assistant Attorney General, Office of Legislative Affairs dated May 13, 1980 and an attached memorandum dated October 30, 1979 (collectively Exhibit 7); Letter of George C. Freeman, Jr., and Michael B. Barr to the Hon. Dale L. Bumpers, dated May 20, 1980 (Exhibit 8). One hopes that the old adage "the more things change, the more they remain the same" will not prove true in the new Administration's ultimate legal analysis of the Bumpers Amendment and its relationship to future appeals of agency actions taken pursuant to E.O. 12291. In my opinion an objective, fresh legal appraisal will confirm my analysis in my response to Question Four that the Bumpers Amendment on balance will substantially aid rather then undercut agency decisions made pursuant to E.O. 12291.

Question.—What will happen to Executive Order 12291 if S. 1080 becomes law?

Answer.—Nothing probably if S. 1080 remains in its present form; but nothing certainly if the "savings clause" recommended by the American Bar Association is included.

As I pointed out in my answer to Question 4, the immediate enactment and effectiveness of S. 1080 will, however, have a substantial impact in what happens in subsequent appeals of agency actions taken pursuant to Executive Order 12291. Many more of them will be sustained.

Question.—The "General Requirements" of E.O. 12291 (Section 2) are imposed "to the extent permitted by law." What does this phrase mean? What law does not permit the requirements of E.O. 12291 to be applied to regulatory action? What law limits the application of E.O. 12291?

Answer.—In my opinion, as I stated earlier in my Answer to Question 4, the term "to the extent permitted by law" in E.O. 12291 has the same meaning as the phrase "except where the enabling statute pursuant to which the agency directs otherwise" in new section 553(c)(2)(D) of S. 1080. Thus, unless the enabling ("organic") statute prohibits cost-benefits balancing and cost-effective decision making expressly or by necessary implication, they are "permitted by law."

For examples of statutes which have been held to preclude application of those decisions and methodologies see my Answer to Question 4 above. As I noted in that Answer, the passage of S. 1080, and the immediate effectiveness of all its provision will have a substantial effect on what reviewing courts will hold to be "permitted by law." New sections 551(16) and (17) and 553(c)(1)(D) conform the enabling statutes to Paragraph 2 of E.O. 12291, mutatus mutande, while the Bumpers Amendment gives agencies greater freedom to change their minds and reinterpret their enabling statutes consistent with E.O. Order 12291 and S. 1080.

[Supplementary exhibits to responses of George C. Freeman follow:]

EXHIBIT 2

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FILE NO.

March 11, 1980

H.R. 3263
The McClory Amendment
on the Scope of Judicial Review

Dear Congressman Danielson:

On March 6, the Justice Department advised you of that Department's "strong opposition" both to the original "Bumpers Amendment" and the substantially revised version being offered by Congressman McClory as an amendment to H.R. 3263.

Congressman McClory's amendment is the product of extended discussions over the past several months among representatives of the American Bar Association (see Enclosure A) and The Business Roundtable (see Enclosure B), Senator Bumpers and his staff, and Congressman McClory and his staff. The product of these extended discussions now before your subcommittee addresses and resolves the technical and draftmanship criticisms of the original Bumpers Amendment voiced last August when the American Bar Association House of Delegates adopted its resolution endorsing the Bumpers Amendment. It addresses and resolves similar criticisms voiced in the United States Senate on September 7, 1979, when it adopted the Bumpers Amendment. It addresses and resolves similar criticisms in the subsequent Report of the Bar of the Association of the City of New York of November 1979. The careful draftmanship reflected in the revised amendment which we understand will be introduced by Congressman McClory has the unqualified support of the American Bar Association, The Business Roundtable and numerous individual lawyers and businessmen.

Against this background of extended deliberations among leaders of the Bar and Bench, the Justice Department's letter falls short of a reasoned analysis of why your subcommittee should vote against Congressman McClory's consensus amendment. After the adjectives are stripped away, the central objection of Justice's letter to the revised amendment is that it would "eliminate from the law the notion that courts, in reviewing [agency] rules, may make . . . presumptions that issues in a rulemaking were validly resolved by the agency." Justice thinks that this would be bad for two reasons:

1. Justice contends the revised amendment would be an "unsound" Congressional redelegation of power from the agencies to the courts because, Justice asserts,:

   -- Eliminating the presumption of validity of agency rules "takes away power" from the agencies and gives it to the courts;

   -- The judges would be given this additional power from the "lost presumption" without providing any legislative guidance to the judges on how to use it;

   -- This would give "federal courts a much freer reign to make law and policy in sensitive areas of public life;"

   -- This is bad because federal agencies are more "politically accountable" than federal courts.

2. Justice also contends that extension of the substantial evidence rule from appeal of all agency adjudications and some agency rulemakings to the balance of agency rulemakings would be unsound because parsing questions of law and questions of fact and providing for different standards of appellate review for each is bad. To use Justice's words it would be "basically contradictory, empirically unjustifiable, and seriously counterproductive in terms of the historic goals and values of the administrative process."

Neither of Justice's objections withstands careful scrutiny.

Taking Justice's last objection first, distinguishing between legal and factual issues and providing different statutory criteria for appellate review of each is already written into § 706 of the Administrative Procedure Act. As presently written § 706(A) through (D) obviously apply to appellate review of "legal questions" and § 706(E) and (F)

obviously apply to "factual questions." The revised amendment adheres to that existing pattern. The extension of the "substantial evidence" rule, now applicable under § 706(E) to review of factual questions in appeals of agency "adjudications" and agency rulemakings that are "on the record", to review of factual questions in the appeal of the balance of agency rulemakings is not injecting a new, untried standard of appellate review. Similarly, writing a rule of strict construction into § 706(C), which now treats a special class of "legal" questions - those dealing with jurisdiction - follows the pattern of the existing Act.

Turning to Justice's principal objection that the revised amendment would be an "unsound" redelegation of power from the agencies to the courts, we need to look precisely at what power we are talking about. It is the power to interpret the Constitution and the laws of the United States. Under Article III of the Constitution this is the job of the courts. We, indeed, do think they are better qualified to exercise the ultimate power of judicial interpretation than are the regulators. Addressing Justice's subsidiary points, Justice is also wrong for the following reasons:

-- The specific standards of appellate review in (C) and (E), together with the criteria already in § 706, refute Justice's charge that the additional power given the courts by elimination of the presumption of validity for the challenged agency rule would be "without any legislative guidance" to the courts on how to decide appellate questions under their "enhanced power;"

-- Writing a rule of strict construction into § 706(C) is not giving the courts "freer reign to make law and policy," it is rather increasing the odds that regulators will stay within the jurisdictional traces Congress has enacted on their authority, thus substantially reducing the burdens of Congressional oversight over the continuing flood of federal regulation;

-- The courts, rather than the regulators, have been the traditional experts in interpretation of the law in our system of government;

-- The courts, rather than the regulators, have been the traditional champions of the rights of individuals against abuses of the government in our system of government;

-- The objectivity and relative freedom from political pressure that life tenure affords our federal judges more than offsets the indirect political accountability of the regulators to Congress and the President in qualifying them to interpret the statutes without bias either for or against the government.

When all is said and done, Justice's arguments, as counsel for the regulators, boil down to the same arguments heard time and time again whenever anyone has sought to place limitations on regulators' authority: those limitations are not needed because the regulators motives are pure, they know what is best, you can always trust them, courts should not "second guess" them, and the people should always do as they say.

Sincerely yours,

George C. Freeman, Jr.
Special Counsel to The
Business Roundtable

Honorable George C. Danielson
Chairman
Subcommittee on Administrative Law
and Governmental Relations
Committee on the Judiciary
U.S. House of Representatives
Washington, D.C. 20515

cc: Members of the Subcommittee on Administrative Law and Governmental Relations
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Chairman of the ABA
Coordinating Group on Regulatory Reform

American Bar Association
Coordinating Group on Regulatory Reform

Richard B. Smith, Chairman	Commission on Law and Economy
Northaitt Ely	Section of Natural Resources
F. Mark Garlinghouse	Section of Public Utility Law
Honorable Carl McGowan	Judicial Administration Division
Ira Millstein	Section of Antitrust Law
W. Warfield Ross	Section of Administrative Law
Randolph W. Thrower	Section of Taxation
Frank Wheat	Section of Corporation, Banking and Business Law
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Enclosure B

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THE WHITE HOUSE

WASHINGTON

EXHIBIT 3

May 12, 1980

Dear Chairman Rodino:

On behalf of the Administration, we would like to take this opportunity to commend the Judiciary Committee on its careful and reasoned consideration of H.R. 3263, the Regulation Reform Act. We wish to underscore the Administration's great interest in this legislation. We also wish to express our concern about certain amendments expected to be offered this week, and the effect they could have on the future direction of this bill.

This legislation was designed primarily to write into law tough but manageable standards for cost-effective regulation, adapted from President Carter's March 1978 Executive Order 12044. The bill was aimed at strengthening the hand of the President and the Office of Management and Budget in bringing new discipline and common sense to the administration of regulatory laws. In addition, the bill was designed to enhance public participation, and to simplify the regulatory process, cutting out unnecessary red tape and delay. Actions by Chairman Danielson's Subcommittee on Administrative Law and by the full Committee to date have generally promoted these aims.

With the effective work of this Committee and others in Congress, we now have a realistic opportunity to pass sound legislation to overhaul a Federal regulatory establishment not comprehensively addressed in nearly 35 years. It is in the light of that objective, which the Committee shares with the President, that we are writing here.

Certain expected major amendments will, if adopted, transform this from a bill to tighten regulatory management and streamline procedure, into a vehicle for further fragmenting authority and compounding the already intolerable complexity of the regulatory process. Such a bill would not be, in the judgment of the Administration, true regulatory reform.

Specifically, we first want to mention the proposal for government-wide legislative veto of major agency rules offered and rejected in the Administrative Law Subcommittee. We acknowledge the concern about accountability that underlies the support for this proposal. But legislative veto is an illusory answer to the regulatory problem. It cuts against all the other features of the President's oversight program and of this legislation. The cost-effectiveness standards in this bill will be rendered meaningless, as will supervision by OMB and the courts. Rules will be made looser in some cases, stricter in others; but in all cases the process will become less predictable, less uniform, less responsive to the general interest, as distinguished from particular interests. To enforce government-wide legislative veto, Congress will either have to expand radically its own staff bureaucracy, or else become responsible for thousands of minutely detailed regulatory decisions without adequate capacity to monitor or evaluate them.

The government-wide legislative veto rejected in Subcommittee provides for action purporting to have a legislative effect without utilizing the constitutionally prescribed process for legislation, a process which, as you know requires the signature of the President. As has been stated, we cannot approve any such measure.

Second, we wish to call attention to the amendment, submitted to you and your colleagues on May 1, 1980 by the Business Roundtable. The purpose and effect of this amendment would be to transfer regulatory policy-making authority from regulatory officials and the President to the Federal courts. As with legislative veto, this measure will undercut the overall aim of the regulatory reform bill to get a handle on the regulatory problem. The amendment will also impair the ability not only of the President, but of the Congress to assure that regulatory decision-makers are accountable and faithful to statutory mandates.

Finally, we wish to underscore a third risk: that "technical" revisions in regulatory procedures may be adopted that will complicate the rulemaking process. Regulatory red tape is a major national problem. We are about to establish an Energy Mobilization Board to short-circuit the regulatory maze now stymying critical energy projects. We must not inadvertently adopt measures in this bill that worsen the kind of problems that the EMB is designed to solve. In this regard, modification of certain changes made by the Subcommittee in Title II of the original bill is essential. The Administration has circulated detailed recommendations on these Title II changes. In addition, it is vital to resist any additional last-minute recommendations by particular private groups that will serve to complicate regulatory procedures.

We very much appreciate the careful and sensitive consideration that the Committee has given this bill. We hope to continue assisting you and your colleagues, to complete a sound, comprehensive charter that brings the Federal regulatory establishment into line with public needs and the public interest.

Sincerely,

Stuart E. Eizenstat
Assistant to the President
for Domestic Affairs and Policy

James T. McIntyre, Jr.
Director
Office of Management and Budget

The Honorable Peter W. Rodino, Jr.
Chairman
Committee on Judiciary
U.S. House of Representatives
Washington, DC 20515

cc: House Judiciary Committee

EXHIBIT 4

Department of Justice
Washington, D.C. 20530

March 6, 1980

Honorable George E. Danielson
Chairman
Subcommittee on Administrative Law
and Governmental Relations
Committee on the Judiciary
U.S. House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

I wish to take this opportunity to reaffirm the Department of Justice's strong opposition to the "Bumpers amendment." As we expressed in testimony on December 10, 1979, and in statements appended to the prepared statement submitted to your Subcommittee, we believe the Bumpers amendment is fundamentally flawed. Its underlying rationale is self-contradictory; its empirical foundation cannot withstand analysis; it is heedless of the affirmative values underlying present doctrine governing judicial review of rulemaking; and it would promise seriously to disrupt the federal administrative process.

At its core, the Bumpers amendment would give broad, ill-defined powers to federal judges without providing any guidance to judges. Federal judges are not subject to the kinds of political oversight that may be applied to federal agencies, both by the Congress and the President. It is contradictory to seek to make agencies more politically accountable -- as the Bumpers amendment purports to do -- while, in fact, simply giving federal courts a much freer rein to make law and policy in sensitive areas of public life.

Existing law provides standards under which judges may, and do, carefully review rules. It is incorrect to assert that under existing law the federal government has an "unfair" or "inappropriate" advantage in proceedings involving the review of rules. Further, this argument fails to deal adequately with the basic point that in a complex system of public law, courts need the flexibility to make rationally based presumptions about the validity of rules under review. Any other rule would, we believe, undermine the healthy allocation of responsibility between courts and agencies in our constitutional system. Certainty in public law decision-making also would be threatened, for the public, agencies and courts would not be able to accord agency rules the necessary measure of finality, subject, of course, to careful judicial review under existing standards.

I understand that your Subcommittee may shortly consider the Bumpers amendment and, in particular, suggested revisions in the amendment as passed by the Senate. These revisions, we understand, are contained in a paper dated December 1, 1979, entitled "Clarification and Perfection of the Bumpers Amendment," which has apparently received the concurrence of the Business Roundtable and the American Bar Association. These revisions are subject to the same basic objections that we have raised with respect to the original Bumpers amendment. The revisions purport to "clarify" the amendment, acknowledging that confusion attends it. They rest on the premises that it is possible neatly to divide "questions of law" from "questions of fact" in judicial review of rulemaking, and that the substitution of a "substantial evidence" standard as the standard for review of rulemaking (instead of the "preponderance of the evidence" standard) would obviate the bill's confusions. These premises, in our view, are insupportable.

There can be no such neat distinction between issues of law and fact, as the questions that arise in judicial review of rules are most frequently "mixed" and therefore have aspects of each. Even more basically, the preoccupation shown by the statement (>osing the revision with artificially and unrealistically inguishing "legal" and "factual" issues misses the mark entirely -- for the core problem with the Bumpers amendment is its attempt to eliminate from the law the notion that courts, in reviewing rules, may make rationally based presumptions that issues in a rulemaking were validly resolved by the agency. Indeed, this aspect of the amendment is rightly called its "primary command" at page 6 of the statement dated December 1, 1979, referred to above. That is the aspect of the amendment the underlying theory for which is basically contradictory, empirically unjustifiable, and seriously counterproductive in terms of the historic goals and values of the administrative process. There is in our view, no way to "perfect" such an essentially unsound approach.

We should underscore, in closing, that the call for regulatory reform is one that this Department recognizes as an important element of governmental reform. But the Bumpers amendment in its original form or in a revised form would not be a reform -- rather, it would make the administrative process slower, most costly, more inefficient, and grounded on an incoherent conceptual foundation. It would, in short, make bad law, and we strongly oppose it on that basis.

The Office of Management and Budget has advised that there is no objection to the submission of this report from the standpoint of the Administration's program.

Sincerely,

Larry L. Simms
Deputy Assistant Attorney General

JIM WRIGHT
12TH DISTRICT, TEXAS

A-43

EXHIBIT 5

Congress of the United States
House of Representatives
Washington, D.C. 20515

April 9, 1975

Mr. George C. Freeman, Jr.
Hunton, Williams, Gay and Gibson
P.O. Box 1535
Richmond, Virginia 23212

Dear Mr. Freeman:

Miss Lenihan of my office has told me of your telephone call and of your specific concern with respect to the intent of Congress in regard to the implementation of the Federal Water Pollution Control Act of 1972.

Due to an unfortunate series of mistakes in transcribing the remarks at the time of your appearance before our subcommittee, the comments which appear in the printed record on page 547 are not only inaccurate but 180 degrees divergent from what I said. The unfortunate error seems to have been in the misplacement of periods and in the erroneous misconnection of sentences. An accurate reflection of precisely what I said, without altering a single word but simply placing the periods where they belong, would be as follows:

> "In response to your specific question, Mr. Freeman, yes, the purpose of the act is to benefit the people. To the degree that it benefits the people of the country in cleaner waters and in the reduction of those things that are part of it, it achieves its objective.
>
> "To the degree that it results in costing people more money than the benefit would be worth, it is not achieving the objective of the act.
>
> "It was for that express purpose that we did have the Agency make an analysis of cost and benefits for each regulation, and for its determination of what constitutes best practicable technology.
>
> "The use of the word practicable was deliberate. It was intended to convey the meaning that we desire the maximum benefits in clean, usable water for people for each dollar expended by people.
>
> "The question of effluent reduction benefits quite clearly was intended to imply benefits that enure to people, cleaner waters, more waters, and a reduction of those elements in the water that inflict harm on the people."

I hope this will be helpful in clarifying the point.

Sincerely,

Jim Wright

THIS STATIONERY PRINTED ON PAPER MADE WITH RECYCLED FIBERS

EXHIBIT 6

AMERICAN BAR ASSOCIATION

OFFICE OF THE PRESIDENT
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TELEPHONE 312 / 947-4042

PLEASE REPLY TO
1800 M STREET, N W
WASHINGTON, D C 20036

May 13, 1980

Honorable Peter Rodino
Chairman, Committee on the Judiciary
United States House of Representatives
Washington, DC 20515

RE: Legislative Veto and Revised Bumpers Amendment

Dear Mr. Chairman:

The American Bar Association would like to commend you and the other members of your committee for your continuing attention to the proposed Regulation Reform Act, H.R.3263, which is a subject of the highest priority to the Association.

I understand that you may consider this week important amendments on the above-captioned two issues. In this regard I write to urge you to continue the strongest opposition to any government-wide legislative veto. and support for the revised, balanced Bumpers Amendment.

The ABA is pleased to join the Administration, your counterpart committee in the Senate, and other proponents of responsible regulatory reform in opposing the adoption of a broad legislative veto. The problems of federal regulatory practice which are addressed by H.R.3263 -- excessive, duplicative and ill-conceived regulation -- simply cannot be resolved by a legislative veto. Although this proposal appears to be politically attractive, its adoption would promise to the American people far more than it, or Congress, could deliver.

If there is a problem of over-regulation or overlapping regulation in an agency, the veto of a single proposed rule would not provide that agency with any guidance on how the regulation might be improved -- and most certainly would not address any underlying problems in the agency. Furthermore, it is not a realistic or sound government practice to hold out to the public the expectation of closer congressional oversight when Congress most likely could only review a fraction of proposed agency regulations under the amendment of Representative Kindness. The indiscriminate application of a legislative veto to all agencies should be defeated as it was in Chairman Danielson's subcommittee.

To more precisely and fully accomplish the needed accountability of agencies, and oversight of agency action, Congress should adopt a series of proposals: carefully limited sunset legislation to assure periodic congressional review of the need for agencies or agency function; enchanced Executive Branch authority to coordinate the action of all agencies; public participation funding to assure agency responsiveness to interested, qualified small business and others; and the revised Bumpers Amendment to assure that the courts assume their full responsibility to assure that agencies abide by the intent of Congress.

The revised Bumpers Amendment would accomplish three important goals of regulatory reform. However, it would not, as was alleged in a recent letter to you by Messrs. Eizenstat and McIntyre, "...transfer regulatory policy-making authority from regulatory officials and the President to the Federal courts." Furthermore, that same letter was simply wrong in

suggesting that this balanced amendment would "impair the ability not only of the President, but of the Congress to assure that regulatory decision-makers are accountable and faithful to statutory mandates." Both Administration assertions are wrong for the simple reasons that the Bumpers Amendment would require better regulatory policy-making by agencies and the President, and would itself assure more accountability and strict adherance by regulatory decision-makers to the statutory mandate of Congress.

The Bumpers Amendment would make three substantive changes to Section 706 of Title 5, U.S. Code which specifies congressional standards applicable to court review of agency rules:

1. It would impose a standard of strict construction (or "clear implication") concerning questions of agency jurisdiction or authority raised on appeal;

2. It would extend the "substantial evidence" standard already applicable to appeals of agency adjudications and many agency rulemakings to all factual determinations in such rulemaking; and

3. It would correct the current inbalance between private parties and agencies in court review of agency rules by removing any presumption of validity of the rules.

The underlying purpose of the substantially revised Bumpers Amendment, is that Congress should make clear to the courts that congressional mandates to regulatory agencies are to be strictly obeyed. Consequently, I urge your support for the revised Bumpers Amendment and opposition to a legislative veto.

Sincerely,

Leonard S. Janofsky

Leonard S. Janofsky

LSJ:CHB:kh

cc: Members, Committee on the Judiciary

EXHIBIT 7

Office of the Attorney General
Washington, D.C.

May 14, 1980

Honorable Peter W. Rodino, Jr.
Chairman, Committee on the Judiciary
U.S. House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

I want you and the members of your Committee to know of my strong opposition to the so-called Bumpers Amendment to the Administrative Procedure Act's provisions for judicial review of agency action.

This amendment would effect a substantial alteration in existing law. By eliminating the ability of courts to accord to agency action any presumption of validity, however well-grounded such a presumption may be in a given case, the amendment would encourage interested parties to relitigate in federal court the multitude of factual issues involved in a rulemaking, the very issues already once decided by the rulemakers. This would directly undermine the value of creating agencies as specialized, expert decisionmaking bodies. It would throw to the courts for reexamination the volumes of evidence on highly technical factual and policy issues that are generated in even the most fundamental rulemaking. It would create incessant uncertainty about the law, fostering more and more complex litigation challenging agency action.

By imposing on all agency rulemaking and adjudication, however informal, a "substantial evidence" test, the amendment would bring additional confusion into the law. Such a standard is geared to formal decisionmaking on the record; informal rulemaking does not require a record encompassing all relevant evidence. A change of that nature would lead agencies to abandon informal procedures and, therefore, further delay the administrative process. It would also raise serious problems for courts reviewing agency actions, giving rise to still further litigation.*

*/ These objections are elaborated upon in the letter to you from Assistant Attorney General Alan A. Parker, dated May 13, 1980, on the Bumpers Amendment.

These proposed changes would not in any sense "reform" the administrative process. Rather they would make it more complicated, inefficient and prone to wastefulness. It would not make rulemaking more politically accountable, for the courts, which would be given broad new powers and duties under the amendment, are not subject to congressional oversight, nor are they accountable to the President whom the voters hold ultimately responsible for the effect of the Government on their lives. The Attorney General's report on Administrative Procedure which was prepared under the direction of Attorney General Robert Jackson forty years ago, and which formed the philosophical foundation for the Administrative Procedure Act, stated flatly on the question of judicial review: ". . . we expect judicial review to check -- not to supplant administrative action. Review must not be so extensive as to destroy the values -- administrative expertness, specialization, and the like -- which . . . were sought in the establishment of administrative agencies." */

I strongly urge you and the members of your Committee to oppose the Bumpers Amendment.

Sincerely,

[SIGNED

Benjamin R. Civiletti
Attorney General

*/ Administrative Procedure in Government Agencies, Report of the Committee on Administrative Procedure Appointed by the Attorney General, S. Doc. No. 8, 77th Cong., 1st Sess. 77 (1941).

ASSISTANT ATTORNEY GENERAL
LEGISLATIVE AFFAIRS

Department of Justice
Washington, D.C. 20530

MAY 13 1980

Honorable Peter W. Rodino, Jr.
U. S. House of Representatives
2462 Rayburn House Office Building
Washington, D. C. 20515

Dear Mr. Chairman:

This presents the Department of Justice's views regarding the so-called Bumpers amendment to the Administrative Procedure Act's (APA's) provisions for judicial review of agency action, as recently revised with the approval of Senator Bumpers. The revised amendment would eliminate any "presumption of validity" that a reviewing court might accord agency action, except when a rule is to be relied upon as a defense, such as by private parties, in civil or criminal actions. It would amend 5 U.S.C. § 706(2)(C) by requiring a court, when agency action is challenged as in excess of statutory jurisdiction, authority or limitation or short of statutory right, to determine that the action is authorized "expressly" or by "clear implication" in the statute or "other relevant legal materials." Finally, it would amend 5 U.S.C. § 706(2)(E) by making the "substantial evidence" test applicable to all informal rulemaking conducted pursuant to 5 U.S.C. § 553 and all adjudications under 5 U.S.C. § 554.

These provisions would constitute substantial alterations in existing principles governing judicial review of agency action and, in our view, would have seriously destabilizing effects on administrative law. They would not, in our view, satisfy the purposes they are said to serve, and they would have major counterproductive consequences, which would include making the administrative process more confused and prone to delay than it already is. By prompting more and more complex litigation regarding agency action, they would also impose significant burdens on already overburdened courts.

At bottom, the provisions rest on a contradiction. They are put forward as a response to a perception that agencies should be more politically accountable to Congress

and hence the people, but in fact they would replace the agencies with federal judges, members of the branch of government which is constitutionally immune from the ordinary methods of political accountability that control the exercise of discretion under law. We doubt that there is any reason to assume, as the Bumpers amendment does, that the judiciary's conclusions on complex policy choices arising in administrative proceedings will necessarily be seen by Congress as more "correct" than those of agencies. It may be anticipated that in the future, as in the past, courts will determine in various cases that agencies should have imposed regulatory requirements more rigorous or otherwise different from those they have imposed. Cf. Phillips Petroleum Co. v. Wisconsin, 347 U.S. 672 (1954); Natural Resources Defense Council, Inc. v. Costle, 568 F.2d 1369 (D.C. Cir. 1977). If Congress wishes to make agencies more accountable to its will, it can do so directly, such as by more detailed substantive legislation or oversight hearings. To seek to do so indirectly by giving broad, new powers and duties to courts is to risk jeopardizing basic values of democratic governance, according to which Congress, not the courts, should assume primary responsibility for determinations affecting public policy.

We will focus on the three main aspects of the revised Bumpers amendment.

I. The "Presumption of Validity"

The revised amendment would provide that a reviewing court shall make determinations about a rule "without according any presumption of validity" to any rule, except where a rule is set up as a defense, such as by a private party, to a civil or criminal action.

This provision is said to be designed to prevent "blind or automatic" judicial deference to agency rules. However, it is incorrect as an empirical matter to suggest that courts blindly defer to agencies. The courts can and do "speak the final word on interpretation of law, both constitutional and statutory." 1/ As to matters involving an

1/ Report of the Attorney General's Committee on Administrative Procedure, Administrative Procedure in Government Agencies, S. Doc. No. 8, 77th Cong., 1st Sess. 78 (1941)(hereinafter cited as Report of the Attorney General's Committee). See Volkswagenwerk Aktiengesellschaft v. FMC, 390 U.S. 261, 272 (1968); Morton v. Ruiz, 415 U.S. 199, 237 (1974).

admixture of factual and policy issues, the Supreme Court has plainly instructed lower federal courts to subject agency rules to a "searching and careful" and "thorough, probing, in-depth review." Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 415-16 (1971). The lower federal courts have heeded such directions by carefully and thoroughly reviewing agency rules. 2/

Although the phrase "presumption of validity" is undefined, it might be said to encompass a wide variety of doctrines under which courts reasonably give weight to agency determinations in view of the agency's specialized experience, familiarity with the underlying statutes and immersion in day-to-day administrative operations that reveal practical consequences of different courses of action. 3/ If this be its meaning here, then its elimination from the law would be senseless and dangerous in terms of its implications for the respective roles of courts and agencies.

For instance, it is rational for courts to defer to an agency's interpretation of its own statute, barring contrary indication in the legislative record, because agencies have specialized knowledge and exposure pertinent to the process of properly construing their organic acts. See, e.g., NLRB v. Seven-Up Bottling Co., 344 U.S. 344, 349 (1953);

2/ See, e.g., Katharine Gibbs Sch. v. FTC, 612 F.2d 658 (2d Cir. 1979); Ethyl Corp. v. EPA, 541 F.2d 1 (D.C. Cir.)(en banc), cert. den. 426 U.S. 941 (1976). Indeed, if courts were not carefully reviewing rules, as we believe they are, then it would be unrealistic at the outset to suppose that courts could be a reliable means of preventing agency "excess." But the Bumpers amendment presumes that courts should be relied on to prevent such "excess." There is thus a deep incoherence in the argument for the amendment: it asserts (wrongly, in our view) that courts blindly defer to agencies, and it would seek to rely on courts (inappropriately, in our view) to remedy the problem of agency "excess."

3/ See generally, Woodward & Levin, In Defense of Deference: Judicial Review of Agency Action, 31 Ad. L. Rev. 329, 331-35, 337-38 (1979).

Wilderness Society v. Morton, 479 F.2d 842, 866 (D.C. Cir.) (en banc), cert. denied, 411 U.S. 197 (1973). Further, it bears noting that historically agencies have been established in order to gain for society the benefits of expert, specialized decisionmaking on complex issues of policy. 4/ It would be inconsistent to rely on such bodies without permitting courts, in the context of reviewing agency rules, to ascribe to agency determinations a presumption of validity in appropriate circumstances. There are, as Judge Learned Hand noted, issues as to which an agency's "specialized experience equips it with major premises inaccessible to judges." NLRB v. Universal Camera Corp., 190 F.2d 429, 430 (2d Cir. 1951). It would also be inappropriate in a democratic system to permit courts to substitute their policy preferences for those of agencies. Since the notion that courts in appropriate cases can accord agency views a presumption of validity is both a basic tool of rational judicial decisionmaking and a bulwark against usurpation by the judiciary of the policy-making role of agencies, its elimination would promise to be significantly counterproductive. 5/

Its elimination would also undermine necessary certainty and stability in the law. An agency rule would need only to be challenged in court to lose its status as presumably valid until found otherwise. The products of federal agencies

4/ See J. Landis, The Administrative Process (1938). See also Report of the Attorney General's Committee, note 1 supra, at 77: "[W]e expect judicial review to check -- not to supplant -- administrative action. Review must not be so extensive as to destroy the values -- expertness, specialization, and the like -- which . . . were sought in the establishment of administrative agencies."

5/ It is no response to suggest that legal issues can be distinguished from "fact" and "policy" issues, and that only the first set of issues would be affected by the elimination of any presumption of validity of rules. It has been long recognized that there is no such "fixed distinction" in administrative law, see, e.g., Dickinson, Administrative Justice and the Supremacy of Law 55 (1927), for many issues subsume legal, factual and policy questions.

thus would be unreasonably denied the basic protection normally accorded most acts of individuals and groups, namely, the assumption that until proven otherwise, actors in society will be presumed to have behaved legally.

II. "Express" or "Clear" Authority for Agency Action

The revised Bumpers amendment would provide that whenever agency action is challenged as not authorized by statute, the reviewing court must determine that it is authorized "expressly" or "by clear implication" in view of the statutory language and "other relevant legal materials."

This provision is said to be a means of preventing excursions by agencies beyond their statutory bounds. However, that purpose is already served by existing standards of judicial review, which require a court to set aside agency action found to be in excess of statutory jurisdiction, authority or limitations, or short of statutory rights. See 5 U.S.C. § 706(2)(C). Accordingly, there is no need to alter existing law to further the aim claimed for this provision, at least with respect to standards of judicial review.

Also, the proposed language raises the possibility that courts could be unable to use the flexible tools of statutory construction in reviewing agency action that have evolved as the necessary concomitants of broad delegations to agencies. For instance, if a statute does not explicitly anticipate a particular problem that arises in its implementation, and if the legislative history is silent on the point in issue -- as happens not infrequently -- a court would likely inquire whether the agency action is consistent with and "reasonably related to the purposes of the enabling legislation . . . ." Thorpe v. Housing Authority of the City of Durham, 393 U.S. 268, 280-81 (1969); see Mourning v. Family Publications Service, Inc., 411 U.S. 356, 369 (1973). It might be argued that, under the proposed language, such a perfectly appropriate judicial inquiry would be barred by the requirement that agency action be authorized "expressly" or by "clear implication," whatever those terms may precisely mean. Such an argument fails to recognize that under statutes conferring broad powers on agencies, agencies often must assess widely competing values, interests or other factors in light of the law, and frequently a given statute cannot plausibly be construed "clearly" to authorize or require one specific result of such a particularistic, policy-laden assessment.

In addition, the free-wheeling use by courts of a "clear implication" or "clear statement" doctrine, such as reflected in the proposed language, could represent a dangerous arrogation by the courts of the policy-making discretion that Congress has delegated to agencies.

III. The Substantial Evidence Standard

The revised Bumpers amendment would amend the APA by making the "substantial evidence" standard applicable to all rulemaking and adjudication, even if they are not required by statute to be conducted on the record after opportunity for an agency hearing. Under the APA, the substantial evidence standard only applies to formal "on the record" decisionmaking, which usually involves a trial-type hearing. See 5 U.S.C. §§ 556, 557 & 706(2)(E).

This proposal rests on the mistaken premise that a higher standard of review of factual issues than that afforded by the "arbitrary and capricious" standard of review is needed. In fact, courts aggressively review factual issues arising in informal rulemaking under the arbitrary and capricious standard. 6/ There is simply no demonstrated need to alter the present standard in order to prompt careful and searching judicial review.

Although the term "substantial evidence" is not a talismanic phrase of determinate meaning, 7/ it involves, under the APA, a review of the whole record underlying the agency action. See Universal Camera Corp. v. NLRB, 340 U.S. 474, 488 (1951). Informal rulemaking is not required to have any "record" encapsulating all the evidence on which a decision is based. At the most basic level, then, it is difficult to understand how a "substantial evidence" standard could be used across the board with respect to all informal rulemaking. 8/

6/ See, e.g., South Terminal Corp. v. EPA, 504 F.2d 646, 671-76 (1st Cir. 1974); State of Texas v. EPA, 499 F.2d 289, 297 (5th Cir. 1974). See also Union Oil Co. of Cal. v. FPC, 542 F.2d 1036, 1041-44 (9th Cir. 1976).

7/ See Associated Industries of N.Y.S., Inc. v. U.S. Dept. of Labor, 487 F.2d 342, 349 (2d Cir. 1973).

8/ See S. Breyer & R. Stewart, Administrative Law and Regulatory Policy 195 (1979) ("Since it presumes review on the basis of all of the relevant evidence, the substantial evidence standard in any event would be inappropriate in informal decisionmaking, which does not generate a trial-type record containing all of the relevant evidence.").

Also, many, if not most, of the crucial determinations pertinent to informal rulemaking are of a general policy nature, and do not turn on the existence or nonexistence of specific "facts" so much as they turn on the evaluation of probabilities, the balancing of objectives and the selection of methods to achieve given ends within statutory limits. It would be erroneous to assume that such decisions can be easily assimilated into a model of review designed especially for factual questions aired and tested in "on the record" proceedings. One could expect considerable confusion about the way in which any "substantial evidence" standard should apply with respect to such issues in informal rulemaking.

Also, one could expect confusion about the proper procedures that should be used to generate a "record" subject to review under a substantial evidence standard. At a minimum, agencies likely would move toward more formalized procedures in order to guard against possible adverse rulings by courts that the record was insufficient or improperly compiled. 9/ This would make the administrative process slower and less efficient, the opposite of the results said by proponents of the Bumpers amendment to be sought. This would also make not only regulation but also de-regulation harder and more costly, further interposing counterproductive tendencies in the administrative process.

It is not a sufficient response to note that in some statutes, Congress has applied a substantial evidence standard to rulemaking not involving the full procedural formalities under 5 U.S.C. §§ 556 & 557. First, in such statutes, Congress has addressed the issue of what other than notice-

9/ See Industrial Union Dept., AFL-CIO v. Hodgson, 499 F.2d 467, 474 (D.C. Cir. 1974). But see Vermont Yankee Nuclear Power Co. v. Natural Resources Defense Council, 435 U.S. 519 (1978). Compare Mobil Oil Corp. v. FPC, 483 F.2d 1283 (D.C. Cir. 1973), with Phillips Petroleum Co. v. FPC, 475 F.2d 842, 851-52 (10th Cir. 1973), cert. den. sub nom. Chevron Oil Co., Western Division v. FPC, 414 U.S. 1146 (1974).

and-comment procedures are required, thereby helping to obviate what would be one of the central confusions flowing from this proposal. Further, it simply does not follow from the fact that Congress has applied a substantial evidence standard to certain "hybrid" procedures that the standard should be applied to all informal rulemaking. Even in the context of particular statutes, the combination of "hybrid" procedures and a substantial evidence test has contributed to confusion and an "absence of harmony with respect to the nature and scope of review." Associated Industries of N.Y.S., Inc. v. U.S. Department of Labor, 487 F.2d 342, 345 (2d Cir. 1973). This sort of confusion would be multiplied should this proposal, imposing a higher standard of review without consideration of its appropriateness in a particular substantive context and without giving any attention to attendant procedural requirements under specific statutes, be adopted.

Conclusion

We believe that the revised Bumpers amendment, like the original Bumpers amendment, 10/ is an inappropriate means for achieving the desired goals of reforming the administrative process. Both would predictably prompt substantial counterproductive consequences. Both would upset long-established legal principles and foster basic confusion in administrative law while complicating and delaying the implementation and enforcement of statutes.

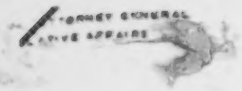
Sincerely,

Alan A. Parker

Alan A. Parker
Assistant Attorney General
Office of Legislative Affairs

Attachment

10/ Attached is an earlier memorandum, dated October 30, 1979, enunciating our views of the original Bumpers amendment as it passed the Senate on September 7, 1979.



Department of Justice
Washington, D.C. 20530

ATTACHMENT

OCT 30 1979

MEMORANDUM FOR STUART E. EIZENSTADT
Assistant to the President for
Domestic Affairs and Policy

Re: The Bumpers Amendment to S. 1477

This responds to the request for the views of the Department of Justice on a floor amendment to S. 1477 sponsored by Senator Bumpers and recently adopted by the Senate, which seeks to achieve accountability over federal agency rules by giving the federal courts new, broad and ill-defined duties in reviewing rules. The Department of Justice strongly opposes this amendment. It promises, in our opinion, to disrupt the regulatory process in major and unforseeable ways. 1/

The Bumpers amendment to the Administrative Procedure Act would delete the first sentence of 5 U.S.C. § 706, and substitute the following language without otherwise altering § 706:

> To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of the agency action. There shall be no presumption that any rule or regulation of any agency is valid, and whenever the validity of any rule or regulation is drawn in question in any court of

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1/ Our opposition to S. 111, which was introduced by Senator Bumpers and eventually became the so-called Bumpers amendment, is expressed in a letter to Chairman Kennedy of September 7, 1979, which is attached for your information. Although in certain detailed respects the language of the Bumpers amendment differs from that of S. 111, the thrust of the two proposals is substantially similar.

> the United States or of any State, the court shall not uphold the validity of such challenged rule or regulation unless such validity is established by a preponderance of the evidence shown. Provided, however, that if any rule or regulation is set up as a defense to any criminal prosecution or action for civil penalty, such rule or regulation shall be presumed valid until the party initiating the criminal prosecution action for civil penalty [sic] shall have sustained the burden of proof normally applicable in such actions.

The amendment's central provisions would: (1) eliminate any presumption by reviewing courts that a rule is valid; and (2) provide that whenever a rule is challenged, the reviewing court shall only uphold it if the agency establishes its validity by a "preponderance of the evidence."

The amendment's weaknesses are fundamental. First, its underlying rationale founders on a contradiction. The amendment is said to be designed to make agencies more responsive to the will of the people as expressed by Congress. However, instead of formulating meaningful statutory standards to which agencies must adhere, the amendment would give broad, relatively undefined powers over rules to federal judges who are not politically accountable either to the President or Congress. 2/ We doubt that there is any reason for Congress to assume, as the Bumpers amendment assumes, that the judiciary's policy judgments will be more "correct" than those of agencies. In fact, courts might well determine that an agency should have promulgated a more, rather than less, stringent regulation in a

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2/ Agencies are subject to Congressional supervision by such means as the authorization, appropriation and oversight processes. Agencies also tend to have widespread input during rulemaking from affected groups. Moreover, agencies generally are subject to Presidential oversight.

given instance. 3/ Members of Congress might well disagree with such judgments by relatively unaccountable judges. To the extent that the amendment would authorize unelected judges to substitute their policy choices for those of agencies, it directly clashes with the democratic principles that its supporters espouse. 4/

We also question what appears to be the major empirical assumption made by those who support the Bumpers amendment, namely, that courts uncritically defer to agencies. In fact, courts conclude with some frequency that the asserted authority for a given rule is insufficient. 5/ Moreover, the Supreme

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3/ Cf. Calvert Cliffs' Coordinating Committee v. Atomic Energy Commission, 449 F.2d 1109 (D.C. Cir. 1971) (AEC rules held not to comply with National Environmental Policy Act); Natural Resources Defense Council, Inc. v. Costle, 568 F.2d 1369 (D.C. Cir. 1977) (EPA Administrator held to have no authority to exempt point sources from Federal Water Pollution Control Act pollutant discharge elimination program); Nader v. Volpe, 475 F.2d 916 (D.C. Cir. 1973) (Secretary of Transportation has limited authority to grant temporary exemptions from safety standards for single manufacturers). See also Kingsbrook Jewish Medical Center v. Richardson, 486 F.2d 663 (2d Cir. 1973). We take no position here with respect to these or other cases. We see no reason to multiply examples of various situations in which courts have determined that agencies should regulate more rigorously or in a different manner than they have. The point is that granting judges broader powers of review cannot properly be assumed to be an effective method of curbing what some consider the "excesses" of regulation. In short, courts are able, as a general matter, to tell agencies to do "less," but they also can instruct agencies to do "more."

4/ Congress has a variety of means at its disposal, including the enactment of more detailed legislation, to make agencies more accountable to its will. If the underlying problem is one of broad delegation to agencies, Congress can address that issue by reconsidering the delegating statutes.

5/ See, e.g., Southeastern Community College v. Davis, 99 S.Ct. 2361 (1979); Chrysler Corp. v. Brown, 99 S.Ct. 1705 (1979); General Electric Co. v. Gilbert, 429 U.S. 125, 143-45 (1976).

Court has stressed that even though courts may not substitute their judgment for that of agencies, they still must subject rules to a "searching and careful" and "thorough, probing, in-depth review." Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 415-16 (1971). It is oversimplified and inaccurate to suppose that because courts express a certain deference to agency expertise, they do not look carefully at a rule's consistency with the underlying statutory mandate. 6/

In addition, the Bumpers amendment fails to take account of the reasons for the long-established notion that in certain circumstances courts should defer to agency determinations in rule-making, especially on matters of technical judgment and policy. It is appropriate to expect that agencies, which over time gain considerable knowledge about problems in their respective areas, will develop valuable institutional expertise. Agencies also tend to be particularly experienced with the statutes that they administer. 7/ This does not mean that agency officials will never err. But agencies that deal day-to-day with problems in certain areas may be expected to, and in our view generally do, exhibit a greater familiarity with complex and

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6/ We disagree with the argument that the Bumpers amendment would merely enhance present practice since it would encourage a harder look at agency rules. In reality, increasing the scope of judicial review of rules inevitably presents courts with a greater opportunity to substitute their judgment for that of agencies with regard to the exercise of discretion vested in agencies by statute.

7/ In many cases agencies have been involved deeply in the process of Congressional consideration of a statute, and frequently rules are issued soon after a statute's enactment. In other cases, Congress re-enacts legislation without challenging an agency's prior interpretation. Cf. Wilderness Society v. Morton, 479 F.2d 842, 866 (D.C. Cir.) (en banc), cert. denied, 411 U.S. 917 (1973). In these and other situations, there is a valid basis for courts to defer to agency interpretations. The Bumpers amendment, however, unrealistically and inflexibly assumes that whatever statute or question may be involved, it is never appropriate for courts to defer to agency views.

technical issues in rulemaking than federal judges, who are generalists, may normally be expected to demonstrate. 8/

Further, we are seriously concerned about the amendment's potentially disruptive impacts. At a minimum, it would likely encourage litigants to challenge rules even on grounds that may be frivolous. A plaintiff at present tends to have little incentive to raise contentions that he knows cannot be sustained. However, in the absence of any presumption of the validity of rules, and with the Government bearing an ill-defined burden of establishing a rule's validity by a "preponderance of the evidence," plaintiffs would have an incentive to raise every conceivable contention simply in the hope that an agency might be held to fail to carry its burden. Since a rule when challenged is to be supported by a preponderance of the evidence, a rule might be subject to something like a presumption of invalidity even if it were challenged on a completely groundless basis. 9/

Such consequences would entail major institutional costs. The public, which requires reasonably settled and consistent interpretations of rules in order to plan their affairs, would suffer to the degree that there ensued increased and repeated litigation, judicial nullification of existing rules and inconsistent holdings. To the extent that the amendment would make more difficult the promulgation and enforcement of rules, it would also make "de-regulation" -- which frequently involves generic rulemaking -- more problematical. In addition, the substantial burden already carried by courts would certainly burgeon. 10/ Further, especially to the extent that the amendment

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8/ "The thesis that deference is never desirable means, in effect, that courts should discard the lessons of their own experience. The courts do not defer to agency expertise in order to avoid their job of construing a statute. Rather, their approach is the product of a judgment, distilled from decades of case law, that deference may be the most constructive and prudent way to reach a correct decision about the meaning of a disputed statutory term." Woodward & Levin, In Defense of Deference: Judicial Review of Agency Action, 31 Ad. L. Rev. 329, 336 (1979) [Emphasis in original].

9/ Something akin to a presumption of invalidity might arise because the amendment provides that a challenged rule may not be upheld unless supported by a preponderance of the evidence. Until such a demonstration were made in court, a challenged rule would fall under a cloud even if the challenge were spurious.

10/ See McGowan, Congress, Court and Control of Delegated Power, 77 Colum. L. Rev. 1119, 1168 (1977).

might subject challenged rules to something like a presumption of invalidity, it would undermine the value of establishing administrative agencies in the first place:

The amendment would also raise many unanswered questions, the resolution of which would have significant implications for our administrative system. 11/ The amendment's term, "validity" of rules, is not defined, and it has a potentially enormous reach. For instance, although the elimination of any presumption of the validity of rules applies most clearly to issues of "law," it is often difficult to distinguish questions of "law" from those of "fact." Even if such a distinction could be made in a given case, it is unclear whether as to "pure" questions of law alone a court might consider itself compelled by the amendment to jettison the accepted notion that a reasonably contemporaneous agency interpretation of open-ended statutory phrases is entitled to deference. 12/ The possibility of such a result illustrates the amendment's far-reaching disruptive potential.

As to issues of fact and of technical and policy judgment additional questions would occur. The presumption of validity is perhaps of greatest importance with respect to technical matters of fact and judgment, which often arise in rulemaking and as to which there is no practical alternative to the exercise of expertise. Frequently such exercise occurs on the basis not of demonstrable "facts" but of substantial probabilities. Would the amendment's elimination of any presumption of validity and its addition of a "preponderance of the evidence" standard have the effect of requiring courts to invalidate agency rules unless they are supported by "firm" facts, rather than substantial probabilities? If so, its disruptive potential in many areas of public health, safety, environment and other sensitive subjects would be quite serious, for in such areas implementation of statutes protecting the public interest might become virtually impossible. Any such result would amount to a modification of existing substantive law, despite the amendment's supporters' protestations to the contrary.

11/ The absence of committee hearings or reports on the amendment increases the uncertainty about its meaning and effects.

12/ See, e.g., Norwegian Nitrogen Products Co. v. United States, 288 U.S. 294, 315 (1933). See generally Woodward & Levin, In Defense of Deference: Judicial Review of Agency Action, 31 Ad.L.Rev. 329, 333-34 (1979).

Also, would a court be required to substitute its judgment for an agency's with respect to the credibility and weight of particular evidentiary items in a rulemaking record? Under present law, this would be an extreme invasion of the responsibilities of agencies. Also, in applying a "preponderance of the evidence" standard, would a court consider it necessary as a practical matter to rehear witnesses de novo? 13/ Such a consequence would be quite wasteful of the already-scarce resources of courts and agencies. Implicit in these questions is the additional concern that a court might consider itself free to substitute its policy judgment for that of an agency, despite a court's comparative disadvantage in terms of knowledge, experience and resources, and despite the fundamental separation of powers principle that courts interpret -- but do not execute -- the law. Further, it is unclear whether the "preponderance of the evidence" standard would be seen to modify if not supersede existing standards of review, namely those of substantial evidence and of arbitrary and capricious agency action. 14/ One may expect years of involved litigation before courts, agencies and parties can achieve a settled interpretation of the amendment that would resolve such issues.

The existence of such substantial questions is likely to generate particular difficulties for informal rulemaking, which traditionally is not based on a detailed record such as required in more formal proceedigs. Informal rulemaking may thus be especially subject to judicial nullification under a "preponderance of the evidence" standard, whatever it may mean. As

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13/ Although the Bumpers amendment, unlike S. 111, does not in terms provide for "de novo" review, the amendment's effect as a practical matter may well be the same as the bill's.

14/ These standards are contained in the present language of 5 U.S.C. § 706 that is unaltered by the Bumpers amendment. A court would have to ascertain the meaning and applicability of the existing standards, which have been applied and interpreted for over thirty years, in light of the "preponderance" standard.

Further, the Bumpers amendment makes no effort to distinguish between different types of rules -- substantive, procedural and interpretative rules and statements of policy. The questions raised by the amendment multiply as one focuses discretely on each type of rule. For instance, what is meant by saying that one must "prove" the "validity" of a procedural rule by a "preponderance of the evidence"?

a consequence, the Bumpers amendment is likely to prompt agencies to use alternative procedures--such as formal rulemaking, adjudication or informal guidelines and policies. It would be counterproductive to respond to perceived "over-regulation" by prompting agencies to use such regulatory techniques that involve greater costs, in which the agencies are less accountable to the public, and in which the public is provided less guidance on how to comply with the law.

To summarize, our opposition to the Bumpers amendment is based on its flawed rationale and the several serious difficulties that it would predictably create. From informal discussion with numerous agencies, we understand that these concerns are widespread. However, we speak here not as a regulatory agency but as the Government's lawyer. In that capacity, we are acutely aware of both the complexity of issues arising in rulemaking and the Bumpers amendment's dangers--not just in encouraging litigation but, more basically, in reducing the effectiveness of our nation's institutions.

Alan Parker
Assistant Attorney General
Office of Legislative Affairs

Attachment

United States Department of Justice
ASSISTANT ATTORNEY GENERAL
LEGISLATIVE AFFAIRS
WASHINGTON, D.C. 20530

September 7, 1979

Honorable Edward M. Kennedy
Chairman, Committee on the
Judiciary
United Stated Senate
Washington, D. C. 20510

Dear Mr. Chairman:

This responds to your request for the comments of the Department of Justice concerning S. 111, a bill "To improve the administrative process by making Federal agencies more responsive to the will of the people." This bill would substantially alter existing law governing the scope of judicial review of agency action by eliminating the presumption that an agency's interpretation of statutes it administers is presumptively correct. Also, any court presiding over proceedings in which the validity of an agency rule is questioned would be unable to uphold the rule "unless such validity is clearly and convincingly shown ...." 1/

The Department of Justice strongly opposes this bill. It would undermine one of the historical bases of the system of administrative law in this country, namely, the assumption that the expert judgment of agencies charged by Congress with making decisions in areas of frequently complex interaction of law, fact and policy should be generally respected by reviewing courts. For instance, the Supreme Court has referred to a "presumption of regularity" accorded agency decisions, and has announced that a court is "not empowered to substitute its judgment for that of the agency." Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 415, 416 (1971). Moreover, the Supreme Court has traditionally spoken of the judicial deference that should be accorded an agency's interpretation

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1/ However, in cases involving criminal prosecutions or actions for civil penalties, the agency regulation would be presumed valid until the party initiating the action had sustained the applicable burden of proof.

of its organic statute, for it is axiomatic that Congress authorizes an agency, not the judiciary, to implement the law delegating power to the agency. See Udall v. Tallman, 380 U.S. 1, 16 (1965). These policies of deference rest, in the final analysis, both on a desire for consistency in administrative decisionmaking, which is needed for individuals to plan their behavior in accordance with federal law and regulations, and on a sense that principles of the separation of powers caution against an over-ambitious program of judicial review.

These policies would be seriously undermined by the proposed legislation. Moreover, the bill, by granting sweeping powers of review to courts, would predictably frustrate -- not promote -- the realization of its avowed aim of making agencies more responsive to the will of the people as expressed by Congress. In fact, the bill would make agencies more responsive to the will of unelected judges. Also, by shifting the burden of persuasion to the government in all cases in which the validity of administrative rules or regulations is challenged, the bill would needlessly reverse the normal understanding in judicial proceedings that the complaining party carries the burden of proving the case. It would place an enormous responsibility on agencies to demonstrate repeatedly the legitimacy of their regulations. Further, it would impose a significant burden on federal courts, which are already strained by the need to deal with the large numbers of cases before them. 2/

In addition, if the concern underlying the bill is the need to guarantee that agency actions are able to be reviewed vigorously by courts, that end would appear to be met to a substantial degree by existing law. Under present standards of review, agency action shall be set aside if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." Also, courts are to reverse agency decisions

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2/ See McGowan, Congress, Court, and Control of Delegated Power, 77 Colum. L. Rev. 1119, 1168 (1977). Judge McGowan points to a further danger of the bill: "[I]ncreasing their responsibility for other-than-interstitial policy-making may deprive the courts of the very attributes -- the self- and statutorily-imposed boundaries on their functions -- that probably contribute most of their current attractiveness to the public vis-a-vis the other branches of government." Id.

if they fail to meet statutory, procedural or constitutional requirements, or if they are unwarranted to the extent that underlying facts are subject to trial de novo. See 5 U.S.C. § 706(2). 3/ As the Supreme Court has noted, the fact that there is a presumption of regularity in agency decision-making does not mean that agency actions are immune from "a thorough, probing, in-depth review." Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 415 (1971).

For all of these reasons, the Department recommends against enactment of S. 111.

The Office of Management and Budget has advised that there is no objection to the submission of this report from the standpoint of the Administration's program.

Sincerely,

Alan A. Parker
Assistant Attorney General

3/ The language of S. 111 providing that a court "shall decide de novo all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of the agency action," is not entirely clear, and we could expect much litigation on the subject of the meaning of the de novo review provision. Normally, de novo review incorporates review of the underlying factual record. Present law provides for such de novo review only in carefully circumscribed situations in which there is reason not to rely on the fact-finding process of the administrative agency. See Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 415 (1971). If S. 111 is intended to require de novo factual review as a general matter, its disruptive effects would be particularly great. In any event, as we have discussed, S. 111 should be opposed for broadly expanding the scope of judicial review of legal issues by eliminating the presumption of the validity of an agency rule, and for shifting the burden of proving the validity of a challenged rule to the government.

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May 20, 1980

File No. 30783.0000003

The Honorable Dale L. Bumpers
United States Senate
3229 Dirksen Senate Office
Building
Washington, D.C. 20510

Dear Senator Bumpers:

This letter is in response to your request for this firm's opinion concerning the Attorney General's letter of May 14, 1980 to Congressman Rodino.[1/] The subject of that letter was your proposed amendment to section 706 of the Administrative Procedure Act (APA), 5 U.S.C. § 706 (1976), which was adopted by the Senate Committee on the Judiciary on May 7, 1980 as part of S.2147. An identical amendment to H.R. 3263, offered by Congressman Synar and McClory, is now pending before the House Judiciary Committee.

The Attorney General's May 14 letter refers to and is accompanied by a May 14, 1980 letter to Chairman Rodino from Alan A. Parker, Assistant Attorney General, Office of Legislative Affairs. It is to the Parker letter, which provides the supporting analysis for the Attorney General's letter, that our discussion will be addressed.

Mr. Parker in his letter claims that the Bumpers amendment would have "seriously destabilizing effects on administrative law;" that it would make "the administrative process more confused and prone to delay than it already is;" that it would "impose significant burdens on already overburdened courts;" and that it would allow the courts to substitute their judgment for that of the agencies on "complex policy choices." These assertions, as the following analysis demonstrates, are incorrect. They are based on a fundamental misunderstanding of the current judicial review provisions of the Administrative Procedure Act as well as the Bumpers amendment itself.

[1/] We should note that this firm is acting as special counsel to the Business Roundtable in connection with the regulatory reform legislation now pending in the Senate and House of Representatives.

We will respond to each of Mr. Parker's claims in order of their appearance on his May 13 letter. Before doing so, however, we think it would be worthwhile to set forth the intent underlying your amendment to section 706 of the APA as you have expressed it.2/

Many of the ambiguities in the APA's current standards of judicial review stem from that statute's failure to delineate clearly which standards apply to the three basic categories of issues presented by agency action:

- issues of law, including questions of agency jurisdiction, other interpretation of substantive law and compliance with procedural requirements;

- issues of fact; and

- issues of statutorily based policy judgments or exercise of agency discretion.

Not only is the current APA somewhat vague as to which standard of review applies to which type of issue, but it also at times requires application of an inappropriate standard of review to a particular issue category. The Bumpers amendment is intended to clarify this confusion by requiring courts to distinguish these three types of issues when reviewing agency action. As a result of the amendment, an appropriate standard of review would then be applied to each issue category.

A major goal of the Bumpers amendment is to eliminate any presumption on judicial review that an agency's regulations are valid. However, critics of the amendment have misconstrued the current extent of this "presumption" and the effect which its elimination would have. The amendment's primary effect would be to eliminate any presumption that the agency has correctly interpreted its statutory jurisdiction or the meaning of a particular statute. These are legal questions which are appropriately answered by the courts.

2/See generally, 125 Cong. Rec. S. 12145-66 (daily ed. Sept. 7, 1979); Statement of Senator Dale Bumpers, Hearings Before the Subcommittee on Administrative Law and Governmental Relations, House Committee on the Judiciary, 96th Cong., 1st Sess. (Dec. 5, 1979).

Requiring agencies to show that their jurisdictional authority over a particular matter is either expressly provided in or clearly implied by their organic statutes is not a radical change from current judicial practice. Most courts recognize their obligation under the current APA to independently examine an agency's jurisdiction to act. The Bumpers amendment is intended to underscore this obligation for those courts that do not.

In regard to substantive issues of law other than questions of agency jurisdiction, the Bumpers amendment will primarily affect those cases where a reviewing court disagrees with the agency's interpretation of relevant law, but nevertheless deems the agency's interpretation to be not unreasonable. Under the APA as revised by the amendment, courts would no longer have to decide such "close" cases in favor of the agency. However, the amendment would not preclude judicial deference to any agency legal interpretation when it is warranted. There would simply be no "presumption" either for, or against, the agency interpretation.

In regard to procedural issues of law, the Bumpers amendment would continue in effect the reviewing court's obligation to ensure that the agency has complied with all applicable procedural requirements. It would not, however, authorize reviewing courts to require agency compliance with procedures beyond those required by the Constitution and other applicable law.

In regard to factual issues, the Bumpers amendment would extend the substantial evidence standard, currently applicable under the APA to agency adjudications and "formal" rulemaking, to all rulemaking proceedings. Congress has already incorporated this standard in a number of organic statutes involving informal or "hybrid" rulemakings to review of agency factual determination in rulemaking. It is, therefore, not a novel department from current practice. Nor would it necessarily require more formalized agency proceedings. It would, however, require there to be substantial evidence in the agency record, however defined, supporting the agency's factual determinations.

Finally, the Bumpers amendment would continue in effect the "arbitrary, capricious, . . . abuse of discretion" standard for review of agency policy judgments or determinations based on exercises of agency discretion. By doing so, it would preserve for the agencies the policy decisions entrusted to them by Congress. Courts would not be free under the Bumpers

amendment to substitute their judgment on such decisions for that of the agencies.3/

1. The Presumption of Validity Issue

Mr. Parker asserts that elimination of a "presumption of validity" would be "senseless and dangerous in terms of the respective roles of courts and agencies." The basis for this claim is that, according to Mr. Parker, "historically, agencies have been established in order to gain for society the benefits of expert, specialized decisionmaking on complex issues of policy" and that it would be "inappropriate in a democratic system to permit courts to substitute their policy preferences for those of the agencies." And he concludes his point by arguing that since "the notion that courts in appropriate cases can accord agency views a presumption of validity is both a basic tool of rational judicial decisionmaking and a bulwark against usurpation by the judiciary of the policy making role of agencies, its elimination would promise to be significantly counter- productive."4/

3/See Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 416 (1971). At the same time, the amendment is intended to underscore the obligation of the reviewing court, spelled out in Bowman Transp., Inc. v. Arkansas-Best Freight System, Inc., 419 U.S. 281 (1974), to assure that the agency policy decision was based on a "consideration of all of the revelant factors" and that there is a "rational connection between the facts found and the choice made." 419 U.S. at 285-86.

4/Mr. Parker also asserts that the elimination of a "presumption of validity" would undermine "certainly and stability in the law." He argues that a "rule would need only to be challenged in court to lose its status as presumably valid until found otherwise." As a result, according to Mr. Parker, "federal agencies thus would be unreasonably denied . . . the assumption that until proven otherwise . . . [they] will be presumed to have behaved legally." This argument makes no sense. The Bumpers amendment affects only the standards for judicial review of agency action. Pending the outcome of that judicial review the rule or agency action at issue would remain in effect. Under current law, if a party wants a stay in the effectiveness of a particular agency action pending appeal, it is required to obtain a stay from the court. 5 U.S.C. § 705 (1976). This requirement would not be changed by the Bumpers amendment.
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These arguments (1) ignore the intent of the Bumpers amendment as you have expressed it; (2) confuse issues of law and issues of policy or agency discretion; and (3) are not supported by the cases cited.

There has been substantial confusion concerning the origin of the phrase "presumption of validity, its current extent, and the effect its elimination would have on judicial review. This confusion is at the heart of Mr. Parker's incorrect assertions about the impact your amendment would have. Indeed, his letter continuously confuses a supposed "presumption of validity" of agency interpretations of law with judicial "deference" to such interpretations and with the courts refusal to substitute their judgment for that of the agencies on matters of policy.5/

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fn 4 cont'd

Moreover, as discussed below, it is not the effectiveness of the agency action which is eliminated by the Bumpers amendment, but rather any "presumption" that the agencies' interpretations of their statutory jurisdiction or other questions of law are "valid." Finally, the amendment explicitly preserves a private party's right to rule on compliance with a rule as a defense in any civil or criminal action.

5/The cases cited by Mr. Parker in the "presumption of validity" section of his letter do not support the proposition that elimination of any presumption that agency interpretations of jurisdiction or other questions of law are valid will allow the courts to "substitute their policy preferences for those of the agencies." Instead, those cases merely illustrate Mr. Parker's failure to distinguish issues of law and issues of policy. As Mr. Parker himself notes, the courts have "the final word on interpretation of law, both constitutional and statutory." Parker letter at 2.

Two of the three cases cited by Mr. Parker as support for his statement that courts should defer to agencies do not deal with legal issues at all. They concern policy determinations by the National Labor Relations Board. See NLRB v. Seven-Up Bottling Co., 344 U.S. 344, 349 (1953) (issue of how to calculate back-pay was a policy and not legal issue; NLRB had "broad discretion" to establish policy based on "cumulative experience"); NLRB v. Universal Camera Corp., 910 F.2d 429, 430 (2d Cir. 1951) (Judge Hand, citing Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 197-99 (1940), states that there may be some issues "on which the Board's specialized experience equips it with major premises inaccessible to judges" but finds only issues of fact present as to which he deems the court as "competent" as the Board. The portion of Phelps Dodge cited by

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The presumption that agency rules are valid is entirely judicial in origin. It stemmed originally from the view, antedating the enactment of the Administrative Procedure Act, that courts generally should not inquire too closely into whether other branches of the federal government or organs of state government have properly discharged their official duties. See United States v. Chemical Foundation, 272 U.S. 1, 14-15 (1926). The origin and basis of this doctrine can be discerned in Pacific States Box & Basket Co. v. White, 296 U.S. 176 (1935), in which the Supreme Court was presented with a challenge to regulations promulgated by the Oregon Department of Agriculture. Justice Brandeis, writing for the Court, held that when agency action is challenged, then "if any state of facts reasonably can be conceived that would sustain it, there is a presumption of the existence of that state of facts . . . . Id. at 185 (quoting Borden's Farm Products Co. v. Baldwin 293 U.S. 194, 209 (1934)). It is important to note that the Court, in upholding the agency action at issue in Pacific States Box, presumed only "a state of facts" supporting the regulations. It did not declare that reviewing courts should defer to agency interpretations of statutory jurisdiction or other questions of law. On the contrary, the Court clearly implied that "of course" the question of whether

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fn 5 cont'd

Judge Hand concerned the NLRB's determination of "back-pay" - a policy and not legal issue).

The third case cited by Mr. Parker, Wilderness Society v. Morton, 479 F.2d 842, 866 (D.C. Cir.) (en banc), cert. denied, 411 U.S. 197 (1973), concerned the issuance by the Interior Deparment of rights-of-way and special land use permits to the Trans-Alaska pipeline. Interior claimed that section 28 of the Mineral Leasing Act of 1920 gave it authority to issue such permits. Pointing out that "(a)dministrative construction is only one input in the interpretational equation," the D.C. Circuit noted that

> [a] court should not abdicate its ultimate responsibility to construe the language employed by Congress . . . but rather should defer to an administrative construction only if there are "no compelling indications that it is wrong."

479 F.2d at 865. (citations omitted).

Thus, the cases cited by Mr. Parker in his discussion of "presumption of validity simply indicate (1) that courts generally defer to agencies' determinations on matters of policy and (2) that courts have no obligation to defer to let alone "presume the validity of" agency interpretations of legal questions. As a result, those cases are entirely consistent with the Bumpers amendment.

"the regulation is within the scope of authority legally delegated" to the agency was appropriate for examination by reviewing courts. 296 U.S. at 186.

It is doubtful that Justice Brandeis, writing years before the enactment of the APA, ever contemplated the impact his opinion in Pacific States Box would have on federal administrative law.[6] The limited "presumption of regularity" discussed in Pacific States Box has over the years been expanded to embrace a virtual "presumption" that the interpretation given a statute by the agency charged with its administration is correct. See e.g., Udall v. Tallman, 380 U.S. 1, 16 (1965). This "presumption" is generally given to agency interpretations of statutory terms. At times, however, it has extended to agency interpretations of jurisdiction.

This gradually increasing "presumption of validity" of agency legal interpretations has resulted in the abdication by many courts of their proper role under the Constitution. It is also incompatible with the Congressional intent embodied in section 706(2)(B), (C) and (D) of the APA. The proper role of the courts was spelled out in one of the Supreme Court's earliest and most profound decisions: "It is emphatically the province and duty of the Judicial Department to say what the law is." Marbury v. Madison, 2 U.S. (1 Cranch 138) 60, 73 (1803). The intent of the Bumpers amendment is to ensure that the courts fulfill this duty when reviewing agency action.

(a) Jurisdictional Questions

Requiring agencies to demonstrate that their jurisdiction over a particular matter is either expressly provided in or clearly implied by their organic statutes is not only an appropriate judicial function, it also is an increasingly crucial check on agencies' expansive views of their authority. The problem was put succintly by the D.C. Circuit in Lubrizol Corp. v. EPA, 562 F.2d 807 (D.C. Cir. 1977):

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[6] Pacific States Box & Basket Co., along with Chemical Foundation, was cited by the Supreme Court in its landmark Overton Park decision for the proposition that an agency's decisions are "entitled to a presumption of regularity." Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 415 (1971). Similarly, lower courts have cited these two decisions and Overton Park for the proposition that under "arbitrary, capricious, . . . abuse of discretion" review of an informal rulemaking the agency's action is presumed "valid." See, e.g., Ethyl Corp. v. EPA, 541 F.2d 1, 34 (D.C. Cir. 1976).

> In a period of seemingly growing popular conviction that government agencies too often transgress the statutorily imposed boundaries of their authority, courts, in reviewing administrative action, must be alert to confine that action within those boundaries . . . . EPA remains free to present to Congress its arguably persuasive case for an amendment . . . . But for this Court to countenance what, on the record before us, is essentially an amendment by regulation would constitute an unwarranted judicial intrusion upon the legislative sphere wholly at odds with the democratic processes of lawmaking contemplated by the Constitution.

562. F.2d at 819 (emphasis in original) (foonote omitted). See also City of Palestine, Texas v. United States, 559 F.2d 408, 44 (5th Cir. 1977); National Nutritional Food Ass'n v. Mathews, 557 F.2d 325, 326 (2d Cir. 1977).

Most courts scrutinize closely an agency's jurisdiction to take the action at issue before them. And, like the court in Lubrizol, many courts require the agency to demonstrate that it had the jurisdictioni to take the action challenged. The Bumpers amendment would reinforce this standard for review of legal issues with which courts are obviously well-equipped to deal.

Since it is unlikely that Congress intended agencies to act in areas where their authority is neither express nor clearly implied by statute, there can be no principled objection to such a provision. The agencies would be free to use legislative history or other tools of statutory construction to demonstrate to the court that their jurisdiction was "clearly implied" in their organic statute.

(b) Other Questions of Substantive Law

In contrast to jurisdictional issues, an agency would not have the burden of demonstrating that its interpretation of law on other questions was correct. Instead, under the Bumpers amendment, courts would be free of any "presumption", for or against, the agency's construction of a statute. They would instead independently interpret the relevant law. And, when substantive legal issues are highly technical in nature, agency

expertise could still be used to convince the reviewing court that the agency had properly interpreted the substantive requirements of its organic statute.7/

The Bumpers amendment's primary impact on review of substantive legal questions other than jurisdiction would probably be felt in those cases such as Udall v. Tallman, 380 U.S. 1 (1965) where a reviewing court feels compelled to defer to an agency construction of substantive law, which is "reasonable," even though the court itself might disagree with that legal interpretation. The Bumpers amendment would ensure that courts would generally not feel obligated to accept the agency's interpretation of a statute, if the court believes another interpretation is more reasonable.8/

There is nothing radical about the notion that courts should not grant any presumption of validity to an agency's interpretation of law or defer to that interpretation even though they might disagree with it.

> Administrative interpretations are not absolute rules of law which must be followed in every instance, but are only helpful guides to aid courts in their task of statutory construction . . . . In the end, after whatever reserve, upon the courts rests the ultimate responsibility of declaring what a statute means.

Wilderness Society v. Morton, 479 F.2d 842, 865 (D.C. Cir. 1973) (citations omitted).

7/The absence of a "presumption" that an agency's interpretation of its organic statute is valid is entirely consistent with the notion that a reviewing court may, under appropriate circumstances, give some "deference" to the agency's interpretation. Volkswagenwerk Akliengasellschaft v. FMC, 390 U.S. 261, 272 (1968).

8/There are, of course, instances in which Congress makes clear that it specifically intended an agency's interpretation of a statutory term to be controlling. See, e.g., Ford Motor Company v. NLRB, 441 U.S. 488, 496-7 (1979). In such cases, so long as the agency interpretation is "reasonably defensible" the courts probably would not upset it. 401 U.S. at 496. The Bumpers amendment would not affect this relatively limited class of cases.

(c) Procedural Issues

A third category of legal issues, which can be termed procedural issues, relate neither to whether or nor how an agency may regulate a particular industry or practice. Instead, they are concerned with the processes by and through which agencies must act.

The APA currently imposes on reviewing courts an obligation independently to ensure that an agency has complied with all applicable procedural requirements. See 5 U.S.C. § 706(2)(D). Most courts do not "presume" that agencies interpretations of such questions are valid; nor do they "defer" to agencies view on applicable procedural requirements. See e.g., Weverhauser Co. v. Costle, 590 F.2d 1011, 1027 (D.C. Cir 1978). The Bumpers amendment would simply make it clear to all courts that this was the correct approach.

2. Express or Clear Authority for Agency Action

Mr. Parker's argument on this point is somewhat contradictory. He argues that the Bumpers amendment's requirement that agencies demonstrate that their authority to act is either expressly provided by or clearly implied in their organic statute is unnecessary because "that purpose is already being served by existing standards of judicial review." Then he goes on to say that such a requirement is undesirable because it might preclude an agency from acting when its organic act does not "expressly" grant it authority to act and the "legislative history is silent on the issue."

If Mr. Parker believes that the courts currently require agences to demonstrate that a challenged action was within the scope of their statutory authority either expressly or by clear implication, then he should have no objection to that requirement being underscored by the Bumpers amendment. On the other hand, if Mr. Parker is arguing that agencies should be free to act even when their statute does not provide them such authority and when the legislative history of that statute is silent on the matter, he is quite right that the Bumpers amendment would require the courts to invalidate such action.9/

9/It is important to note that the courts have required "clear statements" of agency jurisdiction in other contexts. See Kent v. Dulles, 357 U.S. 116 (1958). Commentators have pointed out the appropriateness of applying a similar standard to agency actions involving "economic and social administration." Stewart, The Reform of American Administrative Law, 88 Harv L. Rev. 1669, 1697 (1975).

It is one thing for an agency to act consistently with a "broad" grant of authority. See Thorpe v. Housing Authority of the City of Durham, 393 U.S. 268, 280-81 (1969). Agencies would be free under the Bumpers amendment to use whatever tools of statutory construction were available to convince a reviewing court that their action was expressly provided in or clearly implied by a broad grant of authority. It is, however, another thing entirely for an agency to claim it has authority to act in the absence of statutory authority. Such action would simply bolster the "conviction that government agencies too often transgress the statutorily impassed boundaries of their authority" and be "wholly at odds with the democratic processes of lawmaking contemplated by the constitution." See Lubrizol, 562 F.2d at 819.10/ It is precisely the intent of the Bumpers amendment, as we understand it, to preclude such claims of authority.

3. The Substantial Evidence Standard

In the third section of his letter, Mr. Parker claims first that, "courts agressively review factual issues arising in informal rulemakings under the arbitrary and capricious standard" and that therefore, "a higher standard of review . . . is [not] needed."11/ Second, he argues that the

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10/Mr. Parker's claim that the "free-wheeling use by the courts of a 'clear implication' or 'clear statement' doctrine . . . could represent a dangerous arrogation by the courts of the policy-making discretion that Congress has delegated to agencies," Parker letter at 6, is incorrect. Agencies have no authority to make policy in the absence of a grant of such authority from Congress. And, as pointed out previously, under the Bumpers amendment once a court determines that an agency has authority as a matter of law to take a certain action, the agency's policy judgment will not be upset so long as it is not "arbitrary, caprcious" and does not constitute "an abuse of discretion."

11/This assertion is also incorrect. The APA's narrowest, most restrictive standard of factual review is the requirement that courts "hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A)(1976); see Overton Park, 401 U.S. at 416; cf. Abbott Laboratories v. Gardner, 387 U.S. 136 (1967). (fn cont'd on next page)

substantial evidence standard for review of factual determinations in informal rulemakings will somehow drive agencies away from informal rulemakings. Finally, Mr. Parker attempts to dismiss the fact that Congress has included a "substantial evidence" standard in a number of recent statutes requiring informal or "hybrid" rulemakings, by asserting that such statutes have resulted in "confusion". None of these assertions is correct.

The amendment would actually make only two changes in the APA's current approach to evidentiary review. First, it would require substantial evidence review of factual determinations in all rulemakings -- including informal rulemakings -- where another standard of review is not expressly required by statute.12/ Second, it would clearly limit substantial evidence review to factual issues.

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fn 11 cont'd

Although an arbitrary and capricious standard does require some factual scrutiny, it essentially demands only that the agency's record clearly disclose a "rational basis" for its action. See Bowman Transp., Inc. v. Arkansas-Best Freight System, Inc., 419 U.S. 281, 285-86 (1974). Indeed, at least one court has interpreted an "arbitrary and capricious" standard of review as requiring "no evidentiary record . . . to support the factual premises of the agency if the rule is accompanied by a reasonable statement of why the agency finds the facts to be as it finds them to be." Union Oil Co. of Calif. v. FPC, 542 F.2d 1036, 1040-41 (9th Cir. 1976). See also BASF Wyandotte Corp. v. EPA, 598 F.2d 637, 652 (1st Cir. 1979), cert. denied sub nom. Eli Lilly & Co. v. Costle, 48 U.S.L.W. 3533 (U.S. Feb. 19, 1980).

12/The APA currently requires that facts be reviewed under a substantial evidence standard in only two instances: (i) when agency action may be taken only after the trial-type administrative hearings required by sections 556 and 557 of the APA; and (ii) when an agency's action must "otherwise be reviewed on the record of an agency hearing provided by statute." 5 U.S.C. s 706(2)(F)(1976); Weinberger v. Hynson, Westcott & Dunning, 412 U.S. 609, 622 n. 19 (1973). See also United States v. Florida E. Coast R. Co., 410 U.S. 224, 234-38 (1973).

Elimination of all questions of law or other non-factual questions from substantial evidence review will primarily be felt in those instances where elements of "policy" or agency discretion are involved in the agency's action. These elements of policy or discretion will arise frequently in the context of informal rulemakings. The courts have debated whether such policy judgments are really amenable to substantial evidence review when, in reality, they are quasi-legislative in nature, involve some element of discretion, and cannot be factually verified. See Associated Industries of N.Y.S., Inc. v. Dept. of Labor, 487 U.S. 342, 347-50 (2d. Cir. 1973)

Since virtually all challenges to agency action contain some elements of both fact, policy and law, under the APA as revised by the Bumpers amendment, a reviewing court would first have to distinguish these factual, policy and legal elements.13/ The court would then independently determine all questions of law presented by the agency's action. Next, it would review all factual components of the agency's action under a substantial evidence standard as defined by the Supreme Court in Universal Camera Corp. v. NLRB, 340 U.S. 471, 487-88 (1951) and Consolo v. FMC, 383 U.S. 607, 619-20 (1966). Finally, if there is a policy judgment or exercise of discretion inherent in the agency's action under review, the court would apply an "arbitrary, capricious, abuse of discretion" standard of review to that policy determination or exercise of agency discretion.

Under this approach, a court in reviewing an agency's factual determinations could not simply utter platitudes about deferring to the agency's discretion or expertise and thereby allow the agency to "become a monster which rules with no practical limits on its discretion." Greater Boston Television Corp., 444 F. 2d at 850-51. This approach to judicial review would not place impossible burdens on courts. On the contrary,

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13/Courts can and do seperate legal, factual and policy issues on review of agency action. Section 706 of the APA currently requires such separation since section 706(2)(A)(B)(C) and (D) apply to all agency action, while section 706(2)(E) and (F) apply only to review of factual issues. See Swearington Aviation Corp. v. NLRB, 568 F.2d 458, 463 (5th Cir. 1978); Getty Oil Co. v. DOE, 478 F.Supp. 523, 527 (C.D. Cal. 1978). Moreover in non-agency review contexts, courts have traditionally had to distinguish legal from factual issues. See e.g., Buchanan v. Postal Service, 508 F.2d 259, 267 n. 24 (5th Cir. 1975); Crosby v. United States, 496 F.2d 1384, 1389 (5th Cir. 1974).

it would ameliorate existing confusion, thus implementing the goal of uniform, consistent review of agency action.

Two other effects of the amendment's extension of the substantial evidence standard to all rulemakings should also be noted. First, courts would, under a substantial evidence standard, still have discretion to defer to administrative expertise on factual issues when such deference is warranted by the rulemaking record and issues presented. Thus, if an agency has made all reasonable and appropriate efforts to ensure that it has compiled and considered all relevant, reliable evidence on issues of scientific uncertainty and great technical complexity, a reviewing court could adjust its scrutiny of the evidentiary record accordingly.14/

Second, contrary to Mr. Parker's assertions, the substantial evidence standard would not force agencies to "move toward more formalized procedures" in informal rulemaking. The prevailing view among the commentators is that the substantial evidence "standard of review does not affect the rulemaking procedure the agency is required to use." 1 Davis, Administrative Law § 6:6 (2d ed. 1978).

Moreover, a substantial evidence standard for factual determinations in all rulemakings would be consistent with recent Congressional enactment of statutes which require substantial evidence review of informal or "hybrid" rulemaking, despite the absence of any requirement that the agency hold "formal" hearings when developing these rules. See e.g., Occupational Health and Safety Act of 1970, 29 U.S.C. § 655(f); Consumer Produt Safety Act, 15 U.S.C. 2060(c); Federal Trade Commission Improvement Act, 15 U.S.C. 2060(c); Toxic Substances Control Act, 15 U.S.C. § 2618(c)(1)(B)(i).

Contrary to Mr. Parker's statements, agencies are required to have records "encapsulating all the evidence" on which an informal rulemaking decision is based. Section 706 of the APA currently requires a court, when reviewing agency action including informal rulemaking, to review "the whole record." 5 U.S.C. § 706 (1976). It is difficult to perceive how this could be done if there was no "record." There are clearly

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14/Clearly, "substantial evidence" supporting agency action taken on the "frontiers of sciene" would not necessarily be the same quantum of evidence necessary to support agency action concerning less complex issues which can be addressed with more certainty. See Industrial Union Dept., AFL-CIO v. Hodgson, 499 F.2d 467, 474-76 (D.C. Cir. 1974); AFL-CIO v. Marshall, No. 78-1562 et al. (D.C. Cir Oct. 24, 1979) Slip op. 25-28.

records associated with informal rulemakings. On review, agencies must file with the court either the rulemaking record or a "certified index" to it. See, e.g., Fed. R. App. P., Rule 17(b). That record will contain all of the material, including factual material, upon which the agency relied. Such a record provides ample basis for application of the substantial evidence standard. And the courts have not found it overly difficult when reviewing such records to separate factual from policy issues and engage in "substantial evidence review of factual determinations" in informal rulemaking "while weighing the inferences of policy draw from those facts in terms of their arbitrariness or irrationality." Industrial Union Dept., AFL-CIO v. Hodgson, 499 F.2d 467, 473 (D.C. Cir. 1974), See also Superior Oil Co v. FERC, 563 F.2d 191, 200-01 (5th Cir. 1977).

Finally, any agency record problems that might exist in the rulemaking context would be substantially eliminated if the regulatory reform legislation under consideration by Congress were to define the agency record or file and make clear that agency action must be based on the information in that record or file. See generally Pedersen, Formal Records and Informal Rulemaking, 85 Yale L.J. 38 (1975); AFL-CIO v. Marshall, Slip op. 83 n. 259.

Conclusion

In summary, analysis of your amendment in light of the case law, section 706 of the APA and current administrative practice demonstrates that: (1) it would properly reaffirm and underscore for all courts their existing obligation on judicial review to independently interpret questions of law; (2) it would help check unjustified agency assumption of jurisdiction by requiring that agencies demonstrate that they have been granted authority to act either expressly or by clear implication; (3) it would not allow the courts to substitute their judgments for that of the agencies on policy matters, thus it would not allow the courts to legislate; and (4) its application of the substantial evidence standard to all rulemakings would neither cause confusion nor necessarily result in more formalized procedures in informal rulemaking.

Very truly yours,

HUNTON & WILLIAMS

by George C. Freeman, Jr.
Michael B. Barr

SUPPLEMENTARY EXHIBIT TO THE

TESTIMONY

OF

GEORGE C. FREEMAN, JR.

DATED

MAY 14, 1981

This excerpt from an American Bar Association Section Committee report was drafted principally by George C. Freeman, Jr. It is submitted to express his views on the subject matter it contains and does not reflect an official position of the ABA.

Report on Three Recommended Resolutions of the Commission on Law and the Economy on:

(1) Presidential Intervention in Independent Agency Rulemaking,

(2) Required Regulatory Analysis Statements and Interagency Review, and

(3) Congressional Delegation to the President of Quasi-Legislative Powers

Summary

In 1975, the American Bar Association created the Commission on Law and the Economy, a distinguished group of lawyers, law professors and economists, to examine and report on the growth and operation of federal regulatory agencies and their effect on the national economy. In August, 1979, the Commission produced an exposure draft[1/] setting forth its views[2/] and making twelve specific recommendations for steps to be taken to reform the federal regulatory process. Nine of those recommendations have already been approved by the American Bar Association House of Delegates. The remaining three, revised by the Commission in June, 1979, have been submitted by the Commission to the House of Delegates for action at the August meeting in Dallas, Texas (Enclosure 1).[3/]

1/ ABA Commission on Law and the Economy, Federal Regulation: Roads to Reform (1978).

2/ The Commission's recommendations were not unanimous. Three members of the Commission filed separate statements with dissenting views as to certain recommendations including those in Chapter 5 of the Exposure Draft, which is the basis for the three resolutions that are the subject of this report.

3/ ABA Commission on Law and the Economy, Report with Recommendations to the House of Delegates for August 1979 Annual Meeting (1979) [hereinafter cited as Rev. Comm. Rep.]

The three resolutions are:

> Resolution A, which endorses legislation authorizing the President to intervene in certain agency rulemakings, in instances where he does not already have that authority, in order to obtain more balanced agency decisions consistent with multiple national policy objectives;
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> Resolution B, which supports Presidential directives to federal agencies generally to prepare and make public regulatory analyses before completion of major regulatory actions and, where he deems it appropriate, to require interagency review; and
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> Resolution C, which supports Congressional delegation of quasi-legislative powers to the President, with Congressional oversight enforced by "sunset" provisions rather than legislative vetoes.

The resolutions and the Commission's report were modified to address many of this Committee's concerns. While several problems remain as explained below, we believe that, on balance, adoption of the resolutions would be in the national interest and we recommend that our Section support them.

Background

The message of our Chairman, George Coombe, in the July issue of The Business Lawyer[4/] gives a helpful summary of recent developments in the regulatory reform movement and of the work of the Commission.

The recommendations of the Commission responded to concerns expressed by a number of thoughtful lawyers, scholars and other concerned citizens. Those concerns reflect the

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4/ See Report of the Chairman, 43 Bus. Law. ____ (July, 1979).

mushroom growth of federal regulation in recent years. Government intervention in the day-to-day life of individual citizens and the day-to-day economic decisions of businesses has evolved from the exception to the rule. The growth of substantive regulation has been paralleled by a growth of complexity in administrative procedures. It takes more and more time and more and more money to get answers from federal regulators. And, as described, in the recent Report of this Section's Ad Hoc Committee on the Proposed Federal Criminal Code, many who must act before they can get those answers do so at the peril of draconian criminal sanctions.[5/] In the face of these problems serious doubts have arisen as to the ability of federal regulation as it now operates to respond effectively to pressing public needs. Needless duplication and numerous conflicts between different regulatory objectives and different agencies compound the chaos. As a result, strong public pressure has arisen for drastically curtailing the scope of federal regulation and for drastically reforming the regulatory process where regulation must be retained.

For our economy to operate efficiently, in the areas where regulation is to be retained, it is important to have clear agency rules and to have them expeditiously applied

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5/ Ad Hoc Committee on the Proposed Federal Criminal Code of the Section of Corporation, Banking and Business Law, American Bar Association, Report, 34 Bus. Law. 725 (Jan. 1979).

where permits are required. If not, American industry cannot plan effectively for the future. Delays in the administrative process impose unnecessary costs, initially on industry and ultimately on consumers. In addition, in formulating regulations, the longer the process takes, the more likely that crucial facts will change during that rulemaking and this will lead to further delay. Delay often rules out what would have been the preferable alternative. Finally, delay in getting clear regulations may pose uncertainties which create economic and other risks too large for American businesses to take. The cumulative results over the next decade could be disastrous for the American economy and our national security.

Speeding up regulatory action should not, however, be purchased at the price of informed, rational rule making. Delayed rules and confusing or conflicting rules often result from agencies being given impossible legislative deadlines for promulgating rules of general application in complex factual areas. In many instances these deadlines physically cannot be met or else met only at the expense of irrational rules promulgated in half-ignorance of their consequences. When an agency misses the statutory deadline and the act also requires compliance by individuals by another tight deadline, the adverse results are compounded. A plant owner may confront the dilemma of either closing

his plant in order to avoid violating the law or continuing to operate it under the threat of potential criminal or civil sanctions. Unfortunately, Congress to date has shown little sensitivity to the problems arising from lack of reasonable time for response between definitive agency command and mandated individual compliance.

Thus, the primary problem of present day federal regulation of the economy -- policy conflicts among multiple mission-oriented agencies -- presents American business with either the dilemma of conflicting commands or the dismay of irrational commands. The obstacles to efficient operation of our economy for the greatest good of our people are further exacerbated by the second major problem of federal regulation -- regulatory delay and impossible statutory deadlines. The "law's delay" thus compounds "the insolence of office," and both demonstrate the need for more affirmative action by the President, the agencies and Congress to make the federal bureaucracy function more rationally, more efficiently and more fairly.

As noted earlier, the Commission has made twelve recommendations for dealing with the major problems besetting federal regulation. Nine recommendations were acted on by the Association's House of Delegates meetings in February and August 1978 and February 1979. These recommendations range from

general advocacy of sunset legislation and specific recommendations for streamlining of agency procedures to recommendations as to the appropriate economic theory which should be the basis for regulatory policy.

Revised versions of the three recommendations which have not yet been acted upon by the House of Delegates will be considered at the August 1979 meeting in Dallas.[6/] These three are based on Chapter 5 of the Commission's exposure draft, which in many ways builds upon a law review article written five years ago by Lloyd Cutler and David Johnson.[7/] The basic theme of the three revised recommendations is the need for coordination of the conflicting charters, constituencies and resulting policy biases of overlapping federal regulatory agencies. The Cutler-Johnson diagnosis and prescription for the problem, adopted by the Commission, is:

> Most instances of regulatory failure stem from the inability of independent and expert bodies with separate missions to set national policy priorities and execute them in a balanced and politically acceptable fashion. Under our proposal the President, if he persuades Congress not to block his action, would have the power to set and execute such priorities when he believes that an agency has failed to do so or that the

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6/ These recommendations are drawn from Chapter 5 of the Commission's exposure draft but they, as well as Chapter 5, were revised extensively by the Commission as of June 15, 1979. The revised resolutions, and the Commission's accompanying report to the ABA House of Delegates for action at its meeting in August 1979 in Dallas are attached to this report as Enclosure 1. Many of those revisions address earlier concerns of this Committee which were communicated to the Commission.

7/ Cutler and Johnson, Regulation and the Political Process, 84 Yale L. J. 1395 (1975).

> policies set by two or more agencies are in conflict. That is precisely the power that no one possesses under the existing regulatory structure. It is nothing more nor less than the power to govern effectively and accountably in the present age.[8/]

Views of the Ad Hoc Committee as to
Resolution A: "Presidential Intervention"

Resolution A of the Commission on Law and the Economy supports enactment of a statute authorizing the President to direct the outcome of certain rulemakings[9/] of both "executive branch" and "independent" regulatory agencies.[10/] This authority would, however, be carefully circumscribed by limiting the Presidential intervention in several ways. First, the issues involved would be limited to "critical" regulations, which are defined as "those the

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[8/] Id. at 1418.

[9/] The Resolution expressly exempts "licensing and rate-making cases." Rev. Comm. Rep. at 1-2, 25.

[10/] There is no clear distinction between those agencies that are described as "executive branch agencies" and those identified as "independent regulatory agencies" in the Commission's report. See, e.g., Rev. Comm. Rep. at 2, 6-9, 13-21, 26, 29-31. As pointed out subsequently at page 20 through 21, the Commission's inconsistent use of those two terms is a source of confusion. One plausible separation of the two might rest on whether the agency head or commission members serve at the pleasure of the President and thus are directly accountable to him. Unlike commissioners who serve for a fixed term, they do not have "tenure." On the other hand, Professor Bruff in "Presidential Power and Administrative Rule-making," 88 Yale L. Rev. 451 (1979), takes the position that there is no "fine line" between executive branch and independent regulatory agencies and that presidential authority to intervene in a particular proceeding should follow a "functional" approach. The Ad Hoc Committee believes, however, that there are practical and political reasons for distinguishing between the two type agencies in considering these recommendations and that the test of tenure should be used to distinguish which are "independent" and which are "executive branch." Unless the text clearly indicates otherwise, we use those terms in this Report with those meanings.

President finds to be of major significance both to the national interest and to the achievement of one or more statutory goals in addition to the goals primarily entrusted to the regulatory agency in question."11/ Second, public notice of, and an opportunity for comment on, the Presidential directive would be required.12/ Third, the President's exercise of his authority would have to be consistent with the agency's procedural rules and the substance of his order consistent with the agency's statutory authority.13/ Fourth, Congress would be given an opportunity to comment on the President's directive prior to its effective date.14/ The recommended legislation would not change the standards applicable to agency action on judicial review.15/

This recommendation raises two interrelated questions. First, is the recommended statute necessary? Second, to the extent it is necessary, does its structure and the "safeguards" it would impose reflect the reality of the administrative process?

Is The Recommended Statute Necessary?

For some time it has been assumed that the President has at least implied authority to establish procedural directives binding on all exeuctive branch agencies. For example, the Office of Management and Budget, acting on behalf of President Nixon, instituted a "Quality of Life" review process which required inter-agency review of EPA's

11/ Rev. Comm. Rep. at 1.
12/ Id. at 23.
13/ Id.
14/ Id. at 24.
15/ Id. at 26.

regulations. President Ford ordered the preparation of "inflationary impact statements" by executive branch agencies. President Carter, in Executive Order 12044, has required executive branch agencies to prepare regulatory analyses to accompany the proposal of major regulations. None of these initiatives have been seriously challenged as beyond the scope of Presidential authority. But while there seems little doubt that the President can direct the executive branch agencies to adhere to certain procedural requirements, it is less clear whether he has the authority to actually direct a particular executive branch agency head to reach a particular substantive result. Nonetheless, the President has on occasion done so.[16/] The validity of such actions has been questioned in several court cases.[17/]

Even though the matter has not yet been definitively resolved by the courts, it seems likely that the President's authority to direct an executive branch agency to make a particular regulatory choice in order to best harmonize

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16/ For example, Presidential (or White House) intervention was apparently a deciding factor in the OSHA cotton dust standard decision. It should be noted that in this case, the agency head had broad discretion to consider various factors.

17/ Petitioners in the cases involving appeal of the OSHA cotton dust standards have posed a direct challenge to the President's intervention in that proceeding. While a similar question was initially raised and briefed in the United States Court of Appeals in the District of Columbia Circuit, in the pending appeal of EPA's prevention of significant deterioration regulations under the Clean Air Act, as amended in 1977, the issue was withdrawn at the time of oral argument.

competing statutory goals will be upheld. Clearly Presidential intervention is legal where (1) the choice required by the President is consistent with the particular agency's statutory authority, (2) the President's communications with the particular agency and the rationale for his determination of the appropriate regulatory choice are placed in the record, and (3) the agency record supports the action directed by the President.

Presidential intervention to resolve policy conflicts among federal departments and agencies, particularly those within the executive branch, is often the only practical means for resolving the conflict by either harmonizing the differences or setting priorities. As noted earlier, time is often of the essence to successful resolution of these problems. Unless the matter is of utmost urgency, Congress is not set up to resolve the conflict within the time necessary by new legislation. Moreover, Congress through its entrenched committee system is organized in much the same fashion as federal agencies. Each committee, like its agency counterpart, has its own special interest constituency. Thus, Congressional committees, like federal agencies, have understandable built in biases for the particular policy goals of the statutes for which they have primary responsibility. When the goals and policies in their area of predominance come into conflict with goals and policies in areas where other committees, or agencies, have primary

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responsibility, human nature makes the Congressman, or the agency official, more often an advocate rather than an objective judge.[18/] The President is thus uniquely situated in our system of government not only to act with dispatch but also with greater overall objectivity. Finally, he is ultimately more accountable politically to the people for calling a close shot than are Senators and Representatives -- only the President and his Vice President have a truly national constituency in that they are directly elected by all the voters in every state in the union.

In the simpler world of the early 19th Century, the President's cabinet meetings served as the principal means for identifying and resolving policy conflicts within the executive branch and resolving them under the President's direction. More recently, the number of federal departments and agencies has so multiplied, and the cabinet has grown to such size, that identification and resolution of policy differences, particularly most of those arising in rulemakings, at the cabinet level would be extraordinarily

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13/ While codes of ethics and conflict of interest statutes generally tend to ameliorate these built in biases in agency adjudications, their application to agency rulemaking is more problematical. Recusal of federal agency decision makers, or their advisors, virtually never occurs in agency rulemaking. Moreover, conflicts of interest rules are narrowly focused on potential for personal profit or past or future business affiliation. They have not dealt with more subtle conflicts of loyalty arising from personal beliefs and political or public interest constituencies. In short, such conflicts of interest rules or statutes are not an effective alternative to Presidential intervention to balance competing national policy goals.

unwieldy. For this reason, where policy conflicts among agencies have been resolved by the President in recent times, it has usually been through direct intervention in executive branch agency decisionmaking by the President or his staff.

For all these reasons, it does not seem necessary to enact a statute explicitly authorizing Presidential intervention in executive branch departments and agencies, including those which have been granted "quasi-legislative" powers by Congress, since he already has that authority. A statute authorizing limited Presidential intervention in the rulemakings of the independent regulatory agencies would, however, be useful.

While Professor Bruff's functional approach implies that Presidential power to intervene in the regulatory process, to the extent it exists, extends to the independent regulatory agencies as well as executive branch agencies, the fact is that Presidents traditionally have been far more hesitant to directly insert themselves into the determinations of the independent agencies than those of executive branch agencies. This reluctance has extended to procedural as well as substantive matters.[19/] Undoubtedly, this hesitancy derives from a combination of the special statutory mandates of the independent regulatory agencies

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19/ Interestingly, the proposed version of Executive Order 12044 would have extended application of the order to the independent agencies as well as executive branch agencies. But the final version of the order applied only to executive branch agencies.

and a realization that Congress and the courts tends to view those agencies as not wholly within the executive branch. Moreover, there is merit to the notion that the President's authority, as well as his ability, to see that the laws are faithfully executed outside the executive branch is by its very nature more circumscribed than his authority within it. On the other hand, the independent regulatory agencies, like the executive branch agencies act under statutory mandates that may result in policy decisions where are not necessarily in the overall national interest. Zealous preference for one's own agency's special objectives and special loyalty to its perceived constituency is by no means an institutional bias in only executive branch agencies. Thus, the purpose behind Presidential intervention -- harmonization of conflicting statutory goals and national policies -- applies equally to both the independent agencies and the executive branch agencies. And since Presidential authority to direct a particular substantive result in a proceeding before an independent regulatory agency is problematic, specific statutory authorization for such actions is appropriate and desirable.

We believe that any legislation dealing with this subject should be restricted solely to the independent agencies where Presidential power is presently lacking and

that it should in no way undermine or inhibit existing Presidential powers in dealing with executive branch agencies.20/ While the Commission's original resolution and exposure draft report was ambiguous as to whether or not the restrictions in the proposed statutes were intended to apply the President's existing powers to intervene in executive branch agencies, the final Commission report was clarified to address our Committee's concern. The report now clearly states that:

> (10) No Effect on Existing Presidential Powers. The new presidential authority and the conditions on its exercise would not affect the President's statutory duty to review and approve agency decisions under existing statutes and would not alter any other existing presidential power derived from the Constitution or other laws.21/

We believe that this point should be strongly emphasized in our endorsement of Resolution A.

Does Resolution A Achieve The Goals It Is Designed to Accomplish?

Essentially, Resolution A is designed to limit Presidential intervention to specific classes of rulemakings and to impose stringent procedural safeguards on the exercise of that authority in order to ensure fairness in the

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20/ We thus differ on this matter of tactical judgment with the majority of the Commission, which favors legislation "recognizing" this supervisory authority over executive branch agencies. See Rev. Comm. Rep. at 21. Unfortunately the Commission Report is not precise on what that kind of legislation would say. Our difference with the Commission on this tactical point does not, however, qualify our recommendation of Section support for Resolution A.

21/ Rev. Comm. Rep. at 26; and see Id. at 17-20.

administrative process and provide for Congressional review. These procedural safeguards advocated in Resolution A would require: (1) an agency decision prior to Presidential intervention, (2) publication by the President of "findings" and an opportunity for public comment prior to the effective date of any Presidential order, and (3) an opportunity for Congressional response.

While explicit limitations on the types of proceedings that would be subject to Presidential intervention are appropriate and probably necessary, the procedural "safeguards" on the exercise of that authority recommended by the Commission are still cumbersome. Despite those shortcomings, which we describe below, we believe ABA endorsement of Resolution A is desirable. It would give impetus to needed reform and these shortcomings of detail could be corrected during the legislative process.

The Commission's Revised Report makes clear that the Commission intends that its recommended statute would require the President to refrain from intervention in agency rulemaking until the agency has arrived at, and publically issued, a regulation. The Revised Report now expressly states that:

> Resolution A is limited to Presidential actions before the agency issues a notice of proposed rule-making and after the rule or regulation is issued. The role of the President and his staff during the rule-making proceeding is dealt with in Resolution B.21/

21/ Rev. Comm. Rep. at 22 n. 27.

A careful reading of Resolution B[22/] shows that while it would require agency preparation of a regulatory analysis of a proposed rule and authorize the President to require agency review of rules which he deems of great national import, it is silent as to whether or not the President can direct the agency (whether or not an "executive branch" agency or an "independent agency") to reach a certain decision. This silence contrasts with the explicit endorsement in Resolution A of power for the President "to direct such agencies to modify or reverse their decisions concerning such regulations."[23/] The report as a whole makes clear that the Commission presently believes the President does not have the power to direct an "independent" agency rulemaking. Thus the net result of Resolutions A and B and the Revised Report would be to limit the President's authority to direct a result, in the form of a specific rule, to instances where an already promulgated rule was being reconsidered. This is the major shortcoming of the Resolutions as they now stand because the most appropriate time for Presidential direction is usually during the period prior to the agency's initial decision.

Ideally, the President's views as to the most appropriate regulatory decision could take into account the

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22/ Rev. Comm. Rep. at 2.

23/ Id. at 1.

record established by the agency and the comments submitted by the public during the comment period on the agency's proposed rule. The substance of any communications between the President's staff and the agency should of course be placed in the record. To the extent that these communications contain significant new factual material, as opposed to policy views, not previously available to the public, the agency should provide an opportunity for public comment on the factual material. Finally, to the extent that the decision directed by the President differs significantly from the rule proposed by the agency, it might be appropriate for the agency to repropose the rule in the form directed by the President for public comment.

These requirements do not depend on any obligations concerning the ex parte nature of communications between the President's staff and the agency. Indeed, the concept of ex parte communications has little relevance to rulemaking proceedings in contrast to adjudications. In rulemakings generally there are no parties competing for a government granted monopoly or arguing over site-specific, plant-specific or company-specific rights or restrictions. Rulemakings rather involve multiple participants urging a broad spectrum of opinions as to general public policy and the record upon which the agency decides is not usually a "formal" record but rather one composed of data and information from many disparate sources. The important issue

raised by communications by the President or his advisors made to an agency during the course of rulemaking proceeding is usually not the fact that they were made, but rather what that agency does with them upon their receipt. In order to satisfy the basic procedural requirements of the administrative process an agency upon receipt of factual information, from whatever source, should evaluate the significance of that information. If the information significantly affects the agency's final decision and that information has not previously been disclosed, it should be made available to the public. If this is done, the origin and timing of the communication should not be decisive of the validity of the agency's decision in any subsequent appeal.

While an agency must articulate fully the basis for its proposals and disclose for comment new substantive information as it becomes available during the course of the rulemaking, it need not provide a specific opportunity for "adversarial comment" on every submission made to it before or after the close of the public comment period. In this context it matters little that the communications originate outside the agency's staff. Thus, not every communication between the President's staff and an agency triggers an obligation for public comment. Such a requirement would quickly turn rulemaking into a never ending process and eliminate its usefulness as the primary tool of modern administrative decisionmaking.

Another "safeguard" recommended by the Commission will require careful implementation lest it make the new procedure unavailable to cope with national emergencies. In our opinion, by writing a "sunset" provision into the statute Congress would furnish sufficient incentive for the President to pay attention to their views on any proposed action. It would also afford an opportunity to determine whether the power given the President has been abused by the President or his staff. An additional requirement that an order directed by the President lie before Congress for an extended period before it becomes effective[24/] may add too much delay to the decisionmaking process in areas that presumably are of great national import. Because time may often be of the essence, we think it would be better if any new legislation did not suspend the effectiveness of the regulation.

A relatively minor problem posed by another recommended "safeguard" is the requirement for publication of findings by the President prior to his intervention in the regulatory process.[25/] It is an unnecessary formality that should be eliminated. The President's position and the reasoning behind it should, however, be fully disclosed in the agency record. If it is not, the procedural requirements of the Administrative Procedure Act and the organic statute and the normal rights

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24/ Id. at 24.

25/ Id. at 23.

of appeal will usually have been violated an the agency's action should be set aside. But requiring publication of Presidential "findings" would simply duplicate this requirement without adding anything to it. Moreover, any action directed by the President that was outside the scope of the particular agency's authority would also be set aside on review by the courts.

A final problem area in the revised Resolutions and Report is the inconsistent use of the adjective "independent" and "executive branch" in referring to various agencies. In addressing concerns expressed by our Committee and others within the ABA on the earlier "exposure draft," the Commission unfortunately created a new uncertainty in the process of resolving an old one. While the report was revised to make clear that Resolution A was not intended to undermine any existing Presidential power to "intervene" (or "supervise") in agency rulemakings, a possible new ambiguity was introduced through the Revised Report's inconsistent use of the adjectives "independent" and "executive branch."[26/] These ambiguities may create confusion as to what the Commission's views are as to the extent of existing Presidential power with

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26/ See note 10, supra.

regard to particular agencies characterized variously as "independent" and "executive branch" at different places in the Revised Report. The most important such agency is the Environmental Protection Agency, whose rulemaking decisions are at the virtual center of present day controversy over whether and how policy balancing can be achieved with Presidential encouragement.27/ We believe, however, that at least the Commission majority did not intend to differentiate EPA from other executive branch agencies as to the scope of the President's authority to intervene in executive branch agency rulemakings. The matter should be clarified, however, before or during the House of Delegates action on both Resolutions A and B so that the point can be spelled out precisely in any future testimony of ABA spokesmen to Congress.

Two further points merit further comment. The Administrative Law Section suggested new language in old Recommendation 3, now revised "Resolution A," that would have barred Presidential changes in "fact findings made by administrative agencies in proceedings of an adversary or adjudicatory nature." The underlined words troubled our Committee greatly since virtually all the crucial, important rulemakings where Presidential intervention

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27/ Compare Rev. Comm. Rep. at 6 and 8.

would be necessary to obtain proper balancing could be considered "of an adversary nature." In most of them certain "quasi-adjudicatory" (or "hybrid" or "International Harvester type") procedures beyond the barebone notice and opportunity for written comment requirements would have been accorded participants either because the organic statute requires it or through exercise of agency discretion. We were further disturbed as to what kinds of findings of fact the Administrative Law Section was talking about:

1. Facts that are past occurrences or matters of present existence and that can be objectively demonstrated?

2. Facts that statutory criteria have been satisfied and thus involving unavoidable subjective judgments as to the weight to be given x as opposed to y in balancing to find z?

If the latter were intended, then the Administrative Law Section's suggestion would render the resolution -- and the statute -- meaningless. Our preferred solution was to resolve this problem by simply deleting the proposed references to "adversary nature" in referring to rulemakings, but the Commission demurred since that would jeopardize Administrative Law Section endorsement. So it worked out a "second-best" compromise by distinguishing between agency findings of "basic facts", which the President cannot change,[28] and agency "ultimate conclusions," which he can change. Applying these labels to the two questions posed above, the first requires findings as to "basic facts", while the second

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[28] See Rev. Comm. Rep. at 2 and 25.

requires "ultimate conclusions." Perhaps that is as precise as any one can be in discussing this point generally.

Finally, judicial review of an agency decision directed by the President should be no different than judicial review of any other agency decision on similar matters. Responding to our concerns, the Revised Resolution A now expressly so provides. The decision directed by the President should always be one that the agency has legal authority to make. Otherwise, the decision would be outside the agency's constitutional or statutory authority. The courts will review the agency's decision in the light of the record, whether formal or informal, to determine whether it was arbitrary, capricious or constituted an abuse of discretion, or in limited circumstances, whether it was supported by substantial evidence.

Views Of The Ad Hoc Committee
As To Commission Resolution B

The Commission's resolution supports issuance of an executive order directing that all major regulatory actions by executive branch agencies be preceded by a regulatory analysis that is open to public comment. The resolution also endorses inter-agency review under Presidential auspices "when the President deems it appropriate." It also advocates legislation extending these requirements to independent agencies if experience with them in the executive branch agencies is favorable. At our Committee's suggestion the

resolution also makes clear that any order or statute should not present an independent basis for judicial review.

This recommendation is a further step in the movement to require regulatory agencies to consider national policy concerns other than those peculiar to their own special "missions." The first major step taken in this movement was the enactment of the National Environmental Policy Act ("NEPA")[29/] in 1969. NEPA requires most federal agencies prior to taking any major action significantly affecting the human environment to prepare and circulate for comment an environmental impact statement ("EIS") which sets out policy alternatives, gives their social costs and benefits and weighs the predicted effects against a national policy objective of optimizing governmental decisions affecting the environment.[30/]

More recent steps have included executive orders signed by President Ford, requiring inflation impact statements,[31/] and President Carter, requiring regulatory analyses.[32/] In

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29/ Pub. L. No. 91-190, 83 Stat. 852 (1969), 42 U.S.C. §§ 4321-4347.

30/ While such a NEPA analysis would appear the ideal starting point for a systematic look at alternative pollution control strategies and for likely social consequences of their adoption, the most conspicuous exception from the NEPA impact statement requirement has been the Environmental Protection Agency, the principal federal agency charged with responsibility for protection of the environment.

31/ Executive Order of President Gerald R. Ford (No. 11821) (November 27, 1974).

32/ Executive Order of President Jimmy Carter (No. 12044) (March 23, 1978).

October of 1978, when he announced his voluntary anti-inflation program, President Carter also established a Regulatory Council representing all major executive branch agencies and charged with developing a unified calendar of proposed major regulations and trying to coordinate agency initiatives.

Proposals for Congressional legislation similar to the Carter executive order, and the Commission's proposal, have also been made most recently in Senate Bill 755 (the "Regulatory Reform Act of 1979"), introduced on behalf of the Carter Administration, and Senator Ribicoff's Senate Bill 262. Both of these bills propose requiring that any major rulemaking proposal by a federal agency, whether executive branch or independent, be accompanied by a published preliminary regulatory analysis containing (1) a statement of the need for and objectives of the proposed rule, (2) a preliminary cost/benefit analysis, (3) a description of alternative approaches which might be used to attain the regulatory objective and (4) an invitation for public comment. If the rule is adopted, a final regulatory analysis, taking account of the public comment and containing the agency's justification of the regulatory approach adopted, would be published. As under the Carter executive order, the Office of Management and Budget ("OMB") is given authority to see that the regulatory analysis requirements are met but not the power to direct agency action.

The Ad Hoc Committee believes that the articulation of a reasoned justification for agency regulatory action, including careful cost/benefit analysis and the consideration of less intrusive alternatives, is desirable for all federal agencies, including those not in the executive branch. Thus, the Committee believes that the requirements of regulatory analysis should be extended to independent agencies and recommends that the Section give unqualified approval to Resolution B.

The Ad Hoc Committee earlier expressed its concerns over the part of the original Recommendation 4 dealing with the advisability of direct Presidential supervision of the regulatory analysis process. We feared that the mechanism for Presidential supervision proposed could become unduly burdensome and its effectiveness in dealing with truly important issues diluted if it is applied too broadly to all run of the mill rulemakings. Fortunately the Commission addressed this concern in the final version of Resolution B by limiting inter-agency review to those the President deems appropriate.

Like NEPA, a requirement of regulatory analysis could give birth of a whole new common law of regulatory procedure with the form and content of regulatory analyses being subjected to judicial scrutiny at the behest of interest groups who will benefit from delaying or appealing the rule. The

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Carter executive order, the Administration and Ribicoff legislative proposals and Resolution B would all attempt to avoid this result by providing that agency compliance with the procedural aspects of regulatory analysis do not give rise to an independent basis for judicial review.

The Ad Hoc Committee believes that any legislation dealing with this subject, as distinguished from an executive order, should not designate any particular agency within the executive branch as the agency for screening out the important rulemakings from the routine rulemakings. We believe the President should remain free to select whatever advisors he prefers (including OMB) to assist him in determining which specific rulemakings or types of rulemakings are appropriate for review through this process.

We also believe that care must be taken to see that regulatory analysis does not become so much boilerplate, giving the tip of a pen in the direction of careful balancing of policy considerations but resulting in little change in the seemingly inexorable course of bureaucratic regulation.

The Committee notes that the Commission's proposal would not extend the requirement of regulatory analysis under Presidential auspices to those agencies (such as the money market functions of the Federal Reserve Board and the Federal Elections Commission) where freedom from direct

Presidential influence has been traditionally regarded as in the public interest. The Committee notes, however, that even as to those agencies, coordination under Presidential auspices and regulatory analysis may be appropriate for some functions such as the Federal Reserve Board's rule-making responsibilities under banking supervision and truth-in-lending legislation.

Conclusions Of The Ad Hoc Committee
As To Commission Resolution C

The Commission supports Congressional review of Presidential action under statutes delegating "certain" limited quasi-legislative powers to the President. Three instances are cited where that overview is endorsed. These are when the President has been granted power to (1) reorganize agencies, (2) to fix pay scales of government employees, and (3) to reconcile conflicts among the actions of federal agencies pursuant to Resolution A. While not spelled out in the Commission's Resolution or Report, the use the word "certain" in referring to these quasi-legislative powers and the three examples cited in the Resolution may not be intended to limit the endorsement of Congressional overview and thus it may be intended to endorse and deal generally with Congressional delegation of all such "quasi-legislative" powers to the President.

The Resolution also deals specifically with four aspects of such Congressional overview. First, it endorses

the concept that any such delegation be accompanied by a "sunset" provision, terminating the grant of authority within a specified time unless renewed by further Congressional action. Second, it proposes that any exercise of such power by the President not take effect until Congress has had an opportunity to express its views on the proposed action through a resolution. Third, the Resolution expressly opposes the "indiscriminate application" of any form of legislative veto to statutes delegating regulatory authority to independent and regulatory branch agencies.

The Ad Hoc Committee recommends that the Section endorse Resolution C.

June 28, 1979

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FILE NO.

May 20, 1981

DIRECT DIAL NO. 804 788- 8365

Dear Senator Laxalt:

As a member of the last panel in the hearings before your Subcommittee on Thursday, May 14, I had the benefit of hearing the testimony of the earlier panels as well. In that earlier testimony, witnesses for the Administration, the ABA and others made a strong plea for inclusion of (1) a specific provision permitting the President, or his designee, to designate an agency's proposed rule as a "major rule" and (2) a "savings clause" that would preclude passage of the legislation being subsequently interpreted by a court as limiting in any way the President's present powers of supervision over Executive Branch agencies. This would leave Executive Order 12291, or any successor order, extant after passage of the Bill.

I wish to supplement my written testimony by indicating my strong support for inclusion of both provisions for reasons best spelled out in the enclosed excerpts from an American Bar Association Section committee report of which I was the principal author. The report dealt with regulatory reform matters in general and the enclosed excerpt was entitled "Report on Three Recommended Resolutions of the Commission on Law and the Economy." I wish to make it clear, however, that under ABA policy Section committees have no authority to communicate views to Congress either on their own behalf or their Sections or the Association. Submission of excerpts

from this report does not represent an official communication of the ABA to Congress. As I have made clear to the Subcommittee staff, you must look to Mr. Richard Smith, who testified before you on Thursday, for the ABA's definitive position. But since I was the principal author of that report, you may wish to consider inclusion of this material in the record as the rationale for my views.

Very truly yours,

George C. Freeman, Jr.

The Honorable Paul Laxalt
C/O The Subcommittee on Regulatory
Reform Senate Judiciary Committee
United States Senate
Russell Senate Office Building
Washington, D.C. 20510

20/685

Enclosure

cc: Richard B. Smith, Esq.

June 28, 1979

TO: Officers and Council Members,
Section of Corporation, Banking and Business Law

FROM: Ad Hoc Committee on Regulatory Reform

SUBJECT: Report

There has been a growing belief that federal regulatory agencies: do not adequately consider the costs that their regulations impose on the economy; issue regulations which may lie dormant or are never reviewed to determine whether they are achieving their goals, should be revised or eliminated; and have developed administrative processes which are too protracted and cumbersome. The Administration's initial response to these perceived concerns was Executive Order 12044, issued a year ago by President Carter, and requiring federal agencies to prepare a regulatory analysis for any regulation that will incur costs of more than $100 million or would result in major increases of costs or prices for individual sectors of the economy, and to choose the least burdensome of the acceptable alternative approaches for dealing with the problem.

The American Bar Association responded to the growing concerns about "over-regulation" by forming the Commission on Law and the Economy, which has been studying regulatory activities and recommending legislative and other approaches to possible reforms.

Congress is also considering the relevant issues in the form of omnibus legislation intended to make regulation more efficient and effective, ensure reviews of existing regulations to eliminate or revise those that are outmoded, and to reduce regulatory burden -- including in particular paperwork.

In view of the considerable important activity that is pending involving the general topic of regulatory reform, much of which will involve the American Bar Association, and is of considerable interest to the Section of Corporation, Banking and Business Law, Chairman Coombe created an Ad Hoc Committee on Regulatory Reform at the Section's Williamsburg meeting in April 1979.

The initial assignments given to the Committee were threefold. First, we were to analyze and report to the Council on Recommendations 3, 4 and 5 in the exposure draft of the Report of the Commission on Law and the Economy. These Recommendations, dealing generally with the question of Presidential coordination of possible conflicting charters, constituencies, and policy biases of overlapping federal regulatory agencies, are to be considered this August in Dallas by the House of Delegates, and our Section Delegate must be given the Council's views on the matter prior to the House of Delegates meeting.

Our second assignment involves the omnibus regulatory reform legislative proposals pending in Congress, aspects of which have already been the subject of American Bar Association action, but as to which further action may be appropriate by our Section in the form of our own initiatives or responses to proposals made by other Sections -- particularly the Administrative Law Section. Our Committee was asked to analyze these bills and file an informational report with the Council, along with any recommendations for action we deemed appropriate. Additionally, we were requested to stay abreast of and respond to future developments regarding this legislation.

Finally, in view of the increasing impact of industry regulation, and the importance of regulatory reform matters throughout our Section, we were asked to consider and report on the role that the various standing committees of the Section could play in connection with such matters.

This report will summarize the Committee's activities to date, by (i) setting forth our recommendations concerning the Resolutions proposed by the Commission on Law and the Economy which will be considered by the House of Delegates in August; (ii) updating the Council on the pending federal regulatory reform legislation, and the action taken thus far by our Committee in connection with that legislation; and (iii) setting forth our suggestions as to the role that standing committees could play in connection with regulatory reform matters. Because this is our

initial report and we intend to have it reviewed by the chairmen of all standing committees as a starting point for their consideration of the possible role their committees can play in this area, we have prepared a more detailed report than usual.

1. Commission on Law and the Economy

At our first committee meeting, held in New York on April 30, 1979, a subcommittee chaired by George Freeman was formed to prepare a draft report on the Commission's Recommendations being considered by the House of Delegates in August 1979. Messrs. Freeman, Olson, and Tabor prepared the draft, which was then considered at our second meeting, held in New York on May 29, 1979, and thereafter finalized. The report is annexed as Exhibit A, and contains our recommendations to the Council as to all three Resolutions.

Recommendation 3 (since changed by the Commission to Resolution A) supports enactment of a statute authorizing the President to direct the outcome of certain rulemakings and a limited class of adjudicatory proceedings held by both executive branch and independent regulatory agencies. Our Committee determined that the President already has such authority with respect to executive branch agencies, and that legislation is therefore unnecessary. As to independent regulatory agencies, the Committee recommends that the Section should support the Commission's request for legislation that would give the President explicit authority, in limited circumstances, to intervene in and to direct rulemaking decisions of such agencies. We have, however, recommended certain modifications to the Commission's suggestions. In particular, we believe that the statute should have a six-year sunset provision, and that any exercise of such Presidential authority should be subject to veto by a joint resolution by Congress within sixty calendar days.

Our Committee supports Recommendation 4 (since changed by the Commission to Resolution B), which proposes that regulatory analyses should accompany major agency proposals. However, contrary to the Commission, we believe that only those analyses deemed appropriate by the President should be subject to detailed review by OMB.

Recommendation 5 (since changed by the Commission to Resolution C), deals with Congressional review of the President's exercise of statutorily granted quasi-legislative powers. Our Committee generally endorses this Recommendation.

On May 30th, Committee members George Freeman and John Olson met with the subcommittee of the Commission on Law and the Economy assigned to finalize the three recommendations for the Commission. A number of adjustments were made to accommodate our Committee's concerns. However, a few of our suggestions were not adopted.

Thereafter, Committee member Bill Kennedy attended the meeting of the Commission held on June 6, 1979 to vote on the Resolutions. Our suggestions for change were again expressed at that meeting. Final Commission action was taken at that time, adopting most, but not all, of our recommended changes.

Although a few of our Committee's recommendations were not adopted by the Commission on Law and the Economy, we believe that our input was helpful, and we are pleased to report that the Commission did respond favorably to most of our suggestions. On this basis, we recommend that the Section should advise our Section Delegate to vote favorably on the Resolutions of the Commission on Law and the Economy to be considered by the House of Delegates in August.

For the Council's information and further guidance on this particular matter, annexed hereto are: (i) a copy of a June 6, 1979 letter from Lloyd Cutler to the other members of the Commission on Law and the Economy, responding to our Committee's recommendations and suggesting certain revisions to the Commission's report on that basis (Exhibit B); and (ii) George Freeman's letter of June 4, 1979, to the other members of our Committee, reporting on those aspects of the amended report which he deemed still to be troublesome. (Exhibit C)

2. Pending Regulatory Reform Legislation

At its February 1979 meeting in Atlanta, the House of Delegates adopted a series of Resolutions recommended by the Section of Administrative Law, which addressed various issues contained in legislative proposals for regulatory reform that were

considered in the last Congress. These Resolutions (Exhibit D) established ABA policy on a number of the critical issues contained in the regularoty reform legislation which has been introduced in this Congress, as focused in three Senate bills: S.262, introduced by Senator Ribicoff; S.755, recommended by the Administration; and S.1291, introduced this month by Senator Kennedy. These bills are under the concurrent jurisdiction of the Senate Governmental Affairs and Judiciary Committees. Hearings on the first two bills have been completed by the Governmental Affairs Committee, and a bill is expected to be reported out within the next few weeks. The Judiciary Committee then will have forty days to file its report. The House of Representatives has not given serious consideration to parallel legislation, pending these Senate developments.

The Resolutions adopted by the ABA earlier this year supported those portions of the legislative proposals designed to: (i) reduce agency delays in accomplishing priority objectives; (ii) modify hearing procedures in rulemaking, ratemaking, and licensing so as to require trial-type hearings only to determine specific factual disputes or questions of expert opinion; (iii) and expedite judicial proceedings through various discovery and trial techniques that do not deprive parties of due process. The Resolutions opposed those proposals intended to: (i) allow agencies to give preference to their staff attorneys in filling administrative law judge vacancies; (ii) authorize agencies to prohibit from appearing before them individuals who engage in dilatory tactics; and (iii) make agency non-compliance with announced deadlines for completion of a proceeding the only factor that a court may consider in determining whether agency action has been unreasonably denied.

Our Committee was assigned the task of reviewing and analyzing the pending legislation, preparing an appropriate report or reports informing the Council of aspects as to which we believed the Section might want to become involved, staying abreast of legislative developments, and assuming the initial responsibility for Section consideration of any actions recommended by other Sections of the ABA in connection with the legislation.

We have analyzed the legislation, and have prepared a comparative chart identifying the key issues and the differences in treatment given these issues in the Ribicoff bill (S.262) and the Administration bill (S.755). Additionally, our chart identifies the ABA's position on those aspects of the bill as to which the ABA adopted a position prior to June 1979. The chart is annexed hereto as Exhibit E. We have also prepared an abstract of the Kennedy bill (S.1291), which we have annexed hereto as Exhibit F. Because this bill takes a different approach, it needs to be treated separately.

During the last week of May, we learned that the Section of Administrative Law had prepared recommended Resolutions dealing with certain aspects of the legislation which were to be presented to the ABA Board of Governors for action on June 2, 1979. We obtained these recommendations and the accompanying report, and determined that we could not concur with certain of the recommendations. We agreed with those portions of the recommendations which: (i) favored the allocation of additional resources to federal agencies to enable them to carry out planning and management procedures designed to reduce regulatory delay; (ii) recommended the designation of agency employees to assist and advise presiding officials; and (iii) supported the granting of subpoena power to agencies and the permissibility of pre-enforcement review. However, we disagreed in particular with those aspects of the recommendations that: (i) indicated that there was no immediate need for legislation to require independent agencies to prepare regulatory analyses for regulations that will have a significant impact on the economy or a particular segment thereof; and (ii) argued that the Administrative Conference of the United States should continue to be limited to deliberative functions.

Because less than a week remained before the Board of Governors was to consider the recommendations of the Section of Administrative Law, there was insufficient time for our Section to adopt a position on the recommendations. Accordingly, Chairman

Coombe requested Section Liaison Leonard Janofsky to advise the Board of Governors that our Section desired to participate in this matter and requested that it be tabled. However, at the Board of Governors meeting, it was stressed that the Senate Governmental Affairs Committee had requested American Bar Association comment on these issues prior to the end of June, when the Committee intended to report out a bill. Because of the need for immediate action, the Section of Administrative Law was directed to seek out the comments of other interested Sections and to try to harmonize views so that an American Bar Association position could be adopted by the middle of June.

Our Committee was advised of this action, and we immediately prepared a report (Exhibit G) which was submitted to the Administrative Law Section on June 12, 1979, after approval by George Coombe. It was noted that the report had not been cleared by the other Officers or the Council. Thereafter, the matter was discussed with representatives of the Section of Administrative Law. All of our recommendations were adopted, with one exception. The Section of Administrative Law believed very strongly that experience with independent agent regulatory analyses under Executive Order 12044 should be studied before the requirements are codified in a statute. Because our Committee did not have strong opposition to this point, and our willingness to accept the Section of Administrative Law's position meant that it would adopt all of our other recommendations, we agreed to recede on this particular point.

Accordingly, on June 15, 1979, a revised set of Resolutions and report, embodying the agreed upon changes, were submitted by the Chairman of the Section of Administrative Law to Senator Ribicoff, Chairman of the Senate Governmental Affairs Committee. Thereafter, our Committee's report was accepted by the Officers and Council, with one partial dissent by Bill Wimple (Exhibit H) which we believe can be harmonized with our views concerning the role of the Administative Conference of the United States.

At the present juncture, we are continuing to monitor legislative developments in this area, and we will recommend additional action which may be appropriate at the Council Meeting in Dallas.

3. Standing Committee Involvement in Regulatory Matters

A subcommittee consisting of Messrs. Seward (Chairman), Driver, Kennedy, Smith and Subak were asked to consider recommendations that could be made to the Council as to the role that standing committees within the Section can play in connection with various aspects of federal regulation and regulatory reform. The subcommittee presented its recommendations to the Committee at our May 29th meeting, and the Committee approved the recommendations with minor modifications. Our recommendations are as follows:

1. All standing committees should be informed of the existence of this Committee, its assignments, and the status of the work of this Committee. We believe that this can be done at the present time by bringing this report and its accompanying exhibits to the attention of all committee chairmen. Committee chairmen should be asked to review these materials, ascertain what role, if any, each of their committees can play in connection with the matters being considered by this Committee, and make suggestions in this regard to the Chairman of our Committee.

2. Reports prepared by this Committee should be circulated to all committee chairmen. Reports to date are annexed to this report.

3. Committee chairmen should be requested to keep their committee members advised of developments in this area, as reported by our Committee.

4. If assistance of any of the standing committees could be helpful on particular tasks, such arrangements should be made with the committee chairman involved. Action in this regard has already taken place with respect to the Committee on the Regulation of Consumer Credit, which will follow the Administrative Conference and Congressional oversight of Federal Trade Commission rulemaking under the Magnuson-Moss Federal Trade Commission

Improvements Act of 1976. This work is being coordinated with the Federal Trade Commission Committee of the Section of Antitrust Law, which has been assigned a similar task.

5. Subsequent to this year's Annual Meeting, there should be follow-up activities designed to implement whatever policy decisions are made. In this regard, further consideration should be given to the manner in which these activities should be organized.

6. The Section of Corporation, Banking and Business Law should participate in all activities of the American Bar Association involving questions of regulatory reform.

Respectfully submitted,

Ad Hoc Committee on
Regulatory Reform

Roland E. Brandel
Albert W. Driver, Jr.
George C. Freeman, Jr.
Philip J. Harter
Frank Haynes
William F. Kennedy
Bayless Manning
Alfred A. Olbrycht
John Olson
Jonathan Rose
George Seward
Richard B. Smith
John T. Subak
John K. Tabor
Roger Zaitzeff
Irving Scher (Chairman)

QUESTIONS SUBMITTED BY SENATOR LEAHY

I would like to explore with you the accuracy, and ease with which a regulatory agency can carry out each of the individual elements of the analysis required by S. 1080.

(1) First, the bill requires that the agency set forth a description of the costs of the proposed rule, including any adverse effects that cannot be quantified, and an explanation of how the agency anticipated each such cost or adverse effect will result from the proposed rule including a description of the persons or classes of persons likely to bear such costs or adverse effects. (Sec. 553(c)(2)). Presumably much of the data the agency will need to make these cost estimations will have to come from the parties who will be subjected to the rule once it is made final. How can an agency administrator be certain that the data he has before him and the estimates which are extrapolated from that data are accurate?

How would an agency go about discounting from cost estimates those amounts of money which would have been spent on new equipment or new procedures even if no rule had been proposed?

Mr. CRANDALL. All data about business come from business. To suggest that ignorance is better than data submitted by business is absurd. Should all information received by government authorities be discarded because everyone submitting such information has some private interest in this or a related issue?

Analysis does not mean arithmetic or mere accounting. There are techniques for estimating incremental expenditures, but these techniques cannot be specified by a cookbook. Serious analyses can grapple with the difference between total costs and the incremental costs required by a regulation, but they will never be able to estimate this difference with absolute precision.

Mr. FREEMAN. There are several ways of attempting to assure the accuracy of data used to evaluate costs of costs and benefits of environmental regulations. First, in addition to industry surveys which indicate views within the industry as to the costs of control, it is also possible to obtain independent engineering estimates of costs from knowledgeable consultants who are not beholden to the industry being examined. Second, periodically surveying actual industry expenditures on environmental regulations and comparing these with previous estimates of costs made by both industry and the agency, one can increase industry's incentive to develop accurate estimates. Third, the imposition of non-compliance penalties, where the costs of those penalties depend upon the cost of compliance, provide an incentive to minimize estimates of compliance costs, thus counterbalancing any incentive to overstate compliance costs in the rulemaking. A comparison of estimates derived from non-compliance proceedings with estimates derived from regulatory rulemakings provides a check on the accuracy of industry estimates. Finally, and perhaps most important, where costs of compliance are derived by substantial surveys of individual firms in the industry, there is a substantial opportunity to check the internal consistency of the estimates by comparing costs for similarly-situated firms. Careful review of such data can enable analysts to develop estimates which are reasonably accurate.

In response to your question [2] distinguishing between the aggregate costs of environmental regulations and their incremental cost is often extremely difficulty and requires substantial judgment. These problems, however, arise most seriously in the cases in an entire industry. The problems are far less severe when costs are based upon engineering estimates or upon behavioral models of an industry. A comparison of engineering estimates and behavioral models with the results of survey data can provide a very useful device for distinguishing between incremental and aggregate costs.

Mr. WHITE. The adversary process that occurs during a rulemaking should help the administrator sort the data. The administrator's staff should be able to determine the net impact of a rule; this usually is not a difficult task.

(2) The bill also requires that the agency set forth a detailed description of benefits. (Sec. 553(c)(3)). We hear fairly often that costs are more easily quantified than benefits. That statement, however, implies that benefits can be quantified, although with some difficulty. What are the hurdles one must go through in quantifying benefits? For example, how would an agency go about analyzing risks to human life and the value to be attributed to human life? What is the range of error involved?

Assuming an agency goes through this exercise, how useful is the information to an administrator trying to decide between one alternative and another?

Mr. CRANDALL. The most serious problem in "quantifying benefits" derives from the very uncertain evidence on health effects from most regulations. The estimates

of improved health or safety results are generally very rough and subject to substantial uncertainty. Analyses should give the Administrator a probability distributor of potential effects so as to cope with this problem.

Valuing the benefits is another somewhat less serious problem. Government agencies should coordinate their procedures for placing values on improved health or safety or reduced mortality, pershaps guided by the Congress.

The evidence presented in a cost-benefit analysis is just about the only useful information available to an Administrator if his mandate is protecting health and safety. If his purpose is protecting West Virginia coal or preventing new growth in the Sun Belt, however, it is of much less value.

Mr. FREEMAN. It is not possible, nor necessary in cost-benefit analysis to assign values to human life. It is important, however, in some circumstances to ascertain how much individuals would in aggregate, or on average, be willing to pay in order to reduce risks to life or health. The assessment of the amount the public is willing to pay for alterations in risk can be ascertained by observing individual choices among circumstances which impose such risks. Such analyses have been made to date by comparing choices among occupations of varying risks, choices among localities of varying risks, and choices of driving speeds and driving conditions that impose different risks and costs. In addition, choices made by the public between alternative insurance programs or surgical procedures which also involve risks and loss could be used to make such evaluations. The fact that there exists so many different arenas in which consumers choose among options which have a substantive effect on their life expectancy or their health provides an opportunity for assessing willingness to pay for reduction in risk and, in particular, for examining the consistency of various estimates which have been derived. There are, nevertheless, three serious problems involved in deriving these estimates. First, the actual risks involved in various options among which individuals make choices may differ from the risks perceived by those individuals. While ascertaining the actual risks is relatively straightforward, ascertaining perceived risks is more difficult. Second, individuals have different views of risk and many circumstances in which individual choices can be observed also force the researcher to examine subsets of the population whose views may be atypical. Finally, the amount which people would require as compensation for risks which are imposed upon them without choice may be greater than the amount they would require if the decision to undertake the risk were voluntary. Ascertaining the effect of voluntarism on the willingness to pay is difficult.

Despite all these difficulties, it is not clear that there are any greater uncertainties associated with assessing the benefits from variations in regulatory circumstances that there are from assessing the costs. Moreover, however difficult it is to assess the benefits, it is difficult to see what alternatives there would be to such an assessment if the purpose of regulatory practice is to try to achieve that pattern of regulation which maximizes social welfare.

As I noted earlier in my answer to General Question 8, many regulatory choices made by agencies involve an implicit assessment of the value of health and life. Since funds are not unlimited, it is impossible to set this value infinitely high and even very ambitious health and welfare regulations still do not place infinite values on human value. However flawed the basic procedures which exist for measuring the benefits of environmental legislation, the explicit evaluation of such benefits and their comparison with cost are a better way to evaluate alternatives than to ignore these difficult assessments.

Mr. WHITE. Choices must be made. Implicitly, every decision maker is making a cost-benefit analysis when he makes choices. The regulatory analysis will make the whole process more explicit, less implicit.

Risks to life can be estimated from clinical data on animals or from epidemiological data on people. Extrapolations can be made, though they contain margins of error (which varies, depending on the problem). We have no choice but to use these extrapolations and acknowledge the margins of error.

QUESTION 3 WAS NOT SUBMITTED TO ANY OF THE PANELISTS

(4) Let's assume that you can accurately assess what the adverse effects and potential benefits of a rule will be. How comparable are the data produced on the cost side of the equation with the data produced on the benefit side? As one of our witnesses put it earlier this morning, "Is there a universal calculus for comparing benefits and the adverse effects in determining cost effectiveness?" (Possible question on costs outweighing benefits)

Mr. CRANDALL. All economic decisions involve trade-offs between unlike goods and services. How can anyone decide how to trade off bread for housing; guns for butter;

current consumption for a retirement home? Regulators place a value on benefits when they stop short of zero risk. They should be asked to admit this and to write down the value.

Mr. FREEMAN. There is a subconscious calculus which enables people to make choices among options which impose upon them both costs and benefits. Otherwise, people would find themselves unable to make such choices despite the fact that most goods and services which individuals buy in the market consist of a host of attributes of widely varying values and impose costs which have widely different effects. Most individuals make choices involving alternative life styles with relative ease. These choices are made despite the fact that they frequently involve alternatives which vary widely in their risks to life and health. Thus, individuals make choices between smoking and not smoking, between eating a diet which is high in fats and eating a diet which is not high in fats, between speeding and not speeding, and so on. The task of the analyst in trying to develop a cost-benefit methodology is not to develop a new calculus for comparing costs and benefits but rather to try to ascertain what the private calculus would be for making such comparisons and aggregate such a calculus across broad groups of individuals. Ascertaining the nature of the private calculus which compares costs and benefits is an empirical problem which imposes difficulty which is not unsurmountable. Developing a device for aggregating these decision calculuses across individuals poses difficult theoretical problems. But they are the same kind of problems legislators deal with in attempting to weigh the preferences of their constituents in choosing among alternative statutory patterns of regulation.

Mr. WHITE. Yes, the data are comparable.

(5) Do you believe that the agencies have or could develop the analytic resources to carry out the functions described in the bill? Do you think that the restriction on the use of outside experts will result in poorer analysis by the agency?

Mr. CRANDALL. Yes, with time. I would, however, allow the agencies to contract with outside firms for such analyses to allow the most competent analysts to participate in this process—particularly in the first few years.

Mr. FREEMAN. First, I believe that many agencies whose current rules would meet the proposed statutory criteria of "major rules" already have the resources within the agencies to carry out the functions described in the Bill. This is certainly true of the Environmental Protection Agency. I refer you to the recent EPA rulemaking setting revised new source performance standards for steam electric generating cases, which I discuss at length in my prepared testimony and is discussed by others in the Exhibits to that testimony and in these supplemental answers.

Second, I reaffirm what I stated orally at the hearing on May 14: the restriction on the use of outside experts in S.1080 is undesirable and should be deleted. The agencies should be entitled to rely on the best experts, whoever they are and wherever they are. The public will best be served by rules based on the best evidence and the best analysis.

Mr. WHITE. Agencies definitely should be allowed to use outside experts. Any restrictions will delay the analyses and probably lead to worse analysis.

(6) What is the practical effect of allowing judicial review of the decision of whether a rule is a major rule? Do you think that agencies will designate more than the 150 to 250 rules a year the subcommittee has in mind as major, in order to avoid a later judicial reversal after the process has been completed?

Mr. CRANDALL. No opinion. I am doubtful that such review is necessary, but I cannot hazard a guess as to the effect of such a requirement nor of the number of analyses which will result.

Mr. FREEMAN. For the general practical effects on the regulated of allowing judicial review whether a rule is major, see my answer to General Question Number 4. I would also like to add that I do not think that agencies would resort to wholesale "defensive" characterization of rules as "major" in order to avoid possible reversal on appeal. This does not mean, however, that providing for judicial review would not result in any increase in the number of such classifications each year. Providing for judicial review, like providing for statutory recognition of the president's authority to order an agency to classify a rule as major, would prevent agencies from "cutting corners" because of heavy work loads or otherwise. The policy question posed here is whether (1) the regulatory analysis requirement; (2) the substantive law supplement (new section 553(c)(1)(D)) and (3) the right to oral statement and cross examination should be either (a) hortatory or (b) enforceable. In my opinion the need for all of these requirements in the case of rules that qualify as "major" are too important not to make them enforceable. Normally if something is important enough for Congress to legislate, it should be enforceable. Indeed, this is the essential difference between Congressional laws and Congressional resolutions.

Mr. WHITE. I don't know.

(7) One of the attacks made on Federal regulation is that it has fueled the inflationary spiral over the last decade. Can we be sure that regulation has an actual inflationary impact if we do not measure cleaner air, cleaner water, the reduction in the incidents of job related diseases, etc. as outputs of an economic system governed by regulation?

Mr. CRANDALL. Inflation is a positive rate of change in the price of traded goods and services. One should not confuse the rate of change of the price level with the absolute level of prices. Regulation has added to costs, but its effect upon inflation once it's in place may be zero. Moreover, one should focus upon the relationship between social costs and benefits in analyzing regulation rather than hitching the argument to the popular current concern with inflation.

Mr. FREEMAN. No. But this supports, rather than undermines, the case of the kind of regulatory analysis S. 1080 would require: one that makes a practical "best effort" to measure direct and indirect social costs and benefits and to balance them. Most past studies of the inflationary impacts of regulations have tended to aggregate costs and add them to the general rate of inflation. Whether or not such an increase was "too much" essentially depended on the eye of the beholder. Environmentalists often talked in terms of modest, moderate little percent increases, while industry often complained bitterly about any increase, however small. The true measure of how much is enough, too much or too little really depends upon what we are or are not getting in return. Alfred Kahn brought this out in his 1977 testimony included as Exhibit 3 to my prepared statement. And the kind of analysis that should be made is illustrated in the NERA study, which is Exhibit 4 to my testimony.

Mr. WHITE. Regulation adds to measured costs. If it produces benefits, frequently these benefits are not captured by the GNP or by price indexes. Hence, there is an inflationary bias even to good regulations.

Accordingly, the proper test is a cost-benefit test itself, rather than anything that would refer to GNP.

AMERICAN COUNCIL ON EDUCATION
ONE DUPONT CIRCLE
WASHINGTON, D. C. 20036

DIVISION OF GOVERNMENTAL RELATIONS
(202) 833-4730

MAY 28, 1981

The Honorable Paul Laxalt
Chairman, Subcommittee on Regulatory Reform
Committee on the Judiciary
United States Senate
Washington, D. C. 20510

Dear Mr. Chairman:

On behalf of the higher education associations listed below, we are pleased to present this statement for inclusion in the hearing record on S. 1080 and other related bills pertaining to regulatory reform currently being considered by your committee.

We are fully supportive of the goals of regulatory reform legislation. Our major concern is that the legislative proposals advanced during this session of Congress would appear to exclude inadvertantly from the reform of the regulatory process some of the regulatory problems colleges and universities face. We wish to state for the record our strong desire to be included. Our comments are divided in two parts. Part one explores the nature and types of problems higher education faces with the current regulatory procedure. Part two is specifically directed at the major features of S. 1080 and related bills.

We are appreciative of the time and attention you and members of your subcommittee have devoted to one of the most difficult sets of problems confronting our nation--the regulation of the regulator.

Higher Education and Regulations.

During the last two decades the federal role in higher education has both expanded and changed. The advent of Sputnik in 1958 led to increased federal commitment to scientific and technical research on our nation's campuses. The civil and human rights movement of the 1960s led to the growth of federal programs of student financial assistance which have substantially broadened the opportunity for many to attend college. In addition, the increased diversity within the enrolled student population has had a positive effect in broadening the college experience for all students. However, during the same time period, there has been a steady increase in administrative regulations--fostering an expansion of administrative personnel on college campuses, and dramatic changes in college procedures, practices, and decision-making.

The financial costs of regulation have been substantial. One pilot study of six colleges determined that the costs of compliance with regulations more than doubled from 1970 to 1975, and were continuing to rise much faster than the costs of instruction and the increase in total revenues.

Another study of twelve federal employment-related programs concluded that they are costing institutions as much as four percent of their total operating budgets--a large percentage relative to income from endowment and gifts, deficits suffered by some institutions in recent years, and the budgets of some departments that face extinction because of shifts in institutional budget priorities.

At present, the federal government supervises programs that monitor an institution's salary and wage administration, equal opportunity efforts, retirement benefits, health and safety regulations, expenditure audits, rules on accounting, general and student recordkeeping, and reporting on commercial transactions to list just a few. Much of the underpinning legislation has provided employees, consumers, and society as a whole with necessary safeguards. Too often, however, the attendant regulations and enforcement mechanisms have been poorly tailored to educational institutions--leading even

the most charitable observers to view government as a well-intentioned but over-eager and disorganized regulator. Institutions of higher education experience difficulty in coping with regulations focused on the for-profit sector, and at times, regulations that focus on educational institutions fail to recognize the diversity within the sector.

Difficulty with "business" regulation stems in large part from the fundamental differences between for-profit and nonprofit organizations: differences which are often overlooked in the interest of uniform regulations. Structurally, the two sectors are different. For-profit corporations are vertically organized with a clear hierarchy of decision-making authority. Colleges and universities and most other nonprofits have a horizontal organizational structure. Management authority, style, and responsibilities are very different. "Employees" and subunits of a college have a much greater degree of autonomy than do corporate employees or units. The labor-intensive nature of a college also sets it apart from most business corporations. And lastly, the differences in financial structure are substantial. These differences are best illustrated by the indirect relationship of the price (i.e. tuition and fees) to the cost of an education. The cost is always greater than the amount charged. Financially, colleges and universities live at the margin, hence, their greater vulnerability to unanticipated increases in costs. This is especially true in a decade where the unanticipated costs of energy have been felt disproportionately, despite strenuous efforts for conservation.

Differences in size and function are another source of regulatory difficulties. For example, the regulations on hazardous waste management promulgated last year by the Environmental Protection Agency were in our estimation inappropriate in part, for an institution of higher education. The regulations are directed toward the control of single massive waste streams such as those found in industry, rather than toward the multitude of minor waste streams typically found at colleges and universities.

In addition to inappropriate regulation there is inadvertent regulation, often resulting from the orientation of many regulations toward the for-profit sector. One example is a regulation proposed by OMB which would prohibit federal contractors from soliciting or accepting gratuities from subcontractors. The application of this rule to colleges and universities (as government contractors) would have severely restricted normal fund raising, since it would have barred the corporate practice of financing scholarly chairs or special programs, entering into matching arrangements, or making outright voluntary gifts to institutions of higher education. Fortunately in this case, the regulation by inadvertence was avoided when OMB agreed that the policy would not apply to bona fide academic institutions.

Elaborate regulatory schemes are found not only in "business" regulations, but in those directed solely at educational institutions. too often regulatory approaches to higher education use as their model the large university, ignoring the fact that approximately 46 percent of the accredited institutions of higher education have less than 1,000 full-time equivalent students. Not only differences in size, but diversity in affiliation--religious, non-sectarian, public, independent, and the attendant diversity in missions--is too often ignored.

We are hopeful that many of the problems we have identified can be eased by regulatory procedures such as those outlined in S.1080 which provide for extended public participation as well as a careful consideration of a range of regulatory alternatives including self regulation. This proposed legislation, combined with a fully implemented Regulatory Flexibility Act which recognizes differences in size, could together meet higher education's principal concern that many federal regulations created with insufficient public comment are incompatible with and not tailored to the particular characteristics of colleges and universities. Institutions of higher education are not asking to be exempted from the protective laws prevailing in society as a whole. We do, however, ask for recognition that as an entity we need a full and meaningful opportunity to make our case. The enactment of these proposed amendments should put the regulatory community on notice that Congress intends that the impact of proposed regulations on our community be fully recognized.

Regulatory Analysis

A. Definition of Major Rules

S. 1080 provides for the regulatory analysis of major rules, those having as much impact on the economy as $100 million or more per year or a substantial impact on individual industries, geographic regions, or levels of government. Unless the impact on individual industries is interpreted to include colleges and other non-profit entities, the benefits of this section will not accrue to higher education since our sector's regulatory problems are unlikely to meet the $100 million threshold. We therefore suggest that section 16(A)(ii) be amended to include "a substantial increase in costs or prices for . . . individual sectors of non-profit organizations."

The focus of the definition of a major rule is on the rules' impact on the national economy. We suggest that an equally relevant concern is the cumulative impact of all federal regulations on an entity. A cumulative impact provision should consider both overall costs of regulations, and their qualitative impact.

As we read the pending legislation, OMB circulars, interpretive rules, and revenue ruling procedures would be excluded from the major rule requirements regardless of cost. We think they should be included. Such regulations as OMB Circular A-21 (Cost Principles for Educational Institutions) involve complex issues the resolution of which will have a substantial impact on our nation's research efforts.

In many instances the individual impact of these internal issuances is substantial but does not reach the $100 million level set for an analysis. Relatively few agencies issue rules of that magnitude, yet there are a number of very important rules with potentially major economic consequences for large segments of the population that deserve the careful weighing of alternatives required by a regulatory analysis. In addition, disagreement on many regulatory issues is likely because the agency has the unilateral right to make the "major rule" determination and determine the economic impact. The likelihood for disagreement could be lessened by reducing the regulatory-analysis threshold to $10 million or by providing that in the event of disagreement there would be the right of appeal to the lead agency.

B. Cost-Benefit Analysis

The regulatory analysis section which calls for, inter alia, adoption of performance standards, a consideration of the least-costly alternatives, and an explanation as to why they have not been adopted, and a cost-benefit analysis, including a description of quantifiable and nonquantifiable benefits and costs to the extent available, will go a long way toward establishing a more credible and realistic regulatory process. We are especially pleased that the regulator must take into account "non-governmental alternatives" in developing their analysis.

The higher education community believes self-regulation has considerable merit that currently goes untapped. As problems arise where new standards seem to be necessary, the government should first offer parties an opportunity to develop their own remedies for the problem. Avoiding the burdens of regulation through voluntary efforts can provide a necessary incentive for corrective actions without direct government intrusion. Particularly valuable would be increased use of extensive consultation among representatives of the government, target groups, and the public to seek solutions that would avoid the excessively adversarial "command and control" form of regulation. Also, experiments might be initiated that would call upon methods used by public and private parties, such as those employed by the American Arbitration Association, to encourage self-regulation.

We acknowledge that placing a dollar value on the many benefits of regulations in the health and safety areas is a difficult, value-laden task. In addition, for the foreseeable future it is likely that there will be serious shortcomings in the availability of empirical data on many health and ecological effects as well as inadequacies in the models used to interpret that data. Therefore, cost calculations are at best guesses, especially as they attempt to trace the indirect effects through different levels of the economy. Nonetheless, it is essential that an attempt be made to establish some cost basis

to the extent possible in order to monitor the impact of the proposed regulation. Perhaps requiring agencies to evaluate on a non-mathematical basis the trade offs of the major rules and to determine that such rules are worth their costs and are cost effective will set forth the best plan for achieving a satisfactory resolution of the complex evaluation that is required by the cost benefit concept.

We believe it is essential that the ongoing impact of the regulations, which often continues to expand increasingly after the initial regulation has become effective, should become an element of consideration within the economic analysis. We suggest that five-year projections of cost be added to the analysis, and that a review of the regulations be triggered if the projected costs are, or exceed some significant percentage, such as 50 percent.

We join with other organizations in urging that the bill identify the relevant considerations in analyzing "the adverse economic and other effects of the rule." In order to ensure that important considerations are not deleted from the proposed analysis, the statute should mandate that attention be given to the impact on inflation, technology, paperwork, employment, energy efficiency, and on preexisting state and local regulations.

We strongly support the use of performance standards rather than design standards (detailed process requirements engendered by direct regulation). This would necessitate a penetrating analysis in each instance to assess whether the objective can be best reached by adopting performance standards. At present, such analysis is rarely evident, and this alternative is then assumed not to exist. Performance standards would leave to the regulated--those closest to the problem--the choice of the most efficient and reasonable means of compliance.

Performance standards are inappropriate in some situations. In a wide diversity of social and economic areas, however, problems would be better addressed in such a manner. Standards of performance, arrived at realistically and responsibly, are preferable in almost every instance to detailed regulations promulgated by agencies far removed from the actual problems. Through performance standards, intrusion is minimized, and the autonomy of those being regulated is less disturbed. The targets of regulation will be left with the incentive to be innovative in their compliance actions, and will gain the flexibility needed to adjust compliance to specific situations.

Congressional Review of Rules

Much concern has been expressed regarding the inclusion in the Administrative Procedure Act (APA) of a provision for a so-called "legislative veto." Some of the concerns raised relate to the constitutionality of such a provision. One-house provisions have been included in a number of specific statutes through the years and have been addressed by the proposed procedure for disapproval by joint resolution, since it cannot in reality be called a "legislative veto." S. 1080, as introduced, does not provide a specific process for congressional review of major agency and department rules. We would support the inclusion of a provision similar to the one advanced in H.R. 746.

Under H.R. 746 an appropriate committee would be authorized to report to Congress a joint resolution disapproving a rule which, upon enactment, would make a rule not effective. A joint resolution is legislation and Congress can always nullify an agency rule by legislation. The procedure proposed would not apply to all rules but only to rules designated by agencies as major rules and ordinarily there would be little if any delay in the effective date of such rule because the 30-day period in which the rule would lie before the committee would run concurrently with the grace period otherwise required. In cases where emergency action is essential, an agency may invoke the legislative procedures and make the rule effective immediately. Lastly, any concern that has been expressed that a procedure for Congressional review might lead the courts to infer Congressional approval from no action on a rule has been alleviated by a specific provision which directs the courts to draw no inferences from the failure of Congress to pass a joint resolution. Although effective machinery ill have to be created in order to implement this proposal in a meaningful way, it is our hope that the very existence of a Congressional review process may compel the various agencies to take a stricter look at the legislative mandate under which they are operating and as such, promulgate regulations more compatible with the legislative intent.

Judicial Review

The proposed amendments to Section 706 of Title V of the United States Code relating to the scope of judicial review for agency actions is a long-needed additional element to the regulatory reform picture. It seems to us only reasonable to require agencies clearly to demonstrate the sources of their authority for regulatory actions taken and thereafter to require the reviewing court to take a hard look at the proposed agency action to assure that it indeed falls within the scope of the agency's authority.

The proposed provision would provide that when questions regarding the agency's jurisdiction are raised, a court would decide independently whether the agency had the authority to act as it did by examining the language of the agency's organic statute and other evidence of legislative intent. In this manner, it is less likely that agencies will be able to transgress the outer boundaries of their authority as some have done in the past several years.

With regard to informal rulemaking procedures, the new proposed "substantial support" language recognizes that there is a distinction between an exercise of discretion, a policy choice, and the factual foundation for a policy choice must have substantial support in the rulemeking file. Thus, the materials on which the agency bases its factual determinations must be reliable and credible even though not generated through trial-type procedures.

Review of Existing Regulations

We strongly support the concept of creating a mechanism to evaluate the need to continue agency regulations. Under this proposal all new regulations would be required to include a future date upon which that regulation would automatically expire unless it had been reviewed and evaluated by the agency. In addition, all existing rules would be required to undergo this review process. The proposal for a ten-year plan for all regulations seems to provide for a reasonable review.

We suggest that agencies, in conjunction with their periodic review of a particular rule, be required to publish their regulations in the Federal Register and seek comment on the continuing need for the rule and the need for any proposed changes. In this manner, the public at large would be able to share their views in an orderly fashion with the agency.

We strongly support the provisions of the proposed bill which require that a draft schedule of agency reviews be submitted to OMB, and which give OMB the authority to create a master schedule that allows for simultaneous review of related items. This coordinating mechanism should cut back on conflicting regulations, as well as provide the individual regulators with a broader sense of what the regulatee faces.

Public Participation

Unfortunately, for many years the various federal agencies have given us the perception that public participation in the rulemaking process is a meaningless exercise. Proposed regulations seemed to be "imbedded in concrete" so that responding to them became mere form over substance. Several of the proposals embodied in the proposed legislation will help alleviate some of the problems with rulemaking.

The expansion of the time given to the public to comment on proposed regulations will aid interested parties in providing valuable and insightful views essential to an effective rulemaking process. Giving individuals and organizations only 30 days to comment on proposals that agencies may have taken months or even years to formulate hardly serves the interests of the citizenry or the bureaucracy.

The semi-annual agenda of regulations published by the agencies helps keep interested parties appraised of the status of ongoing agency proceedings and enables them to make an educated prediction of the value and amount of agency activity expected in the next six months. Unfortunately, some published agendas have been spotty and others have not always been published on schedule. legislation should provide that agencies that miss a scheduled date be required to publish a notice of delay announcing a new date for publication of their agendas.

Others forms of agency outreach, such as holding public hearings outside of Washington, should be encouraged. In addition, agencies should publish notices of agency actions in newspapers, magazines, trade journals, or other publications in order to reach beyond the scope of the Federal Register.

The colleges and universities of this country are nonprofit entities whose resources are being dissipated by having to comply with unnecessary regulations. We urge you to acknowledge the plight and concerns of the nonprofit sector, including colleges and universities. Regulatory relief will grant institutions of higher education the opportunity once again to apply their full resources to meeting the true goals of higher education: teaching, research, and community service, without having their limited funds squandered by meeting complex and inappropriate requirements that do not generate any real productive improvement in the quality of life.

Sincerely,

Christine T. Milliken
General Counsel
National Association of Independent Colleges and Universities

Sheldon Elliot Steinbach
General Counsel
American Council on Education

The following associations join in this statement:

American Association of Community and Junior Colleges
American Association of State Colleges and Universities
Association of American Colleges
Association of Catholic Colleges and Universities
Association of Jesuit Colleges and Universities
Council for the Advancement of Small Colleges
National Association for Equal Opportunity in Higher Education
National Association of College and University Business Officers
National Association of Schools and Colleges of the United Methodist Church
National Association of State Universities and Land-Grant Colleges

Prepared Statement of the American Council of Life Insurance

This statement is submitted on behalf of the American Council of Life Insurance. The Council represents over 500 life insurance companies which account for 95 percent of the life insurance in force in the United States, 99 percent of the reserves for insured pension plans, and 97 percent of the assets of all life insurance companies.

The regulatory history of the insurance business is unlike that of any other major sector of the American economy. Historically, the business of insurance has been the subject of state regulation and taxation. Indeed, in 1944, when the Supreme Court reversed itself and found otherwise, Congress quickly responded by the enactment of the McCarran-Ferguson Act. That Act declares that the continued regulation and taxation of the business of insurance by the states is in the public interest. Furthermore, under McCarran, no federal regulatory agency may assert jurisdictional authority over the business of insurance where the states have regulated.

The American Council of Life Insurance thus speaks for a business which is regulated primarily by the states and which believes that continuance of state regulation is clearly in the best interests of the public. But, in the 36 years since the enactment of the McCarran Act, there has, unfortunately, been an increased tendency toward more federal involvement in the insurance business.

Federal involvement in the life insurance business has been largely a consequence of the federal government's role as an economic and social planner, as administrator of federal health and economic security programs, and as legislative "watch dog" over the McCarran Act. Such a role has adversely affected the general economics and social environment in which our business operates in such specific areas as inflation, taxation, savings and invest-

ment, unemployment, and welfare programs. Numerous federal regulatory agencies and statutes affect the operation of each life insurance company as a business, as an investor, and as an employer. The impact of federal activities is felt on our markets, our products, the competitive environment in which we do business, and the type and amount of information we are required to supply. The resulting super-imposition upon state regulation of a layer of fragmented, often duplicative, federal regulation has created confusion and costs of compliance far in excess of the benefits to policyholders already protected by intensive state regulation.

Thus, the life insurance industry has incrementally been subjected to a form of dual regulation; that is, both the federal and state government exercise authority over our business.

In testimony before the Senate Finance Committee on May 19 of this year, the American Council of Life Insurance has already expressed its support of many of the economic policy initiatives being considered by the Congress, particularly those to eliminate counterproductive regulatory measures. We expressed that support in the belief, shared by most of those who have already commented on this legislation, that overly burdensome or unnecessary Federal regulation contributes substantially to inflation--our business' Public Enemy No. 1. We reaffirm that support now in urging favorable consideration of the proposed Regulatory Reform Act.

We do wish to be understood, however, as being fully committed to the regulatory process at the appropriate level, when essential to serving critical public needs. No business that has the financial stake that we have, as writers of life, accident and health, and disability insurance, can find acceptable the use of regulatory reform tools to sweep away reasonable rules that today save lives, prevent accidents and disease, and help promote health and safety in the home, in the workplace, and on the highways.

Cost-Benefit Analysis in Rule-Making. In our view, it is imperative that the steps already taken by the Administration to help improve the quality of agency rule making be supported by Congressional action. Such action would bring the disciplines of sharper cost-benefit analysis to bear on agencies not clearly subject to directives of the Executive Branch.

We particularly favor the provisions of S. 1080 concerning the detailed requirements on the establishment and maintenance of the public file in each proceeding, which would include or identify studies and other documentary material on which the agency is relying in formulating proposed rules. Our business, unlike those regulated comprehensively at the Federal level, is not one which is well understood by any single Federal agency. No Federal agency collects and maintains information about our business comparable to what is available and familiar to state insurance departments. In some Federal proceedings, we often find it frustrating to proceed in open-ended fashion against undisclosed selective data, poor data, or outdated data, whose thrust and importance in the agency's eyes will be made explicit only on final agency action.

In addition, in major rule-making, the opportunity to make oral presentations, including an opportunity for cross-examination, can be critical in sharpening and helping to resolve issues of fact central to the asserted need for regulation, the range of alternatives which might be considered, and the ultimate form which final rules may take.

Judicial Review. We are also strongly in favor of Section 5 of the bill, which would amend the judicial review provisions of the Administrative Procedure Act to incorporate what has come to be known as the Bumpers Amendment. That amendment would prohibit federal courts from presuming that agency interpretations of a law are valid, and would also require agency factual determinations in rule-making to have substantial support. Careful agency

rule-making, exercised with fidelity to Congressional intent, as best as that can be ascertained and given effect, has no need of presumptions in the agency's favor.

Periodic Regulatory Reviews. We are also supportive of the concepts incorporated in section 4 of S. 1080, which would require periodic wholesale reviews of major rules at the Federal level. Such a review would provide a salutary check on the perpetuation of unnecessary or outdated regulations.

Ideally, Congressional committees should exercise continual oversight responsibility for not only the statutory programs under their jurisdiction, but also major rules adopted under each of these programs. However, as a practical matter, other priorities often interfere with the best of plans to engage in systematic reviews of this kind. S. 1080, at least, imposes on the agencies themselves the obligation of periodic review. In many instances, we think that the process will highlight problems which may require Congressional attention or reevaluation by the Executive Branch.

In conclusion, we wish to commend the Chairman and members of the Subcommittee, as well as the other Senators who are now co-sponsoring S. 1080, for their fundamental recognition that agency procedural reform is long overdue.

S. 1080, if enacted, will play a vital role in assuring the continuation of other reform efforts presently underway. We are confident that from all the scrutiny that is being brought to bear on administrative agency law and practice, there can emerge a healthy balance between the pursuit of economic revitalization and growth and the overlay of social control necessary to protect the health, safety and well-being of Americans in the overall public interest.

We stand ready to assist the Members of the Subcommittee and its staff concerning any further information regarding our views on S. 1080.

STATEMENT OF

THE AMERICAN GAS ASSOCIATION

BEFORE THE

SUBCOMMITTEE ON REGULATORY REFORM

OF THE

COMMITTEE ON THE JUDICIARY

U.S. SENATE

ON S. 1080

(LAXALT, R-NV)

THE "REGULATORY REFORM ACT"

May 19, 1981

Introduction:

The American Gas Association (A.G.A.) submits the following statement on S. 1080 (Laxalt, R-NV), the "Regulatory Reform Act". A.G.A. is a national trade association representing nearly 300 natural gas transmission and distribution companies serving over 160 million consumers in all 50 states. A.G.A. member companies account for nearly 85% of the nation's total annual gas utility sales.

Regulatory reform is an issue in which the natural gas industry is extremely interested because of the extent to which the industry is regulated at all levels of government. For example, the siting, construction, and licensing of major new energy facilities are governed by several federal agencies as well as state and local governments. Importation of natural gas is governed by the Federal Energy Regulatory Commission (FERC) and by the Economic Regulatory

Administration (ERA) within the Department of Energy (DOE). Furthermore, pipeline curtailments are governed jointly by FERC and ERA. Pipeline safety is subject to regulation by both the Department of Transportation (DOT) and by the Occupational Safety and Health Administration (OSHA). Finally, there is a myriad of federal regulations governing the energy conservation activities of local distribution (utility) companies. For these reasons, the natural gas industry is keenly interested in any legislation which affects the regulatory process.

A.G.A.'s statement will focus upon the following crucial issues:

A. S. 1080's Omnibus Approach

- While A.G.A. concedes that there are many improvements which could be made in the regulatory process, we are convinced that the omnibus approach taken by this legislation will serve only to further retard the promulgation of well-reasoned regulations. Cost-effective regulation can only be adopted if the regulators perform a meaningful cost-benefit analysis of regulatory proposals. Executive Order 12291 on Federal Regulation[1] will require that all federal agencies (other than independent agencies) adopt major rules consistent with a cost-benefit analysis which establishes that the rule will have the least net cost to society.[2] A.G.A. believes that the Executive Order should be given an opportunity to work prior to any further congressional consideration of proposals to require all agencies to adopt the cost-benefit approach.

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[1] 46 Fed. Reg. 13193; February 19, 1981.

[2] Id., §2(d).

B. Specific Problems with S. 1080

- The regulatory analysis required by proposed Section 3 for major rules should be revised to adopt the "least net cost to society" requirement contained in Executive Order 12291.[3]

- While A.G.A. believes that major rules should be reviewed periodically for the purpose of determining whether they are still cost-effective, we do not believe that such rules should be reviewed automatically on an arbitrary 10 year review cycle. It is possible that the need for some major rules may be obviated prior to the expiration of a 10 year period; furthermore, it is possible that some rules may continue their usefulness for far longer than 10 years. Consequently, A.G.A. believes that no time limit should be set for agency review of major rules, leaving this determination to the agencies having expertise and implementation responsibility for major rules.

- A.G.A. opposes the amendments to the Administrative Procedure Act (APA)[4] contained in Section 5 which relate to the APA scope of review provisions.[5] Specifically, this bill would alter the presumption of validity presently afforded to agency rules by instructing the reviewing court not to accord any presumption for or against agency action. A.G.A. opposes this approach, since agencies should be recognized as having significant expertise regarding the subject matter of their agency action.

- The provisions for preparation and publication of regulatory agendas and the calendar of federal regulations in proposed Section 561 will not accomplish any meaningful regulatory reform. Furthermore, it would appear that this provision would necessitate -- at a time when we are concerned with reducing the size of the federal bureaucracy -- the establishment of a staff within

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[3] Id., §2(d).

[4] 5 U.S.C. §500.

[5] Id., §706.

each agency to deal with the requirements of this legislation, including regulatory analyses, regulatory agendas and other matters of planning and management. For this reason, A.G.A. opposes the provisions for publication of regulatory agendas and the regulatory calendar required of the President.

A. S. 1080's Omnibus Approach

As with regulatory reform proposals in the last Congress, this bill is predicated on the premise that a comprehensive legislative solution is desirable to cure the regulatory problems which exist in the more than 90 federal regulatory agencies. A.G.A. does not, however, accept this premise. Each of these agencies has a specific statutory mandate and a specific area of jurisdiction. Furthermore, the persons and industries which are regulated by these agencies differ vastly from agency to agency. Consequently, A.G.A. is convinced that regulatory reform cannot be achieved in a meaningful manner unless each agency is reviewed from the standpoint of its statutory mandate and from the standpoint of the regulatory framework within which it works.

While there may be problems common to many of the federal agencies, A.G.A believes that the best way to achieve regulatory reform will be for Congress to identify and solve regulatory problems on an individual basis, proceeding as necessary with remedial legislation.

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An omnibus approach to regulatory reform obscures the real source of the regulatory problems to which this legislation is addressed. A.G.A. is convinced that one key source of poor regulation is the body with responsibility for providing agencies with their statutory mandates -- the United States Congress. Many times, it appears to be politically expedient to adopt vague statutes granting agencies ill-defined mandates to go forth and regulate. Unfortunately, the typical agency response to vague statutory directives is to go forth and regulate, and regulate, and regulate.

One example of ill-defined statutory directives can be seen in the Federal Trade Commission Act[6], which requires the FTC to direct its attention to "unfair methods of competition . . . and unfair or deceptive acts or practices . . . ."[7] These vague directives have spawned numerous judicial interpretations and have led Congress to reexamine the FTC Act and the manner in which this agency pursues its statutory mandate. While it is difficult to foresee all of the possible regulatory implications at the time Congress considers organic statutes, A.G.A. believes that Congress would save a substantial amount of regulatory and judicial time if it would carefully consider the problems it wants the agency to resolve and carefully define them in the generic legislation. The most effective way to streamline agency procedures is to

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[6] 15 U.S.C. §41.

[7] Id., at §45.

provide clear guidance to the agency as to what its regulatory purpose is. It would then be much easier to bring a successful judicial challenge to regulations which exceed the statutory mandate. This would also permit the three branches of government -- legislative, executive and judicial -- to function effectively within their respective spheres of responsibility.

Realistic regulatory reform cannot be accomplished by applying a simple solution to a complex regulatory problem. In analyzing the regulatory reform proposals which were considered by the last Congress, one observer wrote:

> The underlying problem with the [current] proposals is that they have all proceeded as if the current regulatory malaise has one single cause. But the problems of the administrative process are many; most are peculiar to a specific agency or subject. Even where general principles or common threads seem identifiable, their application will vary and they must be tailored to the particular problem at hand.[8]

A.G.A. believes that Congressional attention should be directed to the statutory mandates governing each federal agency and the manner in which that agency has fulfilled the requirements of the organic legislation. To the extent Congress finds that there are problems, either in the legislation itself or in the manner in which the legislation is being implemented, Congress should address these

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[8] Gellhorn, Ernest, Reform as Totem - A Skeptical View 3 REGULATION: AEI JOURNAL ON GOVERNMENT AND SOCIETY 23, (May/June, 1979), at 29.

problems on an agency by agency basis. Unfortunately, an omnibus approach, such as S. 1080, is simplistic and will not lead to meaningful regulatory reform. It also is important that Congress exercise careful oversight regarding agencies' management of their rulemakings and regulatory caseloads. Agencies should report periodically on the number of rules and cases pending and those which have not been resolved. Congress should satisfy itself that agencies are using efficient regulatory and caseload management techniques.

Instead of adopting an omnibus legislative measure at present, Congress should allow sufficient time to gain experience under E.O. 12291 before it enacts into legislation an untried approach. We realize that the effective date provided in Section 8(a) for the regulatory analysis provisions is January 1, 1983, and that some may argue that the period before this date should provide for adequate experience with E.O. 12291. However, enacting legislation without <u>first</u> assessing the impact of E.O. 12291 on the regulatory process could be an expensive experiment and could prove to be a regrettable waste of time and resources. Furthermore, Congress would be prejudging the issue if it enacted this legislation while asserting that the January 1, 1983, effective date will provide the agencies needed experience with the Executive Order.

The remainder of our statement will focus on the specific problems we have with S. 1080.

B. Specific Problems with S. 1080

- Regulatory Analysis

Section 3 of S. 1080 would amend the APA to require -- in essence -- that regulatory analyses of major rules be prepared and summarized in the notice of proposed rulemaking published in the Federal Register. The definition of "major rule" contained in proposed Section 551(16) is similar to the definition for "major rule" contained in Section 1(b) of the President's Executive Order.[9] We agree with both of these definitions since they call for an assessment of the proposed rule's effects at all levels and for "nonquantifiable" effects. However, we are concerned that this provision would not reserve any discretion with the agency to include in this definition a rule which the agency otherwise determines will have a major impact. Consequently, we urge that this definition be amended by adding, as new §551(16)(B), the words "(B) any other rule which the agency determines will otherwise have a significant effect." (See: Exhibit I).

A.G.A. is also pleased that this bill would specifically exclude from the "major rule" definition certain rules of particular applicability respecting rates, prices, facilities, services, corporate or financial structures and other case-specific matters. These matters are generally

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[9] 46 Fed. Reg., supra note 1.

dealt with under current Section 551(4) of the APA, and we believe that this definition of "major rule" will prevent the misapplication of inappropriate procedures to such specific proceedings as rate proceedings.

With regard to the §553 amendments, A.G.A. believes that the provisions of E.O. 12291 will provide for a thorough regulatory analysis and will provide for more thorough review of the analysis (as a basis for agency action) than will the provisions of S. 1080. For example, E.O. 12291 requires that all agency action, including major rules, be adopted at the least net societal cost. There is no such requirement of agency action in S. 1080. Under the Executive Order, if the agency chooses not to adopt an alternative approach which would achieve the same regulatory goal at a lower cost, the agency must provide a cost benefit analysis of that alternative and a brief explanation as to why that alternative legally could not have been adopted.[10] S. 1080 does not require such a strict showing and merely requires that the alternative chosen ". . . will substantially achieve the rulemaking objectives in a more cost effective manner than the alternatives to the proposed rule."[11] A.G.A. believes that the E.O. 12291 approach will force agencies to consider only legally feasible alternatives in their regulatory analyses. In our experience, it has not been uncommon for an agency to describe several "alternatives" to the approach

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[10] 45 Fed. Reg., supra note 1, at §3(d)(4).

[11] S. 1080, §3 [proposed §553(c)(2)(D)].

taken in the of which were legally (or technically) feasible. By following this approach, the agency leads the reader to the "inescapable" conclusion that the approach taken in the proposed rule is the only one which could have been taken.

Most recently, A.G.A. filed extensive written comments in a rulemaking before DOE[12] in which the proposed draft regulatory analysis described four "strawmen" as alternative regulatory approaches which they could not have followed legally. The proposed rule was, in A.G.A.'s opinion, a substantial deviation from the statutory directives given to DOE, and, in our written comments in that docket, we pointed out several approaches DOE could have taken to comply with the statute. As Exhibit II to our statement, we are attaching a copy of A.G.A.'s Critique of the Draft Regulatory Analysis in question. We believe that this Critique illustrates the fact that, unless specifically ordered to do so, agencies may not consider regulatory alternatives which are legally and technically feasible. We believe that E.O. 12291

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[12] The Proposed Rule to which we refer would implement certain changes in the National Energy Conservation Policy Act (Pub. L. 95-619; 92 Stat. 3206; 42 U.S.C. §8201; NECPA) by the Energy Security Act (Pub. L. 96-294; 94 Stat. 611; 42 U.S.C. §8211). The Proposed Rule would expand the Residential Conservation Service (RCS) Program to individually heated or cooled multifamily residential buildings and would establish the Commercial and Apartment Conservation Service (CACS) Program -- similar to RCS -- for non-RCS multifamily residential buildings and small commercial buildings. See: 46 Fed. Reg. 4482; January 16, 1981.

will accomplish this objective; however, we are concerned that S. 1080, as written, may not provide agencies with a strong enough directive that they must consider legally and technically feasible alternatives in their regulatory analyses.

- Ten Year Review of Major Rules

While A.G.A. agrees that agencies should periodically review their existing rules (particularly major rules), we are concerned that the provisions of proposed §561 could lead to a more frequent review than every ten years. Proposed Sections 560(a)(4) and (b)(1) state that:

> (a)(4) Except where explicitly provided otherwise by statute or where an extension has been granted pursuant to subsection (f), each major rule that is in effect on the date of enactment of this section shall be reviewed by the agency within 10 years of the date of enactment of this section. Pursuant to such review, the agency shall determine to renew, amend, or rescind that rule.
>
> (b)(1) Except where explicitly provided otherwise by statute or where an extension has been granted pursuant to subsection (f), each major rule promulgated, amended, or otherwise renewed by an agency after the date of enactment of this section shall be reviewed by the agency within 10 years of the date on which such a rule becomes effective. Pursuant to such review, the agency shall determine to renew, amend, or rescind that rule.

Existing major rules are to be reviewed within a ten year period as well. A.G.A. is concerned that these provisions will permit major rules to be reviewed more frequently

than every ten years. Considering that many major rule-makings can take from two to five years to complete, a ten year review cycle may not be sufficient to allow the rule to operate (and establish a track record). Consequently, we urge that the foregoing provision be amended by deleting the underlined words and inserting in lieu thereof "at least ten years after."

While A.G.A. believes that major rules should be reviewed periodically for the purpose of determining whether they are still cost-effective, we do not believe that such rules should be reviewed automatically on an arbitrary ten year review cycle. It is possible that the need for some major rules may be obviated prior to the expiration of a ten year period; furthermore, it is possible that some rules may continue their usefulness for far longer than ten years. Consequently, A.G.A. believes that no time limit should be set for agency review of major rules, leaving this determination to the agencies having expertise and implementation responsibility for major rules.

Finally, we emphasize that requiring an agency to set a date for review of a major rule is not the same as requiring that agency to complete its review of a major rule by that date. This point is crucial in view of proposed Section 560(a)(1) which requires that each agency schedule rules for review and set a review date ". . . within a ten-year period." If one intends that review of a major rule must be completed in ten years, the review of

the major rule would have to begin substantially prior to the tenth year. We do not believe that Congress intends such a result. Consequently, A.G.A. urges that this provision be amended to delete the words "within a ten year period beginning on the effective date of this section." Furthermore, proposed section 560(a)(2) should be revised so that it is clear that completion of agency review may occur after the ten year review date. We believe that this provision will allow agencies maximum flexibility in reviewing major rules and will ensure that major rules are reviewed.

- Proposed Amendment to the Scope of Judicial Review (APA Section 706)

Section 5 of S. 1080 would amend the APA to alter significantly the reviewing court's scope of review of agency action. It would provide that "In making determinations on questions of law, the court shall not accord any presumption in favor of or against agency action." A.G.A. believes that agency expertise must be recognized by reviewing courts, if for no other reason than to assure expeditious consideration of agency action on appeal. To do otherwise might result in the matter under review being argued de novo before the reviewing court. As long as the agency action must be supported by the record, viewed as a whole,[13] A.G.A. sincerely believes that

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[13] Section 5 (amending APA §706) would not affect the reviewing court's responsibility to examine the record of the agency's hearing.

the presumption of validity presently afforded to agency actions should be maintained. Reviewing courts simply do not have the time or the expertise to assess agency actions under any other scope.

- Regulatory Agendas and the Calendar of Federal Regulations

Proposed Section 561(a) largely duplicates the provisions of E.O. 12291 by requiring each agency to publish a regulatory agenda (including the major rules which will be proposed or promulgated) in April and October of each year. We do not believe that the publication of a regulatory agenda will in any way expedite agency action. In fact, to the extent that existing staff must devote significant time to the development and updating of regulatory agendas, this provision could impede the regulatory process. Thus, A.G.A. does not believe that this provision will accomplish any meaningful regulatory reform.

The provision for a calendar of federal regulations in proposed Section 561(b) is repetitive of the regulatory agenda requirements and would also be published in the Federal Register in May and November of each year. This publication would require a substantial expenditure of executive branch staff time and federal funds. Furthermore, there is no "penalty" if the President or the agencies fail to comply. Thus, this provision appears to be unnecessary and should be deleted. This provision would only contribute to regulatory delay by requiring a substantial amount

of staff time to prepare the agenda and calendar submissions and would not expedite rulemaking in any manner.

Despite our opposition to much of S. 1080, we are as concerned with the failure of agencies to complete rulemaking proceedings expeditiously as is Congress. Thus, we support the approach of proposed Section 561(a)(3) in requiring agencies to establish deadlines within which they will complete rulemakings.

- Legislative Veto

We realize that S. 1080 does not contain a provision for legislative veto of agency action. However, this issue has been discussed in Senate hearings, and we believe our views are relevant to any consideration of this issue by the Subcommittee. A.G.A. opposes the application of a legislative veto to all agencies as has been provided in various legislative proposals. We are attaching a copy of a statement we filed on April 30, 1981, before the Subcommittee on Agency Administration of the Senate Committee on the Judiciary on S. 684 (Byrd, I-VA) and S. 890 (Schmitt, R-NM). While the legislative veto may have application in some specific and limited instances[14] we do not believe it

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[14] At this time, A.G.A. is opposing a constitutional challenge to the legislative veto provision in §507 of the Natural Gas Policy Act regarding Phase II of incremental pricing (Consumer Energy Council of America v. FERC, D.C. Cir. Docket No. 80-2184 and 80-2312). This is one specific and limited instance in which we believe the legislative veto has appropriate application, because of the unusually great implications for the economy and the fact that a new type of regulation is involved.

appropriate to require all rules to be submitted to Congress for review. Legislative review of major rulemakings will only serve to further encumber an already cumbersome process.

CONCLUSION

A.G.A. appreciates the opportunity to present our views on S. 1080. We sincerely urge Congress to re-examine this legislation in light of the comments we have made. A.G.A. firmly believes that an omnibus approach to regulatory reform is inappropriate and should not be viewed as a panacea for solving the problems created by a complicated and overlapping bureaucracy. True regulatory reform can only be accomplished in a meaningful way by addressing the organic statutes which have created the vague agency mandates. While we realize that this is going to be a tedious, difficult task, we believe it is an absolutely essential process. A.G.A. is willing to work with this Subcommittee and the Congress on this matter.

EXHIBIT I

A.G.A. Proposed Amendments to S. 1080 Section 2, amending 5 U.S.C. §551

1. p. 3, l. 10 add an "or" after "markets;"
2. p. 2, l. 11, change "(B)" to "(C)"
3. p. 3, after line 10, add new §(B) as follows: "means any other rule which the agency determines will otherwise have a significant effect;"

EXHIBIT II

THE AMERICAN GAS ASSOCIATION'S CRITIQUE OF
DOE'S DRAFT REGULATORY ANALYSIS
FOR THE PROPOSED COMMERCIAL AND APARTMENT CONSERVATION
SERVICE (CACS) PROGRAM DOCKET No. RM-80-125

INTRODUCTION

A.G.A. has reviewed the Draft Regulatory Analysis (DRA)[1] in detail and in view of the President's recent Executive Order 12291 on Federal Regulation (hereinafter the "Executive Order").[2] While we will elaborate on our reasons in our Critique, there are two basic reasons why the DRA does not support the Proposed Rule. First, the DRA fails to present sufficient data to support an analysis of the cost effectiveness of the Proposed Rule. Second, the DRA fails to assess alternative approaches -- which are both legally and technically feasible -- to the Proposed Rule case[3] and its Option 2[4].

Since the DRA purports to form the legal and technical basis

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[1] U.S. Department of Energy, Draft Regulatory Analysis, Expansion of the Residential Conservation Service Program to Multi-family and Small Commercial Buildings, DOE/CS-0014, November, 1980.

[2] 46 Fed. Reg. 13193; February 19, 1981.

[3] DRA, supra note 1, at 2-17 and 3-17, 19.

[4] Id., at 1-9 and 3-14.

for the Proposed Rule.[5] A.G.A. will discuss each Chapter of the DRA.[6] Our Critique will include a discussion of the following points:

- At several points in the DRA, the CACS Program is either referred to as the "RCS extensions program", or, from the context, the impression is given that the CACS Program is viewed as being merely an extension of the RCS Program.[7] The only aspect of the RCS Program which was affected by the legislation creating the CACS Program is the inclusion of multifamily residential buildings (not centrally heated or cooled) after January 1, 1982. The Title VII amendments[8] to the National Energy Conservation Policy Act of 1978[9] created the CACS Program for centrally heated or cooled multifamily residential buildings and small commercial buildings.

- The DRA assesses three alternative regulatory approaches to the Proposed Rule, none of which would comply with NECPA, and would require legislative change.[10] The "no-action case", under which DOE would take no action pursuant to NECPA, clearly would violate the mandatory aspects of the statute; the "limited rule case"[11] would not comply with NECPA since it would not require participation by public utilities; and the "enhanced regulation case"[12] would contain mandatory

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[5] The Draft Regulatory Analysis was prepared for DOE by Union Carbide Corporation, Oak Ridge, Tennessee. While we assume that DOE intends that commenters rely on this document in analyzing the Proposed Rule, we are concerned about the "Notice" which appears inside the cover page. This Notice states that "The views and opinions of authors expressed herein do not necessarily state or reflect those of the United State Government or any agency thereof." Presumably, this statement was not intended as a disclaimer by DOE of the conclusions contained in the Draft Regulatory Analysis with which DOE seeks to support the Proposed Rule.

[6] We will discuss most Chapters separately, but will discuss Chapter 4 only inasmuch as it refers to the CACS Program as the "RCS extensions program."

[7] DRA, supra note 1, at 1-1, 4-1, 5-2.

[8] Energy Security Act; Pub. L. 96-294; 94 Stat. 611; 42 U.S.C. §8211 (the "ESA").

[9] Pub. L. 95-619; 92 Stat. 3206; 42 U.S.C. §8201 ("NECPA").

[10] DRA, supra note 1, at 2-8, 2-15, 3-12, 3-15.

[11] Id., at 2-10, 2-15, 3-13, 3-16.

[12] Id., at 2-12, 2-14, 2-16, 3-15, 3-19.

requirements for state governments, utilities, and tenants and building owners, substantially exceeding the authority granted DOE by NECPA. Thus, DOE has not attempted to analyze reasonable regulatory alternatives to the Proposed Rule which would not require legislative change and which are technically and legally feasible.

- In considering the coverage of commercial buildings, the DRA lists five alternatives to defining "eligible commercial customer" for program coverage.[13] Options 3, 4, and 5 would require amending NECPA. While the DRA states that both Options 1 and 2 would comply with NECPA, only Option 2 was selected for incorporation in the Proposed Rule.[14] As we have stated in our Written Comments,[15] A G.A. believes that only Option 1 is consistent with NECPA. Nevertheless, DOE did not consider Option 1 under the no-action, limited rule and enhanced regulation cases[16] in its cost/benefit analyses of these regulatory approaches.[17] Furthermore, Option 1 was not analyzed in the Regional Studies Chapter "due to time restrictions".[18] Consequently, we believe that Option 1 was not considered adequately in terms of selecting a building coverage Option for the Proposed Rule.

- The Urban and Community Impact Analysis (Chapter 5) is inconsistent in describing the positive aspects of the Proposed Rule[19] and the negative effects of the Proposed Rule in terms of displacing low-income tenants as a result of building improvements. While the DRA describes as one benefit of the Proposed Rule a "multiplier effect" whereby improved energy efficiency forms the catalyst for urban renewal and increased economic activity, it also regards as a possible negative effect the displacement of low-income tenants by building owners as a result of building improvements. The DRA claims that such displacement is unlikely, however, because the amount of financial commitment required to enhance the building's property value would substantially exceed that involved in weatherizing the building.[20] If this is the case, the "multiplier effect" theory cannot be cited as a positive effect of the Proposed Rule, since the DRA assumes that weatherization investments would not be sufficient to significantly enhance the property value.

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[13] Id., at 1-9, 1-10, 3-14, 3-17, 3-19.

[14] Id., at 1-10.

[15] Written Comments of the American Gas Association, DOE Docket No. RM-80-125, supra.

[16] DRA, supra note 1, at 3-15, 3-16, 3-19.

[17] Id., at 11-5.

[18] Id., at 5-10.

[19] Id., at 5-11.

[20] Id.

- The DRA describes the institutional effects of the CACS Program as being a "very modest" 0.5 percent of gas utility revenues.[21] A.G.A.'s latest gas industry statistics reveal that this amount, for 1979 alone, would have been $194,735,710.[22] Such an amount will not appear to be "modest" to the state regulatory authorities who will be asked to rate-base such costs or to the shareholders of utility companies whose state regulatory authorities do not allow such amounts to be rate-based.

- The DRA does not adequately assess the CACS Program impact on gas utilities where a significant number of commercial customers will be included in the Program. The 1,000 therm/month threshold, which represents annual consumption of 1200 MMBtu, is 65% greater than the 1979 average annual gas consumption for a commercial customer -- 726.5 MMBtu.[23] The significant number of eligible commercial customers, and the fact that electric utilities have nearly three times the number of commercial customers as gas utilities,[24] will result in a greater compliance burden for gas utility companies than for electric utilities. The DRA does not analyze this disparity as its relates to potential energy savings or program costs.

- Specific program cost data are essential in assessing the CACS Program's cost effectiveness. Nevertheless, the DRA fails to document many basic assumptions and cost relationships. For example, the data provided in the DRA fail to verify the summary figures shown in Table 1-4.[25] A.G.A. has utilized certain data from the DRA in deriving a figure of $2 billion as the estimated total retrofit costs to commercial building owners and tenants.[26] However, the DRA estimates that the total audit and retrofit cost for commercial building owners and tenants through 1990 will be only $402 million.[27] Unless the DRA can be modified to explain such cost relationships, it cannot accomplish its purported objective of serving as serving serving as the technical and legal rationale for the Proposed Rule.

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[21] Id., at 6-9.

[22] Gas Facts, 1979 Data, American Gas Association (Arlington, Virginia, 1979), at 103. 1979 revenues for the gas utility industry totaled $38,947,143,000.

[23] Id., at 69.

[24] At year-end 1979, the electric utility industry had 9.4 million commercial customers compared with the gas industry's 3.4 million commercial customers. Sources: (Electric) Statistical Yearbook of Electric Utility Industry/1979, Edison Electric Institute (Washington, D.C. 1979), at 2; (Gas) Gas Facts, supra note 22, at 73.

[25] DRA, supra note 1, at 1-20.

[26] Id., Table 3-2, at 3-2, Table 10-6 at 10-25.

[27] Id., at 1-20.

The foregoing represent some of the major problems we have encountered in analyzing the DRA. Most of these problems could have been resolved had the DRA presented an adequate amount of data to support its conclusions. The following is a Chapter-by-Chapter discussion of the specific shortcomings -- both major and minor -- of the DRA. A.G.A.'s goal is to provide DOE with constructive criticism so that the DRA may be revised where necessary, thus enabling DOE to issue a final CACS rule supported by an accurate and comprehensive final regulatory impact analysis.

The Proposed Rule is a major rule as defined by Section 1(b) of Executive Order 12291, since the DRA estimates the total cost of the Program (through 1990) will be $1.703 million.[28] Consequently, Section 7(e) requires a final regulatory impact analysis of the Proposed Rule must accompany the rule in final form. Furthermore, the final regulatory impact analysis must establish that the regulatory alternative chosen for the final rule involves the least net cost to society of all the alternatives discussed.[29] We believe that the DRA does not consider adequately feasible regulatory approaches to the Proposed Rule and, therefore, it does not comply with the Executive Order.

Chapter 1: Introduction and Summary

This Chapter exhibits several tendencies toward inaccuracy which pervade the entire DRA. For example, in describing the RCS Program, the DRA implies that home heating oil suppliers are

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[28] DRA, supra note 1, at 1-20.

[29] Executive Order, supra note 2, Section 2(d).

automatically covered in the RCS Program.[30] Chapter 9 ("RCS Coverage") refers to gas and oil as the same "fossil fuel".[31] However, home heating suppliers are not automatically covered and may only be included under the RCS and CACS Programs if the state governor decides to include them in these programs.[32]

Another inaccuracy in this Chapter (which also pervades the DRA) is the implication that the Energy Security Act had the effect of extending the RCS Program to cover all multifamily buildings and small commercial buildings:

> The ESA provided for certain amendments to Title II of NECPA and established a Title VII, which extended the Utility Program to small commercial buildings and multi-family dwellings with five or more units per building.[33]

The DRA tendency to refer to the CACS Program as merely an extension of the RCS Program is reflected in the Title of the document (". . . Expansion of the Residential Conservation Service. . .") and throughout Chapters 4 and 5 as well. While A.G.A. understands that these misnomers are probably the result of an effort to simplify the DRA, we are concerned that this effort has resulted in over-simplification. For example, in describing the scope of the Proposed Rule, the DRA states that the "residential and commercial sectors . . . are the

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[30] Id., at 1-1. The DRA states that NECPA ". . . requires that large public utilities and home heating oil suppliers provide energy audits. . ."

[31] Id., See for example, Tables 9-6, 9-7 and 9-8 at 9-7, 9-8 and 9-9.

[32] Pub. L. 95-619, as amended, supra notes 8 and 9, §§212(c)(3) and 721(c).

[33] DRA, supra note 1, at 1-1.

targets of the Residential Conservation Service. . ."[34] Since Chapter 1 introduces and summarizes the DRA, it is essential that the information contained in this Chapter accurately portrays the CACS Program. Consequently, we suggest that this Chapter be rewritten to clarify the respective coverages of the RCS and the CACS Programs.

Some of the inaccuracies we have found in this Chapter are merely summaries of the inaccurate material contained in later Chapters on which Chapter 1 was based. Consequently, the remainder of our discussion on Chapter 1 will focus only on problems which appear in more than one succeeding Chapter of the DRA or which are unique to this Chapter.

Section 1.6.3 of this Chapter considers the effect a direct fee for commercial or multifamily audit costs will have on the audit response rate and on energy savings.[35] The DRA provides no data supporting its assumptions and admits that "little quantitative data is (sic) available on the effect of audit charge on audit rate."[36] Nevertheless, the DRA assumes that free audits will ". . . result in about twice the audit rate assumed in this analysis for multi-family and about two and one-half times the rate assumed for the commercial sector."[37] Furthermore, the DRA states that a free audit will result in greater energy savings and will enhance the cost effectiveness of the Program.[38] A.G.A. seriously questions these conclusions when, as the DRA admits, little quantitative data

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[34] Id., at 1-3.

[35] Id., at 1-12, 1-13 at Figure 1-3.

[36] Id., at 1-12.

[37] Id.

[38] Id.

are available. A.G.A. is concerned that these conclusions will be used as a rationale for mandating free CACS audits, through DOE's federal CACS standby authority,[39] in states which elect not to participate in the CACS Program. Furthermore, CACS audits can never be "free" since the audit costs will be borne either by all ratepayers or by the utility's shareholders. Shifting the cost burden from the eligible customer to the ratepayers or utility shareholders will not enhance the CACS Program's cost-effectiveness if the Program is not inherently cost-effective.

In describing DOE's statutory authority for CACS implementation, the DRA states that NECPA "permits DOE some flexibility in applying these [mandatory energy conservation] measures and practices."[40] This statutory flexibility was exercised in the Proposed Rule in the form of establishing applicability criteria for measures, in categorizing measures either for building-specific costs/savings estimates or for generic estimates, and in requiring that any energy using activity accounting for more than 10 percent of the building's consumption be targeted by the commercial audit.[41] A.G.A.'s Written Comments have focused upon several areas of the Proposed Rule wherein we believe DOE has substantially exceeded its NECPA authority. We will not reiterate these points in this Critique unless questions of statutory interpretation affect the efficacy of the DRA's conclusions which underlie the Proposed Rule.

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[39] Pub. L. 95-619, as amended, supra notes 8 and 9. §741.

[40] DRA, supra note 1, at 1-14.

[41] Id. The DRA refers to specific provisions of the Proposed CACS Rule. A.G.A.'s Critique will discuss only those specific provisions of the Proposed Rule which contradict -- or are not supported by -- the DRA.

Chapter 2: Multi-family Buildings

A.G.A.'s major objection to the approach taken by the DRA pertains to its selection of four alternatives (including the Proposed Rule) to satisfy the mandates of NECPA. These alternatives are:

- No-action - energy conservation achieved only through existing programs and by fuel price responses;
- Limited Rule - energy conservation achieved only by non-mandatory guidelines for the CACS Program;
- The Proposed Rule. and,
- Enhanced regulation - energy conservation achieved by mandatory requirements for state governments, utilities, tenants and/or building owners.[42]

As we will discuss below, none of the foregoing alternatives will comply with NECPA.

The no-action case would depend on existing programs, including federal and state tax incentives, to conserve energy in the residential and commercial sectors. The DRA discusses energy tax credits which have been claimed since 1978 pursuant to the Energy Tax Act of 1978.[43] While the DRA's discussion is informative,[44] it does not address the question how DOE could pursue this option without violating NECPA. DOE cannot adopt the no-action case, since NECPA sets forth specific statutory responsibilities for DOE and covered utilities.

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[42] Id., at 2-8 through 2-14.

[43] Pub. L. 95-618; 92 Stat. 3174; 26 U.S.C. §101.

[44] DRA, supra note 1, at 2-9.

The limited rule approach would not require mandatory participation in the CACS Program by public utilities. Procedures for offering audits would not be specified, and there would be no specific time limitations for initiating CACS Programs at the utility level. Audit content would be discretionary, and no particular measure would be required as part of the audit. Finally, there would be no requirements for state plans.[45] While the limited rule case is obviously most attractive to public utilities, it would not comply with NECPA. Participation by public utilities in CACS Program activities is mandatory under NECPA.[46] The time limits within which a utility program must be initiated are also set forth in the statute.[47] Finally, NECPA Section 710(b)(5) lists the energy conservation measures which must be considered by the auditor in performing the CACS Program audit. While A.G.A. would prefer a limited rule case wherein public utility participation would be voluntary, we recognize that such a program would not comply with NECPA.

While the DRA does not acknowledge that the no-action and limited rule cases would not comply with NECPA, it describes the enhanced regulation case as being one which "includes some provisions beyond DOE's existing authority under NECPA and would require additional legislation."[48] For example, enhanced regulation might include mandatory requirements for state governments under the CACS Program, including specified audit rate goals and energy consumption targets which must be met each year. State requirements under this approach

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[45] DRA, supra note 1, at 2-10.

[46] Pub. L. 95-619, as amended, supra notes 8 and 9, §§711 and 731.

[47] Id., §731(a)(1).

[48] DRA, supra note 1, at 2-8.

would be enforced by denying certain federal grants, loans, and public housing subsidies. For utilities, enhanced regulation would set targets for auditing and energy conservation, enforced by imposing taxes, denying certain federal tax deductions and credits and "other regulatory action for those utilities regulated by the Federal Energy Regulatory Commission."[49] Finally, the enhanced regulation case would impose mandatory requirements for tenants and building owners aimed at discouraging excessive energy use:

> Standards would be established for nominal energy requirements for living needs and uses in excess of this amount would be subject to a Federal surcharge based on marginal national energy costs.[50]

The enhanced regulation case substantially exceeds the authority granted to DOE by NECPA.

Since none of the foregoing alternatives comply with NECPA, one would assume that the Proposed Rule would follow NECPA closely. However, as we have stated in our Written Comments, the Proposed Rule is not without its non-statutory excesses.[51] A.G.A. believes that DOE could have issued a Proposed Rule following the limited rule case, but containing the statutory provisions outlined above (e.g., mandatory utility participation, mandatory time limits for program initiation and specific covered measures), in lieu of the prescriptive approach contained in the Proposed Rule. Nevertheless, we believe that the DRA has failed to adequately assess

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[49] Id., §731(a)(1).

[50] Id.

[51] For example, the Proposed Rule would blur the NECPA dichotomy between Title II and Title VII multifamily buildings by allowing eligible Title II (i.e., RCS) customers to opt for Title VII (CACS) coverage. Proposed §§456.320 and 456.321.

reasonable alternatives to the Proposed Rule which would be legally and technically feasible. None of the alternatives discussed in the DRA are feasible within the statutory directives in NECPA.

The DRA suggested three approaches DOE could take in dealing with multifamily dwellings in Title II of NECPA.[52] First, these buildings could be incorporated in the existing RCS Program. Second, these buildings could be included in the Title VII program. Finally, the tenant could be given an option of choosing RCS or CACS Program coverage.[53] For the DRA to have considered any alternative other than treating Title II buildings and Title VII buildings separately contradicts NECPA and illustrates an obvious disregard for the discrete thermal and architectural characteristics of both building types. Nevertheless, the DRA observes that "most apartment units do not differ greatly in thermal configuration from single family houses."[54] From the standpoint of heating equipment alone, this statement is inaccurate. Furthermore, to liken apartment units to single family houses is inconsistent with the statutory approach of NECPA: commercial and residential buildings and end uses are treated differently, as their discrete natures require, in achieving national energy conservation goals.

A.G.A. has two basic problems with the cost-benefit analyses for the no-action, limited rule, proposed rule and enhanced regulation

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[52] Pub. L. 95-619, as amended, supra notes 8 and 9. Title II (RCS) multifamily buildings are not centrally heated or cooled. Title VII (CACS) multifamily buildings are centrally heated or cooled.

[53] DRA, supra note 1, at 1-11.

[54] Id., at 2-2.

alternatives. First, the DRA provides no basis for its assumptions concerning audit response and retrofit rates. While the DRA states that "promulgation of the Proposed Rules is projected to markedly increase the rate of retrofit,"[55] this Chapter does not state -- or provide any statistical basis for speculating -- what the ultimate retrofit rate would be. Second, we are concerned that the DRA has extrapolated data from single-family residential conservation programs (e.g., the Tennessee Valley Authority Home Improvement Program) in deriving the costs and energy savings of the Proposed Rule for multifamily dwellings.[56] While the DRA provides no data to support these assumptions, we urge that the DRA use data consisting solely of information derived from studies on multifamily dwellings.

The DRA favors a strong state role in CACS Program implementation, since ". . .the State may significantly impact the program, its cost-effectiveness and its resulting energy savings."[57] Furthermore, the DRA implies that states should strongly consider incorporating CACS Program costs in their utilities' rate-bases:

> By incorporating RCS (sic) costs in the utility rate-base states can provide economic incentives to utilities for conservation efforts[58]

While A.G.A. does not oppose rate-basing CACS Program costs, we are concerned that the DRA apparently considers rate-basing these costs -- instead of direct cost-recovery from the customer -- as a panacea for the many problems utilities will encounter in CACS Program implementation. A.G.A. believes that states should be

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[55] Id., at 2-6.

[56] Id., at 1-16 through 1-18.

[57] Id., at 2-6.

[58] Id., at 2-7.

encouraged to allow utilities to charge eligible customers directly for CACS Program audits, to the extent allowed under NECPA.

Chapter 3: Commercial Buildings

The DRA discusses the NECPA definition of commerical building focusing particular attention on the average monthly usage thresholds for electricity, natural gas, and other fuels.[59] In interpreting these energy consumption limits, the DRA suggests five alternative approaches, three of which (Options 3, 4 and 5) would require legislative change.[60] However, the DRA acknowledges that only Options 1 and 2 are consistent with NECPA.[61] As we have stated in our Written Comments, A.G.A believes that only Option 1 is consistent with NECPA, since it would require all energy use to fall below the energy use thresholds in order for the commercial building to be covered. The DRA strongly favors Option 2, which would extend program coverage to any commercial building in which use of any energy form falls within its respective threshold. That is, if a building uses both gas and electricity and falls within the gas threshold, while exceeding the electricity threshold, it would be deemed a covered building under this Option.

Having selected Option 2 as the favored interpretation for coverage and the Proposed Rule case, the DRA proceeds to ignore virtually all of the building Options in presenting its cost-benefit analyses for the no-action, the limited rule and the enhanced

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[59] Id., at 3-1.

[60] Id., at 3-14.

[61] Id., at 1-10.

regulation cases.[62] Therefore, if one seeks to compare the cost-effectiveness of Option 1 under the limited rule case, for example, the DRA renders such analysis impossible. While we recognize that the DRA does discuss each Option in its cost-benefit analysis for the Proposed Rule case, each of the other cases should have been analyzed similarly. In fact, it is impossible to tell which building Option the DRA utilized in deriving its cost-benefit analysis for the no-action, the limited rule and the enhanced regulation cases. Since the DRA strongly supports Option 2, one can only assume that this building Option was used for these cases.

The gas utility industry finds it difficult to support any interpretation of the MECPA commercial building definition. This difficulty arises from the fact that 1,000 therms of natural gas represents over seven times the energy (on a btu equivalent basis) of 4,000 Kwh of electricity.[63] The study to which the DRA refers[64] indicates that commercial buildings use approximately 2.5 times more electricity than gas. This study also indicates that energy used for space conditioning is approximately equally divided between gas and electric space conditioning.[65]

While we recognize that the 1,000 therm/4,000 Kwh limitations are in the statute, we believe that DOE should pursue an interpretation of these limits which would recognize the inherent disparity

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[62] Id., at 3-15 to 3-19.

[63] Gas Facts, 1979 Data, supra note 22, at 203.

[64] Jackson, J.R. and Johnson, W.S., Commercial Energy Use: A Disaggregation by Fuel, Building Type and End Use (Oak Ridge, Tennessee, Oak Ridge National Laboratories, 1978), at 64.

[65] Id.

between these energy usage levels. For this reason, A.G.A. sincerely urges DOE to adopt the Option 1 interpretation of the commercial building definition.

A.G.A. is encouraged that the DRA has correctly defined an eligible commercial customer as being "the owner or tenant of a commercial building . . .to whom the public utility sells natural gas. . ."[66] As we stated in our Written Comments, DOE did not follow the NECPA definition of eligible commercial customer. DOE uses the term "provides" in lieu of "sells", thereby broadening the statutory definition considerably. A.G.A. supports this particular approach taken in the DRA and sincerely urges DOE to reevaluate the approach it has taken in Section 458.103(e) of the Proposed Rule in defining eligible commercial customer.

In discussing the small commercial sector, the DRA states that "it has determined that about 61 percent of the buildings would qualify."[67] However, this statement is not consistent with an estimate in Chapter 9 wherein the DRA states that "approximately 55 percent of the buildings in the commercial sector will qualify to be audited . . ."[68] Chapter 9 estimates that there are a total of 1,796,000 commercial buildings, and of these, 985,000 will qualify.[69] A six percent discrepancy between the estimate in Chapter 3 and Chapter 9 leaves the status of over 100,000 small

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[66] DRA, supra note 1, at 1-9. This definition is consistent with NECPA §710(b)(2).

[67] Id., at 3-5.

[68] Id., at 3-5.

[69] Id.

commercial buildings in question.[70] Ignoring 100,000 small commercial buildings could substantially distort the DRA cost-benefit analysis. Meaningful cost-benefit analyses can only be based upon consistent and accurate data. It is impossible to tell which of these two estimates the DRA used in deriving its cost-benefit analyses for commercial buildings.

With regard the fee which can be charged directly to the customer for a commercial building audit, the DRA again expresses a preference that the audit fee be ". . . limited. . . ., with the excess borne by all ratepayers. . ."[71] As we stated concerning Chapter 2, we are troubled by the DRA's reliance upon this method of encouraging CACS Program participation. Rate-basing these costs -- in lieu of permitting direct cost recovery from the commercial customer -- raises serious problems of equity for which DOE has provided no solution. Eligible commercial customers who choose not to participate in the CACS program, as well as residential customers, may be subsidizing program benefits for those who do elect to participate if these costs are rate-based. Furthermore, if the state regulatory authority does not permit the excess amounts to be rate-based, the utility's shareholders will, in essence,

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[70] Utilizing the DRA Chapter 9 data, A.G.A. has determined that over 200,000 buildings more would be included in the CACS Program under the Chapter 3 61% estimate:

Total Commercial Buildings -- 1,796,000
Total Covered by CACS -- 985,000 (54.8%)

If 61% of the total were covered by CACS, 1,096,560 buildings would be covered, or 110,000 more than were estimated under Chapter 9.

[71] Id., at 3-12.

subsidize the CACS Program. This result is not equitable, and it contradicts NECPA which reserves such decisions solely for the state regulatory authorities.[72] We believe that the most equitable result would be for state regulatory authorities to permit utilities to recover CACS Program audit costs directly from the eligible commercial customer. Furthermore, since DOE must issue a Federal Standby CACS Plan for those states which elect not to participate in the CACS Program,[73] we urge that DOE allow utilities to recover the full cost of commercial audits from eligible commercial customers.

Chapter 4: Related Government Programs

A.G.A.'s objection to this Chapter is that it incorrectly refers to the CACS Program as the "RCS extensions program."[74]

Chapter 5: Urban and Community Impact Analysis

As in Chapter 4, this Chapter also inaccurately describes the RCS and CACS Programs. It states that "Title VII extends the Residential Conservation Service Program created under Title II . . . to include multifamily dwellings . . . which are centrally heated, and small commercial buildings . . .".[75] While we recognize that, for the purposes of the Urban and Community Impact Analysis (UCIA), it may not be absolutely necessary to distinguish between CACS and RCS coverage, we believe that some effort should be made to rectify these inaccuracies.

We are concerned that the UCIA contains numerous inconsistencies in data and conclusions throughout its analysis. In addition to failing

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[72] Pub. L. 95-619, as amended, supra notes 8 and 9. §731(b)(3).

[73] Id., §741.

[74] DRA, supra note 1, at 4-1.

[75] Id., at 5-1.

to agree as to the percentage of buildings affected in different locations and as to the age of those buildings,[76] the UCIA presents a significant conceptual inconsistency. The UCIA posits a "multiplier effect" as a benefit of the CACS Program.[77] This effect is the result of energy efficiency improvements in low-income multifamily dwellings which, in turn, generate further renovation efforts, including "a general improvement of downtown areas."[78] However, on the following page, the UCIA contradicts its theory of downtown improvement. The UCIA states that, as a possible negative impact resulting from the CACS Program, low-income tenants might be displaced as a result of improvements made in the building. The UCIA dismisses possible displacement as being unlikely because "a more thorough renovation job would have to be done in order to effectively enhance the overall building."[79] There is an apparent inconsistency in concluding, on the one hand, that the CACS Program possibly will have

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[76] Id., at 5-6 and 5-7, we note these discrepancies:

CATEGORY	5-6	5-7
• Percent of buildings in urban areas	95% (see 5-3 also)	96%
• Percent in central city	57%	60%
• Percent over 20 years old	50%	50% (20 years or older)
• Percent older than 30 years	32%	40%

While a discrepancy of 1-8% may not appear to be significant, it can be quite significant when presenting a formal analysis of program effects covering a building population consisting of nearly one three-quarters of a million buildings. (Table 9-1 estimates that more than 710,000 buildings will be covered by the CACS Program.)

[77] Id., at 5-10.

[78] Id.

[79] Id., at 5-11.

a positive effect by stimulating downtown improvement and, on the other hand, stating that a more thorough renovation job would be required to enhance the overall building.

A G.A. also disagrees with UCIA's conclusion that the "intent of the law implies that the benefits of the program must accrue to the tenants and not the landlord."[80] This is patently untrue. While NECPA includes tenants in RCS Program coverage, the CACS Program does not entitle tenants in Title VII buildings to CACS Program participation.[81]

There are other inaccuracies in the UCIA. For example, the UCIA apparently does not understand that in certain situations, commercial buildings within shopping malls may be included under the CACS Program if those commercial establishments satisfy the definitions for commercial building and eligible commercial customer.[82]

Chapter 6: Institutional Impacts

A.G.A. is troubled by the DRA's description of the overall CACS Program impacts on the gas industry as being "very modest".[83] The DRA estimates these costs as amounting to ". . . less than one-half of one percent of revenues."[84] A.G.A.'s gas industry statistics for 1979 reveal that revenues for the gas utility industry for that year were $38,947,142,000. For 1979 alone, this "very

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[80] Id.

[81] Pub. L. 96-619, as amended, supra notes 8 and 9. §710(b)(6)(A).

[82] DRA, supra note 1, at 5-12.

[83] Id., at 6-9.

[84] Id.

modest amount" would have been $194,735,710.[35] The DRA estimates that the total program cost to 1990 for utilities will be $462 million.[36] Assuming that the DRA intends that the one-half of one percent estimate apply to total projected revenues for the gas industry to 1990, and assuming arguendo that gas industry revenues for the nine year period are equal to the revenues for 1979, the overall effect of the CACS Program on the gas industry would substantially exceed $1.7 billion. Furthermore, the DRA does not state whether annual Program costs would increase or decrease over time, as the implementation process proceeds over the nine year period. While we trust that the DRA does not intend such a result, the DRA should be revised to clarify the overall Program impacts.

Finally, assuming that there is some quantitative basis for the $197 million amount, A.G.A. does not believe that this amount would be considered "very modest" by state regulatory authorities who will be asked to rate-base such costs or by the shareholders of utility companies whose state regulatory authorities refuse to allow such amounts to be rate-based.

The DRA states that natural gas conserved through the CACS Program may be sold to industrial customers at higher rates than would have been available had that gas been sold to residential customers.[37] This observation belies the fact that there are substantial statutory demand constraints which could prevent these

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[35] Gas Facts, supra note 22, at 103.

[36] DRA, supra note 1, at 1-20.

[37] Id., at 6-7.

sales.[88] Furthermore, industrial customers generally pay less for gas than do residential customers.[89]

Finally, the DRA predicts that the CACS Program will require only 400 additional persons and $15 million to administer the Program at the state level.[90] However, the DRA does not take into consideration that some states may elect not to participate in the CACS Program. If this is the case, utilities may be required to assume part of the responsibility for CACS Program administration under the Federal CACS Standby Authority. Thus, utilities may be required ultimately to assume some of these costs.

Chapter 7: Cost of Energy

In spite of its stated purpose, this Chapter does not demonstrate the importance of energy costs to the CACS Program. In fact, energy cost projections are not used anywhere in the DRA to evaluate the cost-effectiveness of the program, or to evaluate the customer participation levels which are essential to the energy savings and ultimate success of the CACS.

The DRA's conclusion that the impact of energy prices on the CACS program can be projected using an index of relative prices is incorrect. It is not the relative price of energy that will determine the rate of retrofit and subsequent energy savings, but the actual prices (i.e., dollars saved versus the cost to retrofit). The payback criterion, which the DRA does not apply to this analysis,

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[88] E.g., the Powerplant and Industrial Fuel Use Act of 1978, Pub. L. 95-620; 92 Stat. 3289; 42 U.S.C. §8301; and Title II of the Natural Gas Policy Act of 1978 (incremental pricing), Pub. L. 95-621; 92 Stat. 3350; 15 U.S.C. §3301.

[89] Gas Facts, supra note 22, at 116.

[90] DRA, supra note 1, at 6-10.

is the proper way to evaluate conservation investments and determine energy savings.

In addition, the Chapter includes a superfluous discussion of the marginal costs of energy which has no relation to actual utility rate structures, and incorrectly compares gas and oil wellhead prices with retail electric prices in an inaccurate attempt to determine future growth rates.[91]

Chapter 8: Potential Energy Savings in Buildings

This Chapter states that total energy use in small commercial buildings is only 15% of the total commercial sector energy consumption, thus limiting the savings potential for retrofits in this category. This assessment illustrates the limitations of CACS Program, which -- according to the DRA -- will save an estimated 1 percent of total commercial energy consumption per year (i.e., in 1979, this would have been a total of 80 TBtu per year out of an estimated 1979 commercial energy consumption of 8.0 quads).[92] A recent A.G.A. survey of gas utilities indicates that commercial gas customers reduced per-user consumption by an average of 2.2%/year between 1973 and 1979, prior to the CACS Program.[93]

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[91] Id., at 7-1 through 7-7.

[92] A Survey of Actual and Projected Conservation in the Gas Utility Industry: 1973-1990, American Gas Association (Arlington, Virginia, March, 1981.

[93] Estimate of total commercial end-use consumption: Gas - 2.5 quads (Gas Facts, supra note 22, at 83); Electricity - 1.7 quads (Statistical Yearbook, supra note 24, at 2); Coal - 0.2 quads (DOE, Monthly Energy Review, January, 1981, at 22); Fuel Oil - 3.6 quads. This fuel oil estimate is derived by calculating the difference between total residential/commercial consumption of 6.9 quads, shown by DOE's Monthly Energy Review, and estimated residential fuel oil consumption of 3.3 quads based on 15.8 million oil heated homes @1500 gallons/home. Using this break-out, fuel oil represents 45% of total commercial consumption of 8.0 quads.

The section also concludes that "savings of at least 15 to 20 percent of [an audited building's] total energy use should be realized from implementation if recommended retrofit measures.[94] Given this assessment, it is not clear why energy savings for commercial and multifamily buildings vary in each of the four cases examined, ranging from a 5%-10% savings in the "no-action" case to 20%-25% in the "enhanced rules" case.[95] The DRA offers no explanation as to why a retrofit done without a mandatory CACS Program would save less energy than a retrofit done under the Proposed Rule. Assumptions such as these act to bias the results in favor of the Proposed Rule.

Chapter 9: RCS Coverage

It is not clear as to which of the references listed in Chapter 12 was used to compile the data presented. Therefore, it is difficult to verify the information given. Nevertheless, by using the DRA data only, we do not believe that the DRA has correctly calculated the number of buildings which will be covered in this Program. Our analysis was exacerbated, however, because it is difficult to determine whether the DRA considered buildings which are eligible under both electric and gas energy use criteria and counted them only once in determining the total building number.

Using information contained in Tables 9-3 and 9-7,[96] the total eligible commercial floor space and total number of eligible buildings can be calculated. We derived the following chart from information

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[94] DRA, supra note 1, at 8-9.

[95] Id., at 10-25.

[96] Id., at 9-15.

in those tables to show the percentage of the commercial sector covered by the CACS Program:

	% of Buildings	% of Floor Space
Fossil (<1,000 therms)	59.5%	11.0%
Electric (<4,000 Kwh)	16.0%	1.1%
Total eligible (some buildings are counted twice)	75.5%	12.1%

Based on this chart, it appears that gas utilities will be auditing over three times the number of buildings that the electric utilities will be auditing and will audit ten times the floor space. We recognize that the "fossil" fuel category includes oil as well as gas: however, there is no indication in the DRA as to a projected participation rate for oil dealers. Nevertheless, there is a disproportionate burden placed on the gas utility industry.

As we discussed earlier, the DRA estimates that approximately 55% of the buildings in the commercial sector will be covered by the CACS Program.[97] These structures account for approximately 8.9 percent of the energy consumed by the commercial sector.[98] A.G.A. believes that this conclusion is the most eloquent argument against DOE's choice of Option 2 as the interpretation for the commercial building definition. To require that 55 percent of the nation's commercial buildings be audited when this target group uses only 8.9 percent of the total commercial building energy use[99] is ludicrous. By selecting Option 1 -- as we propose in our Written

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[97] Id.

[98] Id.

[99] Id.

Comments -- DOE will reduce the total number of buildings covered, thereby reducing the costs of the CACS Program for covered utilities.

Chapter 10: Methods of Analysis

The Tables on page 10-25 make unsubstantiated assumptions which constituted the input data for the multifamily and commercial building analyses. These assumptions contain the essential data upon which the DRA rests, yet they are impossible to evaluate without substantiation. For example, the DRA predicts that the Proposed Rule will result in a retrofit to audit ratio of two-thirds.[100] Furthermore, customers who retrofit are projected to experience a 20 percent energy savings.[101] A G.A. does not believe that describing the workings of the Oak Ridge National Laboratory Residential and Commercial Energy Models provides sufficient justification for the assumptions contained the Tables describing the input data.

Chapter 11: Regional Studies

Option 1 for commercial buildings was not analyzed in this Chapter "due to time restrictions."[102] A.G.A. would be particularly interested in the results of such an analysis, since we believe that Option 1 is the only Option entirely consistent with the NECPA definition of commercial building. Furthermore, since the DRA concludes that "all of the Options are cost-effective in all of the regions,"[103] A.G.A. believes that serious consideration should be given to Option 1.

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[100] Id., at 10-25.

[101] Id.

[102] Id., at 11-5.

[103] Id., at 11-3.

CONCLUSION

The DRA does not present data adequate to support its conclusions. The conclusions reached by DOE from the DRA for the CACS Program cannot be evaluated unless additional specific data are presented. The DRA presents a large amount of qualitative information, without providing the supporting data to the final figures necessary to evaluate the cost-effectiveness of the Program. Specifically, the following information must be included in the DRA:

- The amount of gas, electricity and oil which comprise the 14 MBOE/year estimated annual program savings shown in the DRA,[104] and the relative value, if any, the DRA has associated with each fuel type. Treating gas and oil as the same "fossil fuel" (as discussed in Chapter 9) is unrealistic and inconsistent with present federal policy, which encourages gas use to "back-out" oil in many applications.

- The anticipated participation level of fuel oil dealers, whose participation is not mandatory under NECPA. According to A.G.A. estimates, fuel oil accounts for 45% of commercial energy consumption.[105] A low participation rate for fuel oil dealers would significantly limit the Program's effectiveness.

- A breakout of Program cost figures for electric and gas utilities, and the methodology for arriving at these figures.

- A more detailed explanation of the multifamily sector, including percentage of units covered specifically by the CACS Program which comprise part of the 9 MBOE/yr. projected energy savings.[106]

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[102] Id., at 11-5

[103] Id., at 11-3.

[104] Id., at 1-20

[105] Supra note 93.

[106] DRA, supra note 1, at 1-20.

- An explanation as to why annual energy savings and program costs are assumed to be constant through 1990.[107] It is extremely likely that the Program will not be cost-effective initially until retrofits are widely accepted. DOE should state whether the assumed audit/retrofit rates and costs represent averages, and at what point in time the Program becomes cost-effective. These data are essential for utility planning.

In addition to the foregoing problems, the DRA does not adequately assess the program impact on gas utilities, where a significant number of customers will be included in the Program. The 1,000 therm/month threshold represents an annual consumption of 1200 MMBtu and is 65% greater than the 1979 average annual gas consumption for a commercial customer (726.5 MMBtu).[108] Thus, the compliance burden for gas utilities will be substantial. The DRA makes no attempt to analyze this situation in relation to potential savings or program costs.

Finally, the DRA does not give adequate attention to analyzing the alternative approaches to the Proposed Rule. The DRA assesses three alternative approaches to the Proposed Rule case, none of which would comply with NECPA and would therefore require legislative change. Furthermore, DOE has not attempted to analyze reasonable alternative interpretations to Option 2 in defining "eligible commercial customers." While the DRA admits that both Option 1 and 2 would comply with NECPA, Option 2 was selected for incorporation in the Proposed Rule. Nevertheless, A.G.A. believes that only Option 1 is consistent with NECPA.

American Gas Association
Legislative and Regulatory
Affairs Division

March 17, 1981

ARH/ajb

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[107] Id., at 1-21.

[108] Gas Facts, supra note 1, at 69.

EXHIBIT III

STATEMENT OF

THE AMERICAN GAS ASSOCIATION

BEFORE THE

SUBCOMMITTEE ON AGENCY ADMINISTRATION

OF THE

COMMITTEE ON THE JUDICIARY

U.S. SENATE

ON S. 684

(BYRD, I-VA)

"RULES REVIEW ACT OF 1981"

AND ON S. 890

(SCHMITT, R-NM)

"REGULATORY REDUCTION AND CONGRESSIONAL CONTROL ACT OF 1981"

April 30, 1981

Introduction:

The American Gas Association (A.G.A.) submits the following statement on S. 684 (Byrd, I-VA), the "Rules Review Act of 1981", and on S. 890 (Schmitt, R-NM), the "Regulatory Reduction and Congressional Control Act of 1981." A.G.A. is a national trade association representing nearly 300 natural gas transmission and distribution companies serving over 160 million consumers in all 50 states. A.G.A. member companies account for nearly 85% of the nation's total annual gas utility sales.

Regulatory reform is an issue in which the natural gas industry is extremely interested. For example, the siting, construction, and licensing of major new energy facilities are governed by several federal agencies as

well as state and local governments. Importation of natural gas is governed by the Federal Energy Regulatory Commission (FERC) and by the Economic Regulatory Administration (ERA) within the Department of Energy (DOE). Furthermore, pipeline curtailments are governed jointly by FERC and ERA. Pipeline safety is governed by the regulations of both the Department of Transportation (DOT) and by the Occupational Safety and Health Administration (OSHA). Finally, there is a myriad of federal regulations governing the energy conservation activities of local distribution (utility) companies. For these reasons, the natural gas industry is keenly interested in any legislation which affects the regulatory process.

A.G.A.'s statement will focus upon the following crucial issues:

A. General Comments on S. 684 and S. 890

- A.G.A. opposes the legislative veto provisions contained in the proposed amendments to the Administrative Procedure Act (APA).[1] Legislative review of major rulemakings will only serve to slow down an already cumbersome administrative process. Congress can solve any concerns it has with agency rulemaking by drafting enabling legislation which gives agencies adequate guidance in the promulgation of rules. While a legislative veto might be an appropriate mechanism in certain specific and limited regulatory applications, A.G.A. does not believe this mechanism is well-suited for across-the-board application to the regulatory process.

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[1] 5 U.S.C. §500; S. 684's legislative veto provision would add a new §560 to the APA, and S. 890's legislative veto provision amends §553 of the APA.

- While we vigorously oppose generic legislative vetoes, S. 684 takes a limited approach to the application of the legislative veto mechanism and, therefore, would be far less onerous.

B. Specific Problems with S. 890

- A.G.A. opposes the definition of "rule" contained in Section 2 of S. 890. The proposed definition would require that virtually all rules be subjected to the legislative veto mechanism. This overly-broad definition would require Congressional review of such case-specific regulatory proceedings as pipeline rate cases and licensing or certification proceedings. These matters should not be the subject of Congressional review.

A. General Comments on S. 684 and S. 890

- Legislative Veto

A.G.A. opposes the application of a legislative veto to all agencies as provided in these legislative proposals. While the legislative veto may have application in some specific and limited instances,[2] we do not believe it appropriate to require all rules to be submitted to Congress for review. Legislative review of major rulemakings will only serve to further encumber an already cumbersome process.

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[2] At this time, A.G.A. is opposing a constitutional challenge to the legislative veto provision in §507 of the Natural Gas Policy Act regarding Phase II of incremental pricing (Consumer Energy Council of America v. FERC, D.C. Cir. Docket Nos. 80-2184 and 80-2312). This is one specific and limited instance in which we believe the legislative veto has appropriate application, because of the extraordinary nature of the problem -- how to assure this country's energy future.

When Congress fails to give an agency specific guidance in enabling legislation, the result is an inappropriate delegation of legislative authority to an administrative agency. By adopting an across-the-board legislative veto, Congress is saying -- in essence -- it cannot make a decision on a specific subject in the first instance. Therefore, Congress abdicates its primary decisionmaking responsibilities in favor of a "second-look" via the legislative veto mechanism. While we take no general position on the constitutionality of legislative vetoes, we believe that Congress must be aware that an across-the-board legislative veto will be challenged, and its efficacy will be determined by the courts. The only result will be further delay in the regulatory process. As one observer noted:

> Another deleterious effect of the legitimation of the legislative veto will be an increase in that very practice of congressional delegation of vague and standardless rulemaking authority which has placed us in our current predicament. . . . [T]he delusion that it would be able to control the agencies through the legislative veto will render Congress all the more ready to continue and expand the transfer of basic policy decisions to the agencies. . . . By enabling Congress to have its way -- that is, effectively to control the outcome -- without affirmatively accepting the responsibility in a record vote, the legislative veto is an egregious subversion of the democratic process.[3]

Thus, an omnibus legislative veto could actually <u>increase</u> the number of unreasonable major rules and <u>expand</u> the

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[3] Scalia, Antonin, <u>The Legislative Veto: A False Remedy for System Overload</u>, 3 REGULATION: AEI JOURNAL ON GOVERNMENT AND SOCIETY 19 (November/December 1979) at 25.

effective authority of federal agencies. Consequently, A.G.A. is convinced that an omnibus legislative veto provision is ill-advised and would not solve any of the problems with the regulatory process which have prompted the approaches taken by this legislation.

One specific problem we have with S. 890's legislative veto provision is Section 802(f) which provides that Congressional inaction regarding or rejecting the joint disapproval resolution is not to be deemed an approval of the regulation. This subsection provides the strongest argument in favor of deleting the comprehensive legislative veto: Why should Congress be involved at all if its only involvement is to veto regulations? This provision abrogates the entire philosophy behind a generic legislative veto. In order to make a decision as to how to vote on the regulation, Congress must review the entire rulemaking file. If review by Congress is to be meaningful at all, then its failure to take the affirmative action of vetoing the rule must be deemed a Congressional affirmation of the rule's statutory integrity. Proposed Section 802(f) also creates confusion as to how Congressional intent is to be interpreted. In the case of the vast number of major rules which Congress does <u>not</u> veto, it will become more difficult for affected parties to mount a successful challenge in the courts.

The legislative veto provisions of S. 684 are far less onerous than the sweeping provisions of S. 890. S. 684 is

a two-house veto and offers a degree of assurance -- unlike S. 890's one-house veto -- that the legislative veto will not be used as a weapon to thwart the legitimate exercise of agency rulemaking authority. Whereas S. 890 would permit any member of the House or Senate to introduce a resolution of disapproval of a recommended final rule [proposed §802(c)(3)], S. 684 would require that at least 20% of the members of <u>each</u> house agree to review the rule (both initially and in response to the other house's veto). Therefore, even if one house vetoes a rule, S. 684 would require that at least 20% of the members of the other house agree to review the rule <u>itself</u>. While we strenuously oppose the omnibus legislative veto mechanism, the S. 684 two-house veto approach is less objectionable than the S. 890 one-house legislative veto. A glaring shortcoming in S. 684, however, is its lack of a provision similar to Section 802(f) of S. 890 which at least addresses -- though incorrectly -- the question of what inference is to be drawn if Congress takes no action on a rule. If Congress is to review rules for their shortcomings, failure to veto should constitute an implicit approval of a rule's statutory integrity.

<u>B. Specific Problems with S. 890</u>

Section 2(a) of S. 890 would amend Section 551(4) of the APA to change its definition of "rule" to include specifically:

> . . . the approval or prescription for the future of rates, wages, corporate or financial structures

> or reorganizations thereof, prices, facilities, appliances, services or allowances therefor, or of valuations, costs, accounting, or practices bearing on any of the foregoing; . . .

Application of this definition would result in the review, by Congress, of nearly every agency activity dealing with specific corporations. We cannot believe that Congress intends such a result.

Examples of agency activity covered by this definition include:

- Pipeline rate cases before the FERC;
- Licensing/certificating activities of the FERC;
- Corporate reorganizations subject to the Securities Exchange Commission (SEC);
- Certain financial disclosures required to be submitted to the SEC; and,
- Application of the tax laws to specific corporate situations before the Internal Revenue Service (IRS).

This list is not all-inclusive, but it does illustrate the type of matters Congress would be required to review pursuant to the Section 2(a) definition of "rule". In addition to our strenuous objection to an omnibus legislative veto provision, A.G.A. believes that the S. 890 "rule" definition is an unnecessary burden to both the regulatory and the legislative processes.

Consequently, A.G.A. urges that Section 2(a) be revised significantly to circumscribe Congressional review. This can be accomplished by limiting Congressional review

to major rules[4] or, at the very minimum, to rules which do not apply to the kind of specific corporate activities discussed above.

We are attaching as Exhibit I a reasonable definition of "rule" which we urge be adopted in lieu of Section 2(a) of S. 890. The source of this definition is H.R. 746 (Danielson, D-CA). A.G.A. also urges that the APA definition of "rule" not be amended, as Section 2(a) of S. 890 would do. Congress should define those rules which are subject to legislative veto in an specific and limited manner. This can be accomplished by defining the term "rule" for purposes of legislative veto application in proposed Section 801(2) as we have outlined in Exhibit I.

CONCLUSION

A.G.A. appreciates the opportunity for presenting our views on S. 684 and S. 890. We sincerely urge Congress to reexamine this legislation in light of the comments we have

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[4] A.G.A. supports the "major rule" definition contained in Section 1(b) of Executive Order 12291 on Federal Regulation (45 Fed. Reg. 13193; February 17, 1981):

(b) "Major rule" means any regulation that is likely to result in:
(1) An annual effect on the economy of $100 million or more;
(2) A major increase in cost or prices for consumers, individual industries, Federal, State or local government agencies, or geographic regions; or
(3) Significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic or export markets.

made. A.G.A. firmly believes that an omnibus legislative veto approach to regulatory reform is inappropriate and should not be viewed as a panacea for solving the problems created by a complicated and overlapping bureaucracy. True regulatory reform can only be accomplished in a meaningful way by addressing the organic statutes which have created the vague agency mandates. While we realize that this is going to be a tedious, difficult task, we believe it is an absolutely essential process. A.G.A. will be pleased to work with this Subcommittee and the Congress on this matter.

EXHIBIT I

Amendments to S. 890

(A) Proposed Section 2(a) should be deleted and subsections (b) and (c) redesignated as (a) and (b) respectively.

(B) The proposed Section 3(a) amendment adding new §801(2) to the APA should be deleted and the following inserted:

(2) The term "rule" means a rule as defined in Section 551(4) of this title but does not include --

(A) a rule involving a military or foreign affairs function of the United States;

(B) a rule involving agency management or personnel, or the internal revenue laws of the United States;

(C) a rule relating to --

(i) acquisition by the Federal Government by contract of real or personal property or services, through purchase, lease, or barter, that is promulgated in compliance with criteria and procedures established by the Administrator for Federal Procurement Policy or the Administrator of General Services; or,

(ii) management or disposal of real or personal property or records of the United States, that is promulgated in compliance with criteria and procedures established by the Administrator of General Services;

(D) a rule relating to property or contracts of the Tennessee Valley Authority;

(E) an interpretative rule, general statement of policy, or rule of agency organization, procedure, or practice; or,

(F) a rule of particular applicability respecting rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services, or allowances therefor or to valuations, costs, or accounting, or practices bearing on any of the foregoing.

Prepared Statement of the American Industrial Health Council

The American Industrial Health Council ("AIHC") is pleased to present the following statement in support of S. 1080, the Regulatory Reform Act. AIHC fully supports the efforts of Senator Laxalt and the many cosponsors of S. 1080 to improve the effectiveness of regulatory agencies and to reduce the costs they impose upon the public.

AIHC is an organization of nearly 140 American companies and 80 trade associations which are coordinating their scientific and administrative resources to help the Federal government develop scientifically valid, reasonable policies for employee health in the industrial workplace. AIHC's members include producers of chemicals, steel, aluminum, textiles, pharmaceutical products, oil and consumer goods. A membership list is attached (Attachment I).

When AIHC was established in October 1977, OSHA was in the process of developing a generic regulation for the identification, classification, and regulation of carcinogens in the workplace. A final regulation was published on January 22, 1980. Since 1977, AIHC has been involved in a number of other rulemakings. However, we believe the OSHA generic carcinogen rulemaking, which is discussed in detail in an attachment to this statement (Attachment II), provides the best example of how regulatory analysis requirements could improve the federal regulatory decision making process, enhance the delivery of benefits, and reduce the cost of regulation. If legislation such as S.1080 had been in effect during that proceeding, we believe the rulemaking would have been more focused and more likely to produce a reasonable, efficient approach to the regulation of workplace hazards.

Based on our experience in the OSHA generic carcinogen proceeding and other agency rulemakings, AIHC developed a number of recommendations for reform of agency decision making.

These objectives formed the basis for AIHC testimony in the 96th Congress before the Administrative Practice and Procedure Subcommittee of the Senate Judiciary Committee, the Senate Governmental Affairs Committee, and the Administrative Law Subcommittee of the House Judiciary Committee. We are pleased to state that S.1080 substantially achieves the objectives identified by AIHC for regulatory reform, and that it does so in a logical, coherent fashion.

AIHC has identified the following objectives for regulatory reform legislation:

> Agencies should prepare an initial and a final regulatory analysis for all major rules.
>
> The regulatory analysis should include a succinct statement of the need for, and objectives of, the rule.
>
> Regulatory alternatives should be developed and analyzed.
>
> The projected benefits of all final rules should be reasonably related to the costs of compliance; if no reasonable relationship exists, the agency should explain why existing law or other considerations justify the agency's choice of the rule.
>
> All federal agencies should conduct a thorough analysis of the beneficial effects and economic and societal impacts of each alternative method of achieving the regulatory objectives, and choose the most cost-effective alternative or explain their failure to do so.
>
> The regulatory analysis should be part of the record of the rulemaking subject to consideration by a court at the time of its review of the regulation.
>
> To ensure a full and balanced discussion of the desirability of the regulatory objective and alternative means of achieving it, there should be an opportunity for public comment prior to issuance of the proposed regulation.
>
> Regulations should set performance objectives rather than rigid design and operating standards where feasible.
>
> There should be executive branch oversight of regulatory analyses to ensure that they comply with the legislative requirements, and that they are performed for all rules which will have a major impact.

Although our principal focus was and is chronic health regulation, AIHC has approached regulatory reform as an important and achievable goal applicable to all federal regulatory activities. This statement discusses the regulatory reform issues of primary significance to AIHC, and the ways in which S.1080 addresses these concerns.

A. The Regulatory Analysis

Regulatory analysis is essentially a management tool. As stated by one scholar, "Effective resource management depends on measuring the costs and benefits of alternative programs and selecting that set of programs and levels of spending that gives the greatest excess of benefits over costs." Martin J. Bailey, Reducing Risks to Life 2 (American Enterprise Institute 1980). The urgent need for such management has been well stated by the same author:

> In recent years the role of the government has increased sharply, especially through the sweeping regulatory powers vested in OSHA and in the Environmental Protection Agency (EPA). Although regulations relating to health and safety have a long history, the sweep and scope of the new powers are unprecedented. Those who regulate can impose virtually unlimited costs on the private sector of the economy--they can reduce private standards of living without going through the legislative processes of enacting new taxes and appropriations....To limit wasteful and irresponsible demands by the new regulators, there is an urgent need for standards and procedures by which they would be required to weigh costs against benefits.

Id., at 18.

Current law varies regarding the need for agencies to conduct an evaluation of the beneficial effects and economic and societal impacts of a proposed regulation. However, such an evaluation should be performed by every agency for each significant rulemaking. S.1080 requires such an analysis for all major rules. Moreover, the bill requires that, except where an agency is acting pursuant to a statute which directs otherwise,

the benefits of a rule must justify its costs and adverse effects, and the rule must substantially achieve the rulemaking objectives in a more cost-effective manner than alternatives. AIHC fully supports these provisions, and believes that they should ensure that, in the future, the benefits achieved by a rule will be reasonably related to the costs it imposes.

Cost/benefit is a shorthand description of a complex process. Costs include not only monetary costs imposed on those subject to regulation but also indirect burdens such as the impact on research and development. Benefits include not only improvement in health from reduced exposure but also other significant non-health values such as the social and economic value of the substance to be regulated and, in appropriate cases, the preservation of the individual choice and preferences of the consumer. The length of time provided for compliance is also an important factor in determining both the compliance costs and the benefits to society of a regulation.

AIHC has never suggested that agencies should be required to compute the dollar benefits conferred by a regulation and make a finding that they exceed the costs imposed. Accordingly, we strongly support the guidelines in the bill for agency evaluation of costs and benefits, which require quantification where feasible, but which specify that an agency is not required to evaluate the relationship between costs and benefits primarily on a mathematical basis.

We believe that preparation of a regulatory analysis will not necessarily result in any delay in the promulgation of a major rule. Often, development of such a rule from advance notice or proposal to promulgation has required several years. In two separate rulemakings, AIHC has had economic analyses conducted by independent consultants. These analyses were prepared well within the time limitations of those rulemakings. Even if the preparation of a regulatory analysis results in some initial delay in proposing a rule, the proposal is likely

to be more closely focused on its objectives. Careful analysis at the outset should lead to earlier implementation of a better rule, thereby increasing the net benefit to society and reducing the likelihood of litigation.

The need for a thorough regulatory analysis is demonstrated by the OSHA generic carcinogen rule. The regulation requires OSHA to ignore certain information pertinent to the need for regulatory action when identifying and classifying potential carcinogens, fails to provide any mechanism for assessing the health benefits and costs of future carcinogen standards or determining whether there is a reasonable relationship between benefits and costs, and calls for regulatory priorities to be set without regard to costs, benefits or even OSHA's administrative resources. Indeed, the preamble to the final regulation flatly states that "a cost-benefit approach to setting permissible exposure limits would be inappropriate". 45 Fed. Reg. at 5239 (January 22, 1980).

One specific example may suffice to demonstrate the inconsistency between the approach to regulation specified in S. 1080 and that followed by OSHA in its cancer policy. The regulation specifies that permissible exposure limits to Category I carcinogens "shall be achieved primarily through engineering and work practice controls except that if a suitable substitute is available for one or more uses no occupational exposure shall be permitted for those uses." Such a rigid, arbitrary approach to setting control levels virtually guarantees that OSHA's standards will not be cost-effective.

The regulatory approach embodied in the generic carcinogen rule has been subjected to substantial criticism. The Council on Wage and Price Stability, in comments on a proposed standard for exposure to coke oven emissions, where OSHA similarly took the position that it need not weigh the costs of control against the benefits of the rule, stated:

> Our analysis concludes that, at a minimum, this standard would cost $4.5 million per life saved. Whether to accept such costs is a matter for OSHA's judgment. We note, however, that this figure is extremely high, considering the amounts spent in other health and safety areas. If we were to spend $4.5 million per cancer death in an attempt to save all lives lost to cancer, we would commit ourselves to an annual expenditure roughly equal to our entire gross national product. Since we obviously cannot spend that sum, it is very important first to be sure that our cost benefit figures are correct and second to be sure we understand why society is being asked to spend $4.5 million per life saved in this area of cancer prevention to the exclusion of other areas of cancer hazard. Putting it bluntly, at least we ought to determine whether this $241 million. . .or the more conservative estimate of $160 million per year in expenditure of real resources could not save more lives if it were expended on alternative programs.

Martin J. Bailey, Reducing Risks to Life 13 (American Enterprise Institute 1980).

The need for a thorough regulatory analysis of major regulations has also been emphasized by the courts called upon to review such rules. In its standards for exposure to benzene, OSHA made no attempt to analyze the health benefits that would result from the required control measures or to relate those benefits to the project of compliance costs of $500 million to $1 billion. OSHA took the position that the compliance costs of a standard are relevant only where the standard would cause massive dislocation of an indusry or imperil the industry's existence. The U.S. Court of Appeals for the Fifth Circuit struck down the benzene standard because the health benefits which might result from that standard did not bear a "reasonable relationship" to the compliance costs imposed, as required by the Occupational Safety and Health Act ("OSH Act"). The Supreme Court's affirmance of that decision rested on other grounds, but Justice Powell, in a concurring opinion, found such an analysis required by the OSH Act.

Under S. 1080, OSHA would not be able to support its extreme readings of the OSH Act, advanced in the instances described above.

B. The Rulemaking File

S.1080 contains a number of provisions prescribing the information which agencies must provide in the notice of

proposed rulemaking and/or the statement of basis and purpose for all proposed and final rules, including non-major rules. AIHC believes that these provisions should be very helpful in assuring that an agency begins each rulemaking with an adequate factual record and in directing the agency toward more effective and less burdensome approaches.

For example, for each proposed and final rule an agency must describe the data, methodology, reports, studies, or other information upon which the rule is based, and the purposes for which the agency plans to rely or is relying on such information. In the area of chronic health regulation, agencies have frequently promulgated extremely burdensome regulations on the basis of scientific evidence that is unconclusive or inadequate. AIHC is at present working with the government in an attempt to establish mechanisms to insure that scientific decision making by regulatory agencies is based on sound data which has been independently reviewed by scientific experts. We believe that the requirement that agencies describe the data and other information upon which their rules and proposed rules are based is an important first step toward the use of good science by all regulatory agencies.

C. Consideration of Alternatives

One of the principal reasons why the cost of regulations is greater than it has to be is that many agencies have a strong preference for issuing design and operating rules -- containing detailed, inflexible requirements -- rather than performance standards. Performance standards require agencies to determine what the real objectives of a regulation are, and agencies should use them whenever possible. To this end S.1080 requires an agency to seek proposals for alternative ways to accomplish the objectives of a proposed rule that are more effective or less burdensome than the approach used in the proposed rule. In the statement of basis and purpose, an agency

must describe the alternatives it considered and state why each alternative was rejected. These provisions are extremely useful. In the OSHA generic carcinogen proceeding, well-reasoned, less burdensome alternatives were outlined by AIHC and others, but there is no indication that OSHA ever gave these alternatives serious consideration. Specifically requiring the agency to review its initial proposal in light of alternatives presented to it should improve the decision-making process.

D. Judicial Review

During the debates on regulatory reform in the previous Congress, AIHC and many others maintained that the objectives of regulatory reform will not be achieved if the courts are barred from even considering the regulatory analysis. We believe that the regulatory analysis should be part of the administrative record whch can be considered by the courts in the context of review of the final regulations. The possibility of such review will encourage the agencies to do a thorough job and not just give lip service to the regulatory analysis requirements, as some agencies have done in the past.

The judicial review provisions of S.1080 are carefully drafted to accomplish this objective. The regulatory analysis, while not subject to interlocutory review, will be part of the rulemaking record for purposes of judicial review. This is certainly appropriate since the analysis likely will provide the most thorough description and analysis of the regulation by the agency. The reviewing court thus will be allowed to determine on the basis of the entire record, including the regulatory analysis, if the regulation is arbitrary or capricious, unconstitutional, or in excess of the agency's authority.

We do not believe that this limited judicial review provision will engender any additional litigation or otherwise delay the regulatory process. However, it could help turn what

would otherwise be a paper exercise into something of consequence for the regulatory process.

E. Suggestions for Improving S.1080

As indicated by the foregoing discussion, AIHC fully supports S.1080. We offer the following recommendations for further improvement in the bill based upon our experience in previous rulemakings, particularly those which have depended upon the resolution of complex scientific issues.

1. Executive Branch Oversight

There should be some form of centralized oversight of agency compliance with the regulatory analysis requirements. Under E.O. 12291 such review is presently the responsibility of the Office of Management and Budget. AIHC believes that any regulatory reform legislation should provide a simple and direct mechanism for executive branch oversight of agency compliance with the regulatory analysis requirements, and extend it to the independent as well as the executive branch agencies. We suggest the following language be included in S.1080 to accomplish this objective:

> "A designee of the President within the Executive Office of the President shall have authority to monitor, review, and ensure compliance by agencies with the requirements of this subchapter and shall establish such procedures as may be necessary to exercise such authority. The designee shall from time to time report to the President and the Congress on agency compliance or noncompliance with the requirements of this subchapter."

Although the bill sets forth objective factors to guide the determination whether a rule is a major rule, some agencies may be inclined to avoid the requirements applicable to major rules by deciding that their rules will not have a major impact. Such evasion of the requirements of E.O. 12044 has been recognized as a problem in the past. See Hearings, Regulatory Reform Legislation, Subcommittee on Administrative Practice and Procedure of the Committee on the Judiciary, U.S.

Senate, 96th Cong., 1st Sess., pt. 2, pp. 43-50. Perhaps in part for this reason, E.O. 12291 provides that the Director of OMB may order a rule to be treated as a major rule. It would strengthen the bill to grant the executive branch, presumably through OMB, the power to designate rules as major rules. This would best be accomplished by giving the President final authority to designate any rule a major rule.

2. Closely Related Rules

S.1080 defines a major rule as "a rule or a series of closely related rules" that will have a major impact on the economy. AIHC believes that this language should be interpreted to require a series of closely related rules to be considered as one rule for determining whether the threshold for performing a regulatory analysis is met. The legislative history should make clear that generic rules and their progeny are a series of closely related rules for purposes of the regulatory requirements. The need for the bill to cover generic rules is demonstrated by our experience in the OSHA generic carcinogen proceeding. OSHA maintained that the generic regulation would impose no costs and thus required no economic impact analysis despite the fact that the regulation resolves virtually all the issues which will affect the costs of future regulations on specific substances. By requiring consideration of a series of closely related rules as one rule the argument OSHA used for avoiding the preparation of a regulatory analysis would be eliminated.

3. Advance Notice of Proposed Rulemaking

An advance notice of proposed rulemaking ("ANPR") or similar procedure should be utilized, where feasible, to facilitate public participation in major rulemakings. The publication of an advance notice of proposed rulemaking allows the public an opportunity to propose methods of achieving regulatory objectives which can be examined in the agency's regulatory analysis. AIHC therefore recommends that S.1080 incor-

porate an ANPR provision or a similar procedure designed to prevent an agency from examining only its proposal and straw man alternatives.

The provisions in S.1080 for regulatory agendas and calendars are not as effective as an ANPR provision. Experience in rulemakings where ANPRs were published indicates that such advance notice encourages participation at the most fruitful stage in a rulemaking--before the proposal has been fully developed. While calendar and agenda requirements provide some advance notice, a requirement of 60 days notice published in the Federal Register in advance of proposal of a major rule is more likely to have the intended effect of actually spurring early public response to regulatory activity.

4. Objective Science and Health Risk Determinations

The principal emphasis of S. 1080 and other regulatory reform proposals has been on analysis of the economic impact of regulations. There are no provisions regarding analysis of the underlying scientific data base or review of the scientific evaluation on which an agency relies in proposing or promulgating a rule. Yet good science is central to sound regulatory decisions in many areas. Regulations based on faulty science are not, except by chance, either beneficial to health or cost-effective. Accordingly, scientific determinations which involve assessing the most probable human risk should be made only after all relevant data are reviewed by the best scientists. Unfortunately, there are numerous instances where public resources have been misused or wasted because of reliance on unsound science without validation of the data base or evaluation of the scientific criteria and their application. A number of such instances are described in Attachment III.

Risk assessment and management, which are the heart of the regulatory process involving chronic health risks, contain two separate but interacting components: scientific evaluations of risk and societal decisions as to whether and how

much regulatory action is necessary. Because good science is the essence of a sound national policy on control of chronic health hazards, AIHC has proposed that an independent Science Panel be created to serve all regulatory agencies dealing with chronic health hazards by centralizing the scientific determinations of whether certain materials are likely to pose hazards to health. The Panel would be made up of highly qualified scientists, chosen on the basis of merit from the relevant scientific disciplines, and would assure that all regulatory agencies start with a sound scientific evaluation as a basis for their regulatory decisions. The Panel would focus on a limited number of critical materials that become of interest to regulatory agencies each year, because of their potential to affect health adversely, and for which the scientific issues involved in the determinations are particularly difficult. Attachment IV is a brief summary of the AIHC Science Panel proposal.

Efforts to ensure the validity of the scientific basis of regulation need not await development of a consensus on the Science Panel concept. AIHC has developed some suggestions to improve the scientific bases for identification and regulation of chronic health hazards. We recommend that sections 553(c)(1)(E) and 553(e)(1)(E), which require agencies to describe data, methodology, reports, studies, or other information substantially relied upon in the rulemaking, be amended to include "scientific evaluations" among the information to be described. Additionally, the following subparagraph should be added to section 553(c)(1) and 553(e)(1):

> "Where the rule requires the resolution of scientific issues, a notice of where scientific evaluations, and data or other information not exempt from disclosure pursuant to section 552(b)(4) of Title 5, may be inspected by the public, and a description of any action undertaken by the agency to validate the data and to assure that its resolution of scientific issues is consistent with current independent expert scientific opinion."

These amendments would facilitate the review of agency actions requiring the resolution of scientific issues. They would result in public awareness of the processes and criteria used by the agency for validation of the data base, including any peer review. The amendments would also make agencies' scientific evaluations available to the public with a meaningful opportunity for comment, in much the same way that regulatory analyses are made available for public review of economic evaluations of major rules.

The provisions in S.1080 requiring agencies to describe the data and other information substantially relied upon in rulemaking lay the groundwork for ensuring that the scientific evidence is sound. The amendments suggested above would make agencies' reasoning processes -- their evaluations and validation efforts -- available for public review. However, a mechanism is still needed to secure review by independent scientific experts of the scientific evidence and scientific evaluations relied upon by agencies, where such review is warranted.

AIHC believes that executive branch oversight of agencies' scientific decision making is the most effective way to ensure an adequate science base for regulation. We recommend that the Office of Management and Budget, perhaps in consultation with the Office of Science and Technology Policy ("OSTP"), be authorized to monitor major agency actions requiring the resolution of scientific issues, in order to assure that they are consistent with current independent expert scientific opinion and that they provide substantial support for the rule. Where appropriate, the Executive Office of the President would review the scientific evidence and the scientific evaluations relied upon by the agency. Such review would be comparable to executive branch oversight of agency compliance with the regulatory analysis requirements. It could

be accomplished by adding the following paragraph to the executive branch oversight language suggested above:

> "Where agency action subject to the requirements of this subchapter substantially depends upon the resolution of scientific issues, a designee of the President within The Executive Office of the President shall monitor and review the validity and adequacy of scientific evidence relied upon by the agency."

Conclusion

AIHC recognizes that regulatory reform legislation is not a panacea for all of the current regulatory problems faced by industry. Many of these problems can only be solved by substantive amendments of a number of the organic statutes which mandate regulatory programs. However, passage of S.1080 would result in substantial improvements in regulatory decision-making. We believe that passage of this legislation should be given the highest priority by the Congress.

AIHC would be pleased to elaborate upon any of the points covered in this statement, and, in particular, to work with the Committee to incorporate into S. 1080 a means for ensuring the validity of the scientific basis of chronic health regulation.

Respectfully submitted,

American Industrial Health Council

by Ronald A. Lang
Ronald A. Lang
Executive Director

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ATTACHMENT I--AIHC MEMBERSHIP LIST

MEMBER COMPANIES

AMERICAN INDUSTRIAL HEALTH COUNCIL

Air Products & Chemicals, Inc.
Allied Chemical Corp.
American Acrylic Corp.
American Chemical & Refining Co., Inc.
American Cyamamid Co.
American Hoechst Corp.
AMOCO Chemical Corp.
Apollo Colors, Inc.
ARCO Chemical Co.
Ashland Chemical Co., Div. of
Ashland Oil, Inc.
Badische Corp.
Boehringer Ingelheim, Ltd.
Borg-Warner Chemicals, Div. of
Borg-Warner Corp.
Bristol-Myers
Buffalo Color Corp.
Burroughs Wellcome Co.
Carstab Corp.
Carter-Wallace, Inc.
Carus Corp.
Celanese Corp.
Champion International Corp.
Chattem, Inc.
Chemical Exchange Co., Inc.
Chemplex Co.
Chevron Chemical Co.
Ciba-Geigy Corp.
Cities Service Co.
Conoco Chemicals Co.
Cordova Chemical Co.
Cosden Oil & Chemical Co.
Coulton Chemical Corp.
Cyclo Chemicals Corp.
Diamond Shamrock Corp.
Dixie Chemical Co.
Dow Chemical, U.S.A.
Dow Corning Corp.
E.I. du Pont de Nemours & Co.
Eastman Kodak Co.
El Paso Products Co.
Essex Chemical Corp.
Ethyl Corp.
Exxon Chemical Co., U.S.A.
Firestone Tire & Rubber Co.
First Chemical Corp.
FMC Corp.
General Electric Co.
Georgia Pacific Corp.
Goodrich Chemical Co., B.F.
Goodyear Tire & Rubber Co.
W.R. Grace & Co.
Grantham, Inc.
Great American Chemical Corp.
Great Lakes Carbon Corp.

Gulf Oil Corp.
Halcon Research & Development Corp.
Heatbath Corp.
Henkel Corp.
Hercules, Inc.
Hilton Davis Chemical Co.
Hoffmann-La Roche, Inc.
Hooker Chemicals & Plastics Corp.
Hughson Chemicals, Lord Corp.
ICI Americas, Inc.
International Minerals & Chemical Corp.
Kamco Plastics, Inc.
Kay-Fries, Inc.
Kenrich Petrochemicals, Inc.
Koppers Company, Inc.
Linden Chemicals and Products, Inc.
Loctite Corp.
Mallinckrodt, Inc.
Merck & Co., Inc.
Merichem Co.
Mobay Chemical Corp.
Mobil Chemical Co.
Monsanto Co.
Mooney Chemicals, Inc.
Morton Chemical
NALCO Chemical Co.
National Distillers & Chemical Corp.
Nepera Chemical Co., Inc.
NIPRO, Inc.
Northern Petrochemical Co.
Olin Corp.
Owens-Corning Fiberglas Corp.
Penick Corp.
Pennwalt Corp.
Petrolite Corp.
Pfister Chemical Corp.
Pfizer, Inc., Chemicals Div.
Phillips Chemical Co., Div. of
Phillips Petroleum Co.
Pilot Chemical Co.
Pope Chemical Corp.
PPG Industries, Inc.
Pressure Vessel Services, Inc.
Procter & Gamble Co.
Reilly Tar & Chemical Corp.
Republic Steel Corp.
Revlon Foundation
R. J. Reynolds Industries, Inc.
Rohm & Haas Co.
Ruetgers-Nease Chemical Co., Inc.
Saban Electric Corp.
Shell Chemical Co.
SOLTEX Polymer Corp.
Specialty Products Co.
Standard Oil Co. (Ohio)
Stauffer Chemical Co.
R. R. Street and Co., Inc.
Sun Chemical Corp.
SunOlin Chemical Co.
Sunset Plastic Products
Tenneco Chemicals, Inc.
3M Co.

Paul Uhlich & Co.
Union Carbide Corp.
Uniroyal Chemical Co.
U.S. Borax
United States Steel Corp.
Univar Corp.
R. T. Vanderbilt Co., Inc.
Velsicol Chemical Corp.
Virginia Chemicals, Inc.
Vulcan Materials Co., Chemicals Div.
Witco Chemical Corp.

LIMITED MEMBERSHIP

Ansul Co., The
Certainteed Corp.
Crown Zellerbach
Ferro Corp.
Fisher Scientific Co.
McKesson Chemical Co.
National Steel Corp.
Morton Co.
Upjohn Co., The

AMERICAN INDUSTRIAL HEALTH COUNCIL

MEMBER ASSOCIATIONS

Adhesives and Sealants Council
Adhesives Manufacturers Association
Aluminum Association, Inc.
American Boiler Manufacturers Association
American Chemical Institute
American Coke and Coal Chemicals Institute
American Foundryman's Society
American Iron and Steel Institute
American Meat Institute
American Mining Congress
American Paper Institute
American Textile Manufacturers Institute
American Welding Society
American Wood Preservers Institute
Asbestos Information Association
Associated General Contractors
Association Industries of Massachusetts
Business Round Table
California Fabricare Institute
Canadian Pulp and Paper Association
The Carpet and Rug Institute
Chamber Commerce of the U.S.
Chemical Manufacturers Association
Chemical Specialties Management Council
Chemical Specialties Mfgrs. Association, Inc.
Chlorine Institute, Inc.
Cosmetic, Toiletry and Fragrance Association, Inc.
Diesel Automobile Association
Distilled Spirits Council of the U.S.

The Dry Cleaners Exchange
Dry Color Manufacturers Association
Dyes Environmental and Toxicology Organization
Foundry Supply Manufacturers Group
Hardwood Plywood Manufacturers Association
Health Industry Manufacturers Association
Independent Petroleum Association
Institute of Industrial Launderers
International Fabricare Institute
International Institute of Synthetic Rubber Producers, Inc.
Linen Supply Association of America
Man-Made Fiber Producers Association
Metal Finishing Suppliers Association
Motor Vehicle Manufacturers Association of the U.S.
National Agricultural Chemicals Association
National Association of Manufacturers
National Association of Water Companies
National Constructors Association
National Cotton Council
National Electrical Manufacturers Association
National Federation of Independent Business
National Forest Products Association
National Paint and Coatings Association
National Particleboard Association
National Petroleum Refiners Association
Neighborhood Cleaners Association
New Jersey Business and Industry Association
Ohio Cleaners
Organization Resources Counselors, Inc.
Pharmaceutical Manufacturers Association
Polyurethane Manufacturers Association
Portable Sanitation Association
Proprietary Association
The Refractories Institute
Rubber Manufacturers Association
Safety Management Association
Scientific Apparatus Makers Association
Single Service Institute
The Soap and Detergent Association
The Society of the Plastics Industry, Inc.
Steel Plate Fabricators Association, Inc.
Synthetic Organic Chemical Manufacturers Association, Inc.
Synthetic Rubber Manufacturers Association
Thermal Insulation Manufacturers Association
Truck Trailer Manufacturers Association
The Tobacco Institute
Underwood Jordan Associates
Virginia Association of Launderers and Cleaners, Inc.
Western Wood Products Association
Wisconsin Fabricare Institute, Inc.

The OSHA Generic Carcinogen Regulation

A brief review of OSHA's generic carcinogen rulemaking illustrates the need for regulatory reform legislation. OSHA's regulation is referred to as a generic regulation because it will establish rules by which substances will be identified and controlled as carcinogens according to the nature of the evidence of their carcinogenicity. In turn, the classification of a toxic substance will determine automatically the controls which will be placed upon exposure to the substance, regardless of whether any benefits are demonstrated or not.

In future rulemaking hearings aimed at issuing occupational safety and health standards for specific substances, OSHA would not allow the introduction of any new scientific evidence bearing on the invalidity of the identification criteria or the inappropriateness of the mandatory control measures. Thus, evidence challenging those determinations, no matter how compelling or persuasive, would not be admissible in future hearings on specific substances. The generic regulation itself would have to be challenged to change any of these determinations; a slow, cumbersome and expensive procedure.

A. The Impact of the Regulation

OSHA's proposed generic regulation determined to a large extent the control mechanisms to be mandated for specific substances. For example, a substance which produces benign tumors in a single animal test and a positive response in a short term test for mutagenicity would be classified in the "confirmed carcinogen" category, or Category I. Substances in Category I would be subject to the following generic control requirements without a determination of the benefits of control and whether the benefits are reasonably related to the cost:

- Control of exposure to the lowest feasible level without consideration of potency of the substance;

- Control of exposure to the mandated level by means of engineering controls, rather than personal protective equipment or other protective measures;
- Prohibition of all exposure if "suitable substitutes," an undefined term, are available;
- Prohibition of all eye or skin exposure; and
- Extensive recordkeeping, monitoring and medical examination requirements.

OSHA proposed this control system for all substances meeting the criteria for Category I classification despite the fact that OSHA acknowledges that there is more than a millionfold difference in the potency of animal carcinogens which could fall within this category. Because the regulation did not provide for any differentiation between substances according to their carcinogenic potency, a low potency substance such as saccharin possibly could be subject to the same control measures as a very potent carcinogen like bischloromethylether.

B. OSHA's Analysis of the Regulation

When it proposed its generic carcinogen regulation, OSHA stated that the economic impact statements required by Executive Orders 11821 and 11949 would be performed in future rulemakings conducted on individual substances. The generic regulation was claimed by OSHA not to have any direct cost impact. Therefore, OSHA did not:

- Estimate the risk to workers from exposure to the substances to be regulated;
- Estimate the benefits to workers from such control of exposure;
- Estimate the projected costs to industry of implementing the control measures; or
- Analyze alternative approaches for reducing exposure to carcinogens in the workplace to acceptable levels.

Although determinations which would control the costs of regulating potential workplace carcinogens would be made in the generic proceeding, OSHA proposed to defer consideration of costs to future rulemakings on specific substances where these determinations could not be altered.

The Foster D. Snell Division of Booz, Allen & Hamilton, Inc. prepared for AIHC under severe time constraints a preliminary cost study of the proposed regulations. The costs of compliance for three regulatory scenarios at two levels of control were examined. The estimated, direct compliance costs were as follows:

Direct Compliance Costs ($ Billion, 1977)

Scenario 1/	Capital Cost 10 ppm	Capital Cost 1 ppm*	Annual Cost 10 ppm	Annual Cost 1 ppm
Low scenario (38 high volume substances)	9	23	6	11
Medium scenario (1,870 substances)	17	47	10	20
High scenario (2,415 substances)	30	88	18	36

(Source: Snell Report at 29.)

*Reduction of airborne concentrations to the 10 or 1 part per million level.

1/ The low scenario assumes that regulations will be issued covering the 38 substances on the 1976 NIOSH suspected carcinogen list that are produced at levels above 25 million pounds per year and that have been assigned to Category I or II (based on the proposal's classification criteria) by the staff of NIOSH's National Occupational Hazard Survey (NOHS).

The medium scenario assumes that 1,870 substances from the 1976 NIOSH suspected carcinogen list will be regulated as assigned to Category I or II by the staff of NOHS.

The high scenario assumes that all 2,415 substances on the NIOSH suspected carcinogens list will be regulated whether or not they have been categorized by the NOHS staff.

However, the significance of the Snell Report lies not in the preliminary cost estimates, but rather in the inescapable fact that the economic impact of this rulemaking is likely to be substantial by any standard. A methodology for a

complete economic analysis was set out in an appendix to the preliminary cost study prepared by Snell.

In March of 1978, President Carter issued Executive Order 12044. After the close of the rulemaking hearing in July, OMB prevailed upon OSHA to conduct a regulatory analysis pursuant to Executive Order 12044. OMB recognized that the economic impact of a generic regulation which preempts later regulatory decisions would never be evaluated unless it was evaluated prior to adoption of the generic regulation.

OSHA's regulatory analysis was made available after the close of the public comment period on the proposed regulation. The administrative law judge who had conducted the proceeding reopened the record to receive comments on the regulatory analysis. Comments were submitted by AIHC, the Regulatory Analysis Review Group (RARG) and others.

The comments of AIHC and others noted that OSHA had made no attempt in its regulatory analysis to estimate benefits, risks, or costs associated with the proposed generic regulation. These comments also disputed OSHA's contentions that risk assessments evaluating the danger of exposure to carcinogens could not be made and that the costs of such a regulation could not be estimated.

The publication by the Interagency Regulatory Liaison Group, of which OSHA is a member, of a document on risk assessment for suspected carcinogens establishes that scientific risk assessment for human cancer risks can be made. The Foster D. Snell Study also set forth an appropriate methodology for estimating the economic impacts of the proposed regulation.

OSHA did not give serious consideration to the alternative proposals presented during the hearings. For example, OSHA failed to examine a significant alternative proposed in September 1978 by RARG. The RARG alternative called for sepa-

ration of the scientific function of identifying and evaluating the potential risk from carcinogens and the regulatory function of setting standards based on a weighing of risks and benefits and costs. The RARG alternative also suggested that OSHA make greater use of personal protective equipment for reducing exposure instead of expensive engineering controls. OSHA also did not consider an alternative similar to RARG's proposed by AIHC in February 1978, We believe the AIHC proposal would provide workers with protection as great as OSHA's proposal but in a less burdensome manner.

These deficiencies in OSHA's regulatory analysis were recognized by RARG, which concluded:

> "Because both the potential costs and benfits are likely to be very large, and because of the proposal's inflexibility and lack of sensitivity to cost-effectiveness considerations, we recommend that OSHA complete a more comprehensive and analytical regulatory analysis and consider modifying its proposal along the lines outlined [in the Report]."

RARG Report, submitted in OSHA Docket H-090 by the Council on Wage and Price Stability, at 8 (October 24, 1978).

The final generic carcinogen regulation was published on January 22, 1980. OSHA issued no final regulatory analysis. An environmental impact analysis of the proposal and the final regulation was made available without any opportunity for public comment at the time the final regulation was issued. This statement failed to address the criticisms made by RARG, AIHC, and others, and was completely unsatisfactory. Proceedings to review the cancer policy were initiated by AIHC and others.

C. Present Status of the Regulation

On July 2, 1980, the Supreme Court handed down its decision in the Benzene case which, as OSHA itself has recognized, declared invalid basic premises of the generic carcinogen regulation. On January 19, 1981, in a last-minute effort to bring the regulation into compliance with the Benzene deci-

sion, the Carter Administration issued a final rule deleting portions of the regulation, and four days later OSHA proposed further amendments to the cancer policy.

On February 17, 1981, President Reagan issued Executive Order 12291, requiring agencies to perform regulatory impact analyses of major rules. The Executive Order sets forth criteria substantially equivalent to those in S. 1080 for evaluating major rules. OSHA withdrew the proposed amendments on March 25, 1981, and the President's Task Force on Regulatory Relief announced that the regulation would be reviewed for compliance with E.O. 12291.

ATTACHMENT III

Regulatory Credibility is a Function of the Soundness of the Science

Social desirability and the soundness of regulatory decisions on matters of chronic health are directly related to the soundness of the science upon which the decision was based. If a risk is poorly evaluated or misevaluated because of reliance on biased science or unsound science, the regulatory decision will be faulty - the regulation will involve wasteful costs or will fail to deal with the real hazard.

The purpose of this memo is to list a number of examples where regulatory and public resources were seriously misused or wasted because of reliance on unsound science without validation of the data base or evaluation of the criteria and their application. The examples listed involve instances in which outside (non-government, non-industry) scientists criticized science relied upon by government without adequate peer review.

N.B. Copies of the articles, letters, and miscellaneous items referenced in this Attachment have been provided to the Subcommittee staff. Those items are not included in this Statement.

1. Nitrites

In August 1978 Dr. Paul Newberne (MIT) submitted to FDA a report of a chronic study he and Dr. Blount (MIT) had undertaken for FDA on nitrites. (Rept. FDA 74-2181). The study was positive, reporting an increase in lymphoma in rats fed nitrites in the diet.

The study was released by FDA and Agriculture and a regulatory procedure looking toward reducing or banning nitrites began with enormous fanfare in the press.

In fact doubts were raised early within the government concerning the validity of the study. As a consequence a contract was granted to the Universities Associated for Research in Education in Pathology (U.A. REP), a non-profit consortium of fifteen universities organized to carry out research activities in the field of pathology, to re-evaluate the Newberne study.

While the study was under way, the regulatory pressure on nitrites continued.

The final UAREP report concluded that the original pathological evaluation of the study was in error. (A copy of the title page and text (without tables) of UAREP Report is attached for reference).

As a result of the outcry about the resources wastes as a result of a study found an evaluation to be negative, Senator Eagleton wrote to FDA and the Department of Agriculture on the need to strengthen the scientific review procedure (copy attached).

2. EPA and Love Canal

On June 4, 1980 Governor Carey appointed a distinguished Panel to Review Scientific Studies and the Development of Public Policy on Problems Resulting from Hazardous Wastes. That Panel, chaired by Dr. Lewis Thomas, Chancellor of Memorial Sloan-Kettering Cancer center was highly critical of EPA and the studies it published and relied on with reference to Love Canal.

A copy of the transmittal letter and title page of the Report of the Panel is attached.

Attached also are press clippings referring to the serious consequences of invalid studies which the Panel concluded fueled rather than resolved public anxiety.

3. EPA Halogenated Solvents

On October 10, 1979 EPA proposed a generic regulation for identifying carcinogens to be listed and regulated under §112 of the Clean Air Act as hazardous pollutants. (44 Fed. Reg. 58642).

After a hearing in 1980, EPA announced that it would submit scientific issues raised at the hearing to EPA's Science Advisory Board for review. 45 Fed. Reg. 25828.

On June 2, 1980, EPA announced that a SAB Subcommittee on Airborne Carcinogens would advise the EPA on the "adequacy of scientific assessments the Agency had prepared to support a decision on whether to regulate as particular substances as airborne carcinogens under the Clean Air Act." 45 Fed. Reg. 39338.

Risk assessments on six substances were submitted to the subcommittee for review and consideration at the subcommittee's meeting in September 4 and 5, 1980.

The risk assessments submitted included assessments on 4 major halogenated solvents: trichloroethylene, perchloroethylene, methylene chloride and methyl chloroform. For each of these solvents EPA's cancer assessment group (CAG) had concluded that there was "substantial" evidence of carcinogenicity.

The subcommittee strongly disagreed with EPA and for all four substances found the evidence to be inconclusive.

It is important to note that the Drinking Water Panel of the National Academy of Sciences in Volume III of the study "Drinking Water and Health" released late last year agreed with the SAB subcommittee evaluation of the four solvents. (Drinking Water and Health, National Academy Press, Vol. III pp. 124-128, 134-142, 144-166 (1980).

4. EPA's inconsistency: Halogenated solvents/water quality criteria

In the course of the hearing before the SAB subcommittee on Airborne Carcinogens, Dr. Roy Albert, Chairman of EPA's Cancer Assessment Group made clear that the risk assessments being reviewed by the subcommittee were based on agency guidelines which were incorporated in the IRLG Estimation Report, and that the guidelines were equally applicable to the other statutes ad-

ministered by EPA in water, pesticide and solid waste regulations.

Despite the criticism by the risk assessments of the four halogenated solvents and EPA's agreement to re-do the risk assessments and re-submit them to the subcommittee, EPA went ahead and issued water quality criteria on the four solvents on the basis of the evidence which the subcommittee found to be inconclusive. 45 Fed. Reg. 79318, November 28, 1980.

5. EPA: Carcinogenesis criteria/water quality criteria. IRLG Risk Assessment Report

The SAB subcommittee on airborne carcinogens severely criticized EPA for its failure to submit to independent peer review the criteria the agency was using to identify carcinogens. Dr. Albert for EPA agreed that such peer review is desirable.

EPA pointed out that the criteria it was using came from the IRLG paper "Scientific Bases for Identification of Potential Carcinogens and Estimation of Risk." 44 Fed. Reg. 39858, July 6, 1979. The subcommittee asked whether the IRLG report had been peer reviewed. When it was informed that the paper had not been peer reviewed and the extensive public comments had not been evaluated, the SAB subcommittee stated its view that the IRLG report should be subjected to peer review. EPA agreed peer review was desirable.

Despite the criticism of the criteria and of the failure to subject the criteria to peer review, EPA used those criteria in evaluating the carcinogenic risk in 34 of the water quality criteria. 45 Fed. Reg. 79318.

6. EPA inconsistency: Bis(chloromethyl) ether water quality criteria.

On February 4, 1981 EPA published a final rule removing bis(chloromethyl) ether from the list of toxic pollutants. In the course of its discussion EPA said:

> "EPA recognizes that BCME is a potent mutagen and laboratory animal and human carcinogen.

However, these toxic properties of BCME have never been demonstrated in an organism exposed to BCME through direct ingestion of water or through ingestion of aquatic organisms in its diet. The carcinogenic threat of BCME towards humans is confined to inhalation or concentrated dermal exposure and in those contexts primarily in the work environment."

Nonetheless, EPA concluded:

"This removal action does not affect the validity of BCME's water quality criterion which has recently been published."

7. CPSC/Spray Adhesives

In 1973 CPSC banned spray adhesives on imminent hazard causing birth defects. In 1974 after more careful study indicated that the report on which the ban was based was invalid, CPSC lifted the ban.

In the meantime 9 women responded to the Commission's warning by undergoing an abortion.

The story and references are set out in "The Future of Business Regulation" by Murray Weidenbaum. The relevant pages are attached.

8. OSHA/Beryllium

On July 7, 1977 OSHA proposed to regulate occupational exposure to beryllium. 42 Fed. Reg. 29021.

Eight independent scientists wrote the Secretary of Labor and the Secretary of HEW severely criticizing the data on which OSHA was relying. Copies of the letters are attached.

Attached also is a letter from David Bayliss, formerly of NIOSH, to the Center for Disease Control setting out the history of data manipulation on beryllium.

9. OSHA/Benzene/Generic Cancer Regulation

OSHA issued first an emergency temporary standard (ETS) relating to occupational exposure to benzene. 42 Fed. Reg. 22516 (May 3, 1977). The ETS was enjoined by the Fifth Circuit Court of Appeals.

Thereafter OSHA proposed a permanent standard (42 Fed. Reg. 27452) and after a hearing published a final standard, 43 Fed. Reg. 5918.

OSHA's evaluation of benzene exposure was based on criteria constrained by OSHA policy decisions on scientific issues. OSHA's criteria, which the Supreme Court referred to as OSHA's cancer policy, is based on the assumption that there is no threshold for exposure to carcinogens; all exposures present a risk and must be controlled to lowest feasible. No risk assessment was made by OSHA.

The Supreme Court overturned OSHA's benzene standard and in the process rejected OSHA's cancer policy stating

> "In the absence of a clear mandate in the Act, it is unreasonable to assume that Congress intended to give the Secretary the unprecedented power over American industry that would result from the Government's view of §§3(8) and 6(b)(5), coupled with OSHA's cancer policy. Expert testimony that a substance is probably a human carcinogen - either because it has caused cancer in animals or because individuals have contracted cancer following extremely high exposure - would justify the conclusion that the substance poses some risk of serious harm no matter how minute the exposure and no matter how many experts testified that they regarded the risk as insignificant. That conclusion would in turn justify pervasive regulation limited only by the constraint of feasibility. In light of the fact that there are literally thousands of substances used in the workplace that have been identified as carcinogens or suspect carcinogens, the government's theory would give OSHA power to impose enormous costs that might produce little, if any, discernible benefit.
>
> "OSHA's proposed generic cancer policy, 42 Fed. Reg. 54148 (Oct. 4, 1977) indicates that this possibility is not merely hypothetical. Under its proposal, whenever there is a certain quantum of proof - either from animal experiments, or, less frequently, from epidemiological studies - that a substance causes cancer at any exposure level, an emergency temporary standard would be promulgated immediately, requiring employers to provide monitoring and medical examinations and to reduce exposures to the lowest feasible level. A proposed rule would then be issued along the same lines, with objecting employers effectively foreclosed from presenting evidence that there is little or no risk asso-

> ciated with current exposure levels. 42 Fed. Reg., at 54154-54155, 54184.
>
> "The scope of the proposed regulation is indicated by the fact that NIOSH has published a list of 2,415 potential occupational carcinogens, NIOSH Suspected Carcinogens: A Subfile of the NIOSH Registry of Toxic Effects of Chemical Substances, HEW Pub. No. 77-149 (Dec. 1976). OSHA has tentatively concluded that 269 of these substances have been proved to be carcinogens and therefore should be subject to full regulation. See OSHA Press Release, USDL 78-625 (July 14, 1978)."
>
> Industrial Union Dept. v. American Petroleum Institute, July 2, 1980.

The decision of the Supreme Court undermines the OSHA generic cancer regulation (45 Fed. Reg. 5002) which is based on the OSHA cancer policy. OSHA has taken two steps to conform to the Supreme Court's decision in benzene: (1) OSHA published a final rule stating that OSHA will regulate only significant risks and removed the lowest feasible requirement from the regulation, 46 Fed. Reg. 4889 (January 19, 1981), and (2) on January 23, 1981 proposed amendments to the rule requiring not only that OSHA find significant risk but will regulate to lowest feasible levels found to be necessary or appropriate to eliminate a significant risk. 46 Fed. Reg. 7402.

OSHA, however, refused to change the criteria for identifying carcinogens and stated that while it will consider certain scientific evidence in evaluating risk it will not consider that evidence as relevant to the identification and classification of carcinogens.

Thus OSHA has re-affirmed its intentions to use criteria dictated by administrative policy and convenience rather than scientific evaluation of the evidence in identifying and classifying carcinogens. The OSHA criteria present a "lower hurdle" to identification and classification than the IRLG document criticized by the SAB subcommittee for failure to submit the criteria to peer review.

OSHA peer review is constrained by the administratively determined criteria.

OSHA cancer policy is built on administrative policy, not science.

10. FDA/SOM

On March 20, 1979 FDA proposed a regulation to implement the so-called DES proviso to the Delaney Clause. 45 Fed. Reg. 17070. Under the DES proviso, residues of animal carcinogenic drugs will be permitted if they are not detectible by a method prescribed by the Commissioner. Because the regulation turns on the analytic method selected by the Commissioner, the proposal is sometimes referred to as the sensitivity of the method or SOM.

The Commissioner proposed a risk assessment method (selected for conservatism) and proposed a limit on the residue based on the linear extrapolation model using 99% upper confidence limits.

This proposal is in fact a severe regulatory limit concealed in scientific language. David Hoel who was the chief biostatistician relied on by FDA discussed what this meant in terms of permissible dose in an article cited by FDA and pointed out that these criteria were "awkward" because of its impact on non-carcinogens.

> "This problem is concerned with compounds which have not been established as carcinogens. A chemical which has been tested for carcinogenicity in a given number of animals and not given positive results might have been shown positive if more animals had been used. On the other hand, a policy of applying the linear model to chemicals which have been negative in reasonably designed and performed carcinogenicity bioassay procedures could lead to unrealistic regulatory decisions. For example, if a chemical had been tested in 100 mice at 1% in the diet and no tumors had resulted, the level in the human diet corresponding to a calculated tumor incidence of one per million people would be 0.22 ppm, extrapolating from the upper 99% confidence limit ofthe experimental result, using no additional "species extrapolation factor" and assuming there were no tumors in the control animals. In most cases, the occurrence of spontaneous tumors would result in an even lower "permissible dose level" for the stated

> risk level. Thus, any chemical tested in only 100 animals could not be introduced in the human food supply at a level exceeding 0.22 ppm, even if there was no evidence of its carcinogenicity, assuming the risk level of one per million were "acceptable." At an "acceptable" risk level of one per hundred million, the level of the chemical could not exceed 0.0022 ppm. Thus, applying the linear model to all chemicals could result in the elimination of many chemicals from our environment on the grounds that they present an unacceptable carcinogenic risk even though there was no experimental evidence of their carcinogenicity. Alternatively, if the chemicals were not eliminated, such equivalent treatment of carcinogens and other chemicals could result in high risk estimates for chemicals not shown to be carcinogens at the levels at which they might be used.
>
> "The fact that the method of extrapolation recommended in this report appears equally applicable to new and existing chemicals and to naturally occurring or synthetic chemicals makes its unthinking use in all circumstances subject to serious question. In particular, applying it to chemicals for which neither experimental evidence nor chemical similarity to known carcinogens suggests carcinogenicity is at best awkward." (Estimation of Risks of Irreversible, Delayed Toxicity, David G. Hoel, et al., Journal of Toxicity and Environmental Health, 1:133-151, 1975)

Instead of relying on a valid and unbiased scientific evaluation, the Commissioner proposed to establish a criteria which would constrain science and set unreasonable ("awkward") limits on noncarcinogens.

FDA has science advisory committees, but no committee to review decisions on carcinogenicity criteria.

11. DHEW/OSHA Estimates Paper

On September 15, 1978 a paper entitled "Estimates of the Fraction of Cancer in the United States Related to Occupational Carcinogens" was filed in the record in the OSHA generic cancer regulation proceedings.

That paper which had contributors but no authors, was described by one of the contributors (Dr. Umberto Saffiotti) as a draft which would be worked on for publication. The filed paper was described as not ready for publication in a scientific journal.

Despite the passage of time, the Estimates Paper has never been submitted for publication. The estimates in the

paper have been subject to severe scientific criticism but despite the criticism have been cited by OSHA, CEQ, the Surgeon General and others.

Sir Richard Doll was commissioned to evaluate the extent or estimate of cancer from occupational exposure. He has referred to the original paper as "scientific nonsense." A considerable literature critical of the Estimates Paper could be compiled. A short summary is contained in an editorial in Science, copy attached.

Despite the failure to submit the figures in the Estimates Paper to critical peer review, government and private sources continue to cite the original estimates as a basis for regulatory decisions.

12. Delegation of Scientific Decisions to Private Contractors

It is common practice at EPA and OSHA to delegate to private contractors the development of a scientific data base and evaluation of that data base. Apart from the very real issue of invalid delegation to private persons of official duties or functions, there are significant scientific issues growing out of the extensive use of contractors to perform scientific evaluations.

With the rarest of exceptions (see Nitrites) the agency neither has nor attempts to validate the contractor's data base. Nor is there any agency procedure (other than reading the contractor's report) for validating the criteria used and evaluating their application.

The contractor evaluation is shielded from peer review unless forced by the agency. Drafts of reports, contractor's papers and the underlying data base cannot be examined by private parties as of right and is not available under the Freedom of Information Act. Lead Industries Assn. v. Occupational Safety and Health Admin. 610 F 2d 70 (CA DC 1979).

Since contractor's work is shielded from peer review, it is not possible to cite examples of poor science except where the agency establishes a peer review procedure. See Nitrites and Love Canal. Those examples establish the need for peer review and unconstrained scientific evaluation of contractor's reports.

ATTACHMENT IV

AIHC AMERICAN INDUSTRIAL HEALTH COUNCIL
1612 K STREET, N.W., SUITE 308, WASHINGTON, D.C. • (202) 689-0060

March 20, 1981

AIHC Science Panel Proposal

The Problem: The soundness of regulatory decisions on chronic health problems is a function of (1) sound scientific state-of-the-art identification and evaluation of the human health hazard, and (2) separation of the scientific evaluation from the regulatory decision to assure scientific objectivity.

Proposed Solution: Create a Science Panel made up of distinguished scientists of several disciplines to provide scientific evaluations to regulatory agencies concerned with chronic health to assure excellence and uniformity of scientific evaluation by competent, objective scientists.

Location: To assure objectivity and availability of the Science Panel to all regulatory agencies, the Panel should be located in a government agency not affected by the Panel's determinations.

Make-up: The Panel would be composed of 15 scientists appointed for staggered three year terms. The Panel would select other scientists to participate on particular sub-panels. Panelists and support scientists would be part time to avoid career interruption. Appropriate conflict of interest rules would apply. The Panel would be supported by its own staff.

Panel Decisions: The Panel would address significant scientific issues with provision for public input. It would not address routine scientific matters nor regulatory questions (e.g. costs, benefits, etc.). The Panel evaluation would not be binding, but an agency not utilizing the Panel's evaluation would be obliged to explain its decision. The Panel's evaluation would be part of the record on review of the regulation.

Agency Scientists. The Panel would not change the need for agency science capability. Because of the excellence of the Panel review, agency scientific staffs would tend to be upgraded. This would lead to improvement of the science base for routine matters not referred to the Panel.

Interaction With Agency. The Panel and the agency will interact as the scientific evaluation proceeds to assist the agency in data gathering objectives and in setting priorities. The Panel evaluations would provide a sound base for identifying regulatory alternatives and selecting the most cost effective..

How Created: AIHC recommends creation by legislation.

NEW YORK OFFICE: 1075 CENTRAL PARK AVENUE, SCARSDALE, NY 10583 (914) 725-1492

Supplementary Material to AIHC Statement on S. 1080

(Contract #223-79-2263)

RE-EVALUATION OF THE PATHOLOGY FINDINGS OF STUDIES ON NITRITE AND CANCER—HISTOLOGIC LESIONS IN SPRAGUE-DAWLEY RATS

Final report submitted by Universities Associated for Research and Education in Pathology, Inc.

Joint Committee of Experts: Dr. Joe W. Grisham, Chairman; Dr. Donald L. Dungworth; Dr. Harlan I. Firminger; Dr. Thomas C. Jones; Dr. Robert A. Squire; Dr. Benjamin F. Trump; Dr. Kenneth M. Brinkhous, Co-investigator; and Dr. Dante G. Scarpelli, Co-investigator.

Kenneth M. Endicott, M.D., Principal Investigator.

INTRODUCTION

During the course of a study on the chronic toxicity of diets containing N-nitrosomorpholine or various concentrations of sodium nitrite and morpholine (FDA Contract No. 71-81) carried out by Drs. Ronald C. Shank and Paul M. Newberne at the Massachusetts Institute of Technology (MIT), rats fed control agar diet plus sodium nitrite were reported to exhibit a higher incidence of lymphomas than did rats fed the control agar diet alone.

The original study was not specifically designed to evaluate the induction of lymphoma. Since nitrites are used extensively as a food additive, FDA entered into a second contract with MIT (FDA 74-2181) for the purpose of examining the possibility of lymphoma induction more specifically.

In this second study, there were 18 groups of rats and three basic diets—agar diet, powdered casein diet and chow diet. In all but four groups, (15, 16, 17, and 18) the diet regimen was begun during the pregnancy of the dam and continued after weaning so that the rats were exposed from early fetal life to death. In groups 17 and 18, the diet was started at weaning. Groups 15 and 16 were dams fed the diet regimen from first pregnancy until death. There were negative controls fed diet alone, positive controls fed urethane and experimental groups fed $NaNO_2$ at various levels in diet or drinking water.

In his final report on FDA 74-2181, submitted in August, 1978, Dr. Newberne reported an increased incidence of lymphomas in rats given sodium nitrite in various diets or in drinking water.

"While the results do not permit assigning nitrite a proximate carcinogenic role in the induction of lymphoreticular tumors, an enhancing effect is evident. Thus, nitrite appears more a promoter of the neoplastic process than an initiator."

He also reported an increased incidence of "immunoblastic cell proliferation" in the spleens of rats receiving nitrite.

"In addition to malignant tumors of the lymphatic system, an alteration referred to as immunoblastic cell proliferation was observed in some members of all groups except the positive controls (groups 8 and 12). This disease in humans, which is similar histologically to that observed in our rats, is considered by some to develop into lymphoma; others consider it nonneoplastic." (Science 204: 1080, 1979)

Dr. Newberne's report to FDA cautioned against over-interpretation. In his summary he states:

"While these observations require some consideration, the data are only suggestive and the biological significance of nitrite-associated lesions of the lymphoreticular system is unclear. There are suggestions, however, of sufficient magnitude and the study used sufficient animals to raise questions about the widespread use of relatively high concentrations in our food supply."

A Government Interagency Working Group on Nitrite Research examined a sample of histologic slides from the MIT study and concluded that there was sufficient difference of opinion as to pathologic diagnoses to justify an independent re-evaluation of the histopathological findings. FDA requested that the re-evaluation be undertaken by Universities Associated for Research and Education in Pathology (UAREP), a non-profit consortium of fifteen universities organized to carry out educational and research activities in the field of pathology.

The purpose of the re-evaluation, as set forth in the contract, was "to confirm or deny, by a panel of impartial experts of national and/or international reputation, the accuracy of the pathology diagnoses made at MIT with respect to nitrites and cancer. . .".

During the period of contract negotiation, several options were considered with regard to experimental design. The most elaborate design would have required that a panel of at least three pathologists review each tissue and reach a consensus as to diagnosis. Because this approach would have been very costly and time consuming, it was abandoned. The least elaborate design would have limited the review to the tissues from those animals designated at MIT as showing lymphoma or immunoblastic cell hyperplasia. This approach was rejected on the basis that it would afford no opportunity to detect other possibe nitrite-related lesions in the total MIT study.

As a compromise between the two extremes, it was finally agreed that all tissues would be examined by one of a group of reviewing pathologists and, that if his diagnosis agreed with that made at MIT, the diagnosis would be accepted as final. If there was disagreement, then the tissue would be examined by a panel of three pathologists to arrive at a consensus.

The contract required that UAREP develop a system for security and integrity of microscopic slides and records. The system which was adopted provided appropriate rules for maintenance of slides and records in locked facilities, transfer of slides to and from headquarters and field laboratories, and keeping of logs.

The contract provided that statistical analysis of the results were to be carried out by FDA and that UAREP would stand by to comment on the statistical analysis or other items as might be requested by FDA.

Joint committee

The contract required that UAREP appoint a Joint Committee of Experts (JCE) representing the best available North American expertise in relevant areas of experimental, veterinary and medical pathology. The principal functions of the Joint Committee of Experts were to design the protocol for the review of the histological data, evaluate the qualifications of participating pathologist, establish diagnostic criteria, monitor the histopathologic reviews, examine selected tissues, evaluate the results, and prepare reports.

Provisions for "blind" study

The study was to be carried out under a "blind" arrangement whereby the reviewing pathologists did not know the microscopic findings, accession numbers, or the experimental schedule of the individual animals in the MIT study.

To this end, each slide was to be encoded with a UAREP number under a coding system developed by the Principal Investigator and kept secret from the Joint Committee of Experts and the reviewing pathologists.

APPOINTMENT AND EARLY WORK OF THE JOINT COMMITTEE OF EXPERTS

As required by the contract, UAREP, with approval by FDA, appointed a Joint Committee of Experts as follows: Joe W. Grisham, M.D., Chairman; Ronald F. Dorfman, M.R.C. Path., Donald L. Dungworth, Ph.D., M.R.V.S.; Harlan I. Firminger, M.D.; Thomas C. Jones, D.V.M.; Robert A. Squire, D.V.M., Ph.D.; and Benjamin F. Trump, M.D.

Ex Officio: Kenneth M. Endicott, M.D., Principal Investigator; Kenneth M. Brinkhous, M.D., Co-investigator; and Dante G. Scarpelli, M.D., Ph.D., Co-investigator.

Consultant: Risa B. Mann, M.D.

During the course of the study, Dr. Ronald F. Dorfman withdrew because of the pressure of other duties but continued to serve as a consultant. Dr. Jones was on sabbatical leave during a portion of the study and Dr. Donald L. Dungworth was added to the JCE.

Before the actual review of tissues could begin, the JCE had to develop and submit to FDA for approval: Diagnostic Criteria; Histological Review Procedures; Roster of Reviewing Pathologists; and Histological Diagnostic Reporting Form.

Diagnostic criteria

As required by the contract, the JCE held a public hearing on April 19, 1979, followed by an open comment period of thirty days in order to receive comments regarding diagnostic criteria. No comments were received. Dr. Newberne submitted his criteria which were generally accepted by the JCE with minor modifications. The criteria, as approved by the JCE and detailed in the Phase I Report, were submitted to FDA for acceptance before slide review was begun.

Histologic review procedures

In order to assure that histologic review was carried out without knowledge of experimental conditions or previous (MIT) diagnosis, slides and gross pathology reports were encoded. Encoded slides plus encoded gross description were distributed to the University of Maryland, the University of North Carolina, and Northwest-

ern University where histologic review was carried out under the supervision of Drs. Benjamin Trump, Kenneth Brinkhous, and Dante Scarpelli, respectively. A plan for systematic review of the pathologic material was developed and approved by FDA which required the recruitment of qualified pathologists for preliminary examination.

Roster of reviewing pathologists

Nominations for Reviewing Pathologists were sought from the Board of Directors of UAREP and from the JCE. The objective was to develop a roster with balanced representation of veterinary pathologists and medical pathologists with expertise in experimental animal neoplasms, human neoplasms and hematologic disorders. Curriculum Vitae for each candidate were reviewed by the JCE and by FDA. A roster of reviewing pathologists was approved for participation in the study. (See Appendix A.)

Nitrite study worksheet for microscopic findings

A form was developed for the use of the Reviewing Pathologists. (For final form see Appendix B.) In developing the form, the JCE sought to reduce the terminology problem by the use of generic diagnostic terms where possible.

WORKSHOP

On April 28th in Chapel Hill, the JCE conducted a one-day orientation session for reviewing pathologists. The study design and reporting form were discussed. Experts in areas relating to the study made presentations and the proceedings were recorded on videotape for future reference.

At that session, tissues from 102 rats drawn from MIT's nitrite-morpholine study were reviewed (three animals for each pathologist). The Principal Investigator subsequently decoded the results and compared the diagnoses with those from MIT. There were many discrepancies which arose because many minor diagnoses were not recorded in the studies at MIT while UAREP reviewing pathologists recorded all findings for each tissue present. Other discrepancies reflected the use of different terminology for the same lesion. On the basis for this experience, the forms were revised in preparation for the study.

THE SAMPLE FROM THE NITRITE-MORPHOLINE STUDY AS A PRETEST

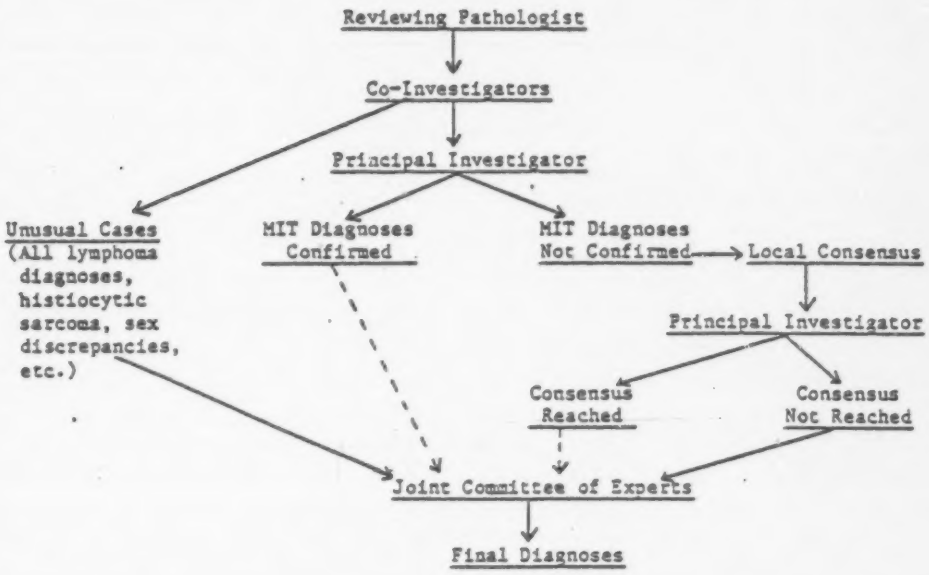
As proposed by UAREP and agreed to by FDA, the tissues from two groups of rats from the nitrite-morpholine study was utilized by UAREP to field test the protocol, the criteria and the reporting forms. These two groups did not receive morpholine. One received the agar control diet and the other received the agar diet plus 1000 ppm $NaNO_2$. In view of the incomplete sampling of tisses and the fact that a number of tumors described by the prosector were not sectioned, UAREP takes the position that the groups from the nitrite-morpholine study should be regarded simply as a pretest and that the findings should not be combined with the subsequent nitrite study.

The tissues on the slides varied from animal to animal but averaged 8.4 tissues/animal. The slides were divided among the three laboratories for review. Results were forwarded to the Principal Investigator for decoding. The Principal Investigator, after discussion with the JCE and the Project Officer, invoked consensus review on all tumor diagnoses (whether diagnosed at MIT or by UAREP pathologists or both). Consensus review on non-tumor diagnoses was not carried out. The number of tissues sectioned was so small that no accurate determination of incidence of lesions could have resulted. For this reason, we consider the review of these slides to be a procedural pretest and are not presenting overall incidence data in this report.

THE NITRITE STUDY

After reviewing the nitrite-morpholine pretest, the JCE made final revisions in the reporting form and adopted a final protocol. Initial review of the slides from each animal was carried out by one reviewing pathologist who recorded his results on a special form. The completed forms were shipped to UAREP headquarters where the Principal Investigator decoded the results and compared them with the results in the MIT study. In those instances in which the reviewing pathologist confirmed the diagnosis submitted from MIT, the findings were tabulated accordingly. In those instances in which the tumor diagnoses did not agree, the Principal Investigator ordered a consensus review. The consensus review was carried out by a panel of three or more pathologists who reviewed the slides independently and then conferred to reach a consensus. When there was unanimous agreement, their diag-

nosis was accepted. If the panel could not reach unanimity, the case was referred to the JCE. The following chart summarizes the slide review process:



- - - - → Indicates that only selected cases were examined by the JCE.

The JCE reviews were carried out at the laboratory to which the slides had been assigned. In addition, the co-investigators in that particular laboratory were asked to present any additional problem cases encountered.

In reviewing the cases selected, each member of the JCE would review the slides independently and then the JCE would meet to compare diagnoses. In the event of differences, the committee would view the slides together (using a special projector or multi-headed microscopes) in order to resolve the differences so that a consensus diagnosis could be recorded.

The final JCE monitoring was carried out when the JCE met to prepare reports to FDA. At this time, the JCE compared all UAREP diagnoses of neoplasia with those from MIT and selected for re-examination all unusual cases. Such cases were then reviewed by individual members and the JCE as above.

Because of the importance attached to lymphomas in the MIT report, all lymphoma cases diagnosed at MIT or UAREP were reviewed by a JCE subcommittee and then by the JCE.

Materials

Materials furnished by FDA consisted of histologic slides stained with hematoxylin-eosin. The slides were generally of good quality but the number of tissues present on the slides varied considerably from one animal to another. Brain, heart, kidney, liver, lung and spleen were included in most, but not all, animals. Pituitary and mammary glands appear to have been included only when neoplasia was suspected at autopsy. Other tissues or organs such as skin, thymus, parathyroid glands, urinary bladder and mesentery were included in less than half of the animals (for detailed tissue counts, see Table IV).

Dr. Newberne supplied the original necropsy record cards. These cards displayed, on one side, typewritten histological findings and, on the reverse side, in handwriting, the gross findings. In some cases, there were drawings showing location of tumors. The prosector's signature was usually present. In some instances, the record cards contained a different or additional handwritten histologic diagnosis as well as a typewritten diagnosis. Most tumors observed at necropsy appeard on slides; of those missing, most were from the pituitary, mammary, or earduct regions. Tumors described grossly but not represented on microscopic slides are not included in our analysis and tabulation. It is the opinion of the JCE that the determination of tumor incidences requires histopathologic examination.

In the course of this study, UAREP found twenty rats in which the sex noted on the necropsy record card was not in agreement with the sex organs found in the tissue sections. FDA found seventy-one rats in which the sex recorded in litter records did not agree with the sex recorded in the necropsy record cards. Dr. Newberne was asked to check his records and, in a letter to FDA, transmitted his findings.

The discrepancies were resolved in all but fourteen rats. Of these, in seven rats the MIT records did not agree with the sex organs present in tissue sections. There were six cases in which both male and female sex organs were found in the tissue sections. There was one case in which no sex organs were found in the tissue sections, but the gross description recorded one sex and the MIT record showed the other. In our reports, we have excluded these fourteen rats from our incidence tables. Since none of these rats showed lymphomas or histiocytic sarcomas (HS) and were distributed among both control and treated groups, the exclusion of these rats should not seriously bias statistical analysis.

FINDINGS

The original study carried out at MIT comprised the following:

Group 1. Agar diet control.
Group 2. Agar diet + 250 ppm $NaNO_2$.
Group 3. Agar diet + 500 ppm $NaNO_2$.
Group 4. Agar diet + 1000 ppm $NaNO_2$.
Group 5. Agar diet + 2000 ppm $NaNO_2$.
Group 6. Agar diet + 1000 ppm $NaNO_2$ in drinking water.
Group 7. Agar diet + 2000 ppm $NaNO_2$ in drinking water.
Group 8. Agar diet + 2000 ppm Urethane.
Group 9. Chow diet control.
Group 10. Chow diet + 1000 ppm $NaNO_2$.
Group 11. Chow diet + 2000 ppm $NaNO_2$.
Group 12. Chow diet + 2000 ppm Urethane.
Group 13. Casein diet control.
Group 14. Casein diet + 1000 ppm $NaNO_2$.
Group 15. Agar diet—mothers.
Group 16. Agar diet + 1000 ppm $NaNO_2$ — mothers.
Group 17. Agar diet control — weanlings.
Group 18. Agar diet + 1000 ppm $NaNO_2$ — weanlings.

In accordance with the terms of the contract, our study was carried out in two phases. Phase I included a pretest on rats derived from an earlier study as well as the rats from Groups 1, 4, 5, 8, 11, 13, 15, 16, 17, and 18. Phase II covered Groups 2, 3, 6, 7, 9, 10, 12, and 14. Reports covering Phase I and Phase II presented our findings with regard to neoplasia. In this final report we present the neoplasia tables from both previous reports as well as our findings regarding non-neoplastic lesions.

This study began with criteria for immunoblastic hyperplasia because this diagnosis was used in the MIT study. After reviewing all of the material from Phase I of this study, the JCE did not interpret the lesions in the spleen and lymph nodes as immunoblastic hyperplasia. These lesions are interpreted predominantly as extramedullary hematopoiesis (EMH) and, occasionally, plasmacytosis in the spleen and plasmacytosis or reactive lymphoid hyperplasia in lymph nodes. EMH and plasmacytosis are common conditions in rodents, and EMH may be augmented in this study because of nitrite-induced hemolysis. The JCE, however, has found no evidence from this review that a lesion of spleen or lymph nodes closely analogous to immunoblastic hyperplasia, as described in man (Cancer 41: 578-606, 1978) exists in rodents.

The Joint Committee of Experts reports fewer lymphoma diagnoses than reported by MIT. The discrepancies involved the differentiation from lymphomas of extramedullary hematopoiesis, plasmacytosis, or histiocytic sarcoma (described below). The diagnostic criteria used for lymphomas were those traditionally employed as defined in the Phase I Report. Lymphomas were characterized by neoplastic proliferations of lymphocytes in various stages of differentiation, including tumors presumably comprised of large transformed lymphocytes which are traditionally classified as histiocytic lymphomas. In contrast, EMH was comprised of erythrocytic, granulocytic and megakaryocytic cells in various stages of differentiation, which though not uncommon in rat spleens, was present in a marked degree in many of the animals examined. Plasmacytosis consisted of partial replacement of lymph nodes, or of splenic red pulp infiltration by normal appearing plasma cells and their precursors.

Histiocytic sarcoma

In the course of successive reviews of problems cases by the JCE, a number of rats were found to have proliferative lesions in which clear separation of a granulomatous from a sarcomatous process was sometimes difficult. When all of the lymphomas were reviewed, many of those reported at MIT were found to be examples of this lesion. It was then concluded that these cases represented a malignant neoplastic disease complex distinct and different from lymphomas. Although further study is required, the morphologic evidence suggests that component cells in this disease complex are histiocytic in origin. This disease was, thus, given the generic name *histiocytic sarcoma.*

The term is not intended to imply that this is a new neoplasm in rats. Similar lesions appear to have been observed sporadically in other rat strains and studies both in treated and control animals (Goodman et al. 1979; Goodman et al. 1980; Squire 1980; Ward et al 1980;). Terms which have been applied to similar entities include: malignant fibrous histiocytoma; unclassified sarcoma; reticulum cell sarcoma; granulomatous disease, and perhaps others. In the older literature, histologic descriptions and illustrations are not adequate to determine if this neoplasm was included among the variety of soft tissue sarcomas reported.

Histiocytic sarcoma has a spectrum of histologic features. The characteristics vary from animal to animal as well as among different tissue sites in the same animal. At one end of the spectrum, the lesions resemble a granulomatous process consisting of focal collections of histiocytes, often mingled with multi-nucleated giant cells and sometimes showing areas of necrosis. Surrounding the areas of necrosis, the histiocytic cells were frequently oriented in palisaded arrays. At the other end of the spectrum, which constituted the majority of lesions, there was a diffuse and disseminated proliferation of oval to spindle-shaped mononuclear cells with round, reniform or, occasionally, bizarre distorted nuclei. Neither nucleoli nor mitoses were prominent. The cytoplasm was eosinophilic, and hemosiderin inclusions and erythrophagocytosis were occasionally seen. Less often, a more cellular, exuberant proliferation of spindle cells occurred with or without giant cells and the characteristic necrosis.

Tissue sites commonly affected included liver, peritoneal and pleural surfaces, lung, pancreas, lymph nodes, and soft tissues, especially the mesentery. Spleens were infrequently involved and bone marrow was rarely found to be affected. The lesion was highly infiltrative in adipose and other soft tissues, and tissue architecture was preserved, similar to that seen in hematopoietic malignancies. However, there were other patterns of infiltrative growth. In some sites, there were space-occupying tumor masses; in others, the infiltrate spread along serosal surfaces, enveloped and infiltrated organs and lymph nodes. Invasion of the vascular wall and intraluminal clumps of tumor cells within small blood vessels and lymphatics, particularly in liver and lung, were often present and provided additional evidence of malignant behavior. This pattern of spread and tissue distribution was unlike that of lymphomas. Furthermore, the cell type was morphologically different from those found in lymphomas. The histiocytic sarcoma has some morphologic similarity to malignant fibrous histiocytoma of man but there are characteristics such as the granulomatous formations, lack of cellular pleomorphism and the patterns of growth which set "histiocyctic sarcoma" apart. Some histologic features, especially hepatic sinusoidal and lymph node sinus infiltration, resemble malignant histiocytosis in humans; other features suggest it to be a different disorder.

The biological nature of histiocytic sarcoma remains to be fully characterized. The frequent concomitant appearance of the granulomatous lesions with the sarcomatous ones has led us to the tentative conclusion that the two are related and are both part of this disease complex. The nature of the granulomatous component and its relation to the neoplastic lesion remain to be unequivocally established. This disease appears to be a neoplastic complex distinct and different from lymphomas and other hematopoietic neoplasms in man and other animals.

At the request of FDA, a detailed description of histiocytic sarcoma, including photomicrographs of the lesion as it appears in various organs and tissues, is being prepared.

Description of tables

In Table I, arranged by group, by animal number, and by tissue are displayed the MIT diagnosis and the final UAREP diagnosis for all rats diagnosed as having lymphoma, lymphosarcoma, or lymphoreticular tumor. For the sake of completeness, we have included, not only those in the MIT final report dated September 25, 1978, but also those in the earlier report in May, 1978. The column headed "Source" indicates those identified in the May report as "5", those in the September report as "9", and those in both reports as "5 & 9". Those diagnosed by UAREP only are designated "UAREP".

In Table II, we present our findings of neoplastic lesions. The table presents, by individual animal and by group, the UAREP tumor diagnosis as well as the MIT diagnosis with indication as to whether there is a significant difference (x) and an indication as to whether the difference adds to (+) or subtracts from (−) the total tumor incidence. Also indicated is the age at death and, under the animal number, the sex of the animal (M or F) and whether the animal died a natural death (ND) or was sacrificed at 6, 12, 18, 24, or 30 months.

Table III is a summary table which indicates the number of tumors of each type by tissue or origin, sex, and animal group. It does not tabulate metastatic tumor. For lymphomas as well as other neoplasms for which we were unable to determine site or origin, the tabulation simply indicates the number of animals involved in each group.

Table IV, a table of animal and tissue counts, has been prepared indicating the number of males and the number of females in each group and a tissue count by organ or tissue for each sex and each group. In those cases in which there was more than one section of a given organ or tissue, multiple sections were counted as one.

Table V summarizes our findings with regard to non-neoplastic lesions using the format of the worksheet we used for reporting histologic diagnoses. The JCE has reviewed this table but has not carried out consensus review of these non-neoplastic lesions.

Summary

Universities Associated for Research and Education in Pathology (UAREP) has conducted an independent re-evaluation of the pathology findings of studies on nitrite and neoplasia in rats. The original studies were carried out at the Massachusetts Institute of Technology (MIT) under contract with the Food and Drug Administration (71-81 and 74-2181).

The UAREP study involved the "blind" review of histologic slides and necropsy records of more than 2,000 rats. More than 50,000 tissues were examined. A Joint Committee of Experts (JCE) developed the protocol, established diagnostic criteria, monitored the study, examined samples of tissues as appropriate and prepared reports.

Preliminary examination of encoded slides and encoded gross pathology records was carried out by pathologists selected by the JCE and approved by FDA. The panel of reviewing pathologists included both M.D.'s and D.V.M.'s expert in rodent pathology, cancer pathology or both.

Results of the preliminary examination were decoded by the Principal Investigator for comparison with the MIT diagnosis.

In all cases in which the preliminary diagnosis of neoplasia differed from the MIT diagnosis, the tissues were re-examined by a panel of three pathologists who arrived at a consensus diagnosis. In those cases in which the panel could not reach agreement, the tissues were examined by the JCE which established the final diagnosis.

The studies were carried out at Northwestern University, the University of Maryland, and the University of North Carolina at Chapel Hill.

At the request of FDA, the study was carried out in two phases. Phase I included a pretest utilizing tissues from FDA contract #71-81 and full review of Groups 1, 4, 5, 8, 11, 13, 15, 16, 17, and 18. Phase II covered the remaining groups—2, 3, 6, 7, 9, 10, 12, and 14. Reports on Phase I and Phase II were prepared but submission of these reports to FDA was delayed pending resolution of discrepancies relating to identity of individual animals. Reports on Phase I and Phase II accompany this final report.

Since statistical analysis remains to be carried out by FDA, we cannot draw conclusions as to either the statistical significance or biological implications of the findings.

In our reports, we have called attention to certain observations. We were unable to confirm the diagnosis of immunoblastic hyperplasia. We found a much lower incidence of lymphoma. Our diagnoses with regard to neoplasia disagreed with those of the MIT reports in a number of instances. We also found a number of cases which we have diagnosed as histiocytic sarcoma and are preparing a separate report on this lesion which includes photomicrographs.

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U.S. SENATE,
COMMITTEE ON APPROPRIATIONS,
Washington, D.C., August 28, 1980.

Mrs. CAROL TUCKER FOREMAN,
Assistant Secretary for Food and Consumer Services, U.S. Department of Agriculture, Washington, D.C.
Dr. JERE E. GOYAN,
Commissioner of Food and Drugs, Public Health Service, Department of Health and Human Services, Rockville, Md.

DEAR MRS. FOREMAN AND DR. GOYAN: Several months ago, I indicated my concern to you about taking regulatory actions before evidence is available to and reviewed by the scientific community. Your recent actions concerning the use of nitrite reinforce my concern, because they raise serious questions about the adequacy of your scientific review process for food additives and particularly your mechanisms for ensuring peer review of scientific data.

Specifically, in 1978, based upon conclusions of the Newberne study, your agencies reached the tentative conclusion that nitrite might cause cancer. As a result, you announced a series of potential regulatory proposals to phase our nitrite use contingent upon the development of a botulism protection alternative.

Soon after the announcement, however, serious questions arose concerning the validity of the study. Ultimately, the FDA review and that of the independent group with which FDA contracted, resulted in the conclusion that there was "no basis for FDA and USDA to initiate any action to remove nitrite from foods at this time." Regrettably, this conclusion was reached almost two years after nitrite was publicly spotlighted by the initial conclusions of the Newberne study, two years during which the affected industries had to live with a cloud over their heads.

These events demonstrate, I believe, some real problems in your review process that must be remedied. While I understand that your statutory duties to protect the public may require prompt action in the face of new evidence, I strongly believe that you must find ways to strengthen and accelerate the scientific review process so that your judgments can have the benefit of extensive review prior to major regulatory decisions. The nitrite case is, I believe, a good example of the problems that can arise when you make important regulatory judgments without the benefit of extensive peer review of the data upon which those judgments are based.

Consequently, I believe it is essential that your agencies undertake a study to find alternate ways to improve your peer review mechanisms. I know that the American Industrial Health Council has recently recommended a study of the alternative institutional means for making sure that scientific regulatory agencies have the best and most objective system of scientific evaluation. I would appreciate your consideration of these ideas and any others that you might propose.

Your response to this letter, including an estimate of the cost of any proposed study, would be appreciated at the earliest possible time.

Your very truly,

THOMAS F. EAGLETON,
Chairman, Subcommittee on Agriculture, Rural Development and Related Agencies.

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE,
FOOD AND DRUG ADMINISTRATION,
Rockville, Md., September 10, 1980.

Hon. THOMAS F. EAGLETON,
Chairman, Subcommittee on Agriculture and Related Agencies, Committee on Appropriations, U.S. Senate, Washington, D.C.

DEAR SENATOR EAGLETON: This is in response to your letter of August 28, 1980, requesting that FDA and USDA consider ideas for making sure that scientific

regulatory agencies have the best and most objective system for evaluating scientific data on which regulatory judgments are based. You suggest specifically that we study alternate ways to improve our peer review mechanisms, stressing your concern that important regulatory judgments not be made "without the benefit of extensive peer review of the data upon which those judgments are based." Finally, you ask that we provide an estimate of the cost of any proposed study.

We agree that it would be extremely useful to have an appropriate organization conduct for us under competitive contract a study that would do the following:

1. Assess the procedures now in place at FDA and USDA for sponsoring and monitoring the progress of research examining the toxicity of substances.

2. Assess the procedures now used by FDA and USDA to evaluate for regulatory purposes scientific data on the toxicity of substances, including existing procedures for obtaining external peer review of such data.

3. Consider whether changes are needed in the manner in which FDA and USDA review scientific data for regulatory purposes, including whether, and under what circumstances, additional external peer review mechanisms are needed.

4. To the extent additional peer review mechanisms are needed, consider what those mechanisms should be.

5. Consider how FDA's and USDA's evaluation of scientific data, including any needed peer review, should mesh with the administrative processes required to take regulatory action.

Since these questions represent the intersection of a number of regulatory policy, legal, and scientific process issues which have not previously been addressed, we hope to receive innovative and imaginative proposals to conduct this study.

We believe that a study, as described above, could be performed under contract for approximately $0.5 million. However, we must hasten to point out that resources requested by the Agencies for 1981 have already been reduced substantially by the President's revision of his original request and by House action on this revised request. While we fully support the need for fiscal constraint as a step toward assuring a healthy national economy, we must point out that our financial plans are so austere as to make it virtually impossible to absorb even the relatively modest cost of such a study within resources currently projected for 1981.

Sincerely yours,

JERE E. GOYAN,
Commissioner of Food and Drugs.
CAROL TUCKER FOREMAN,
Assistant Secretary for Food and Consumer Services.

[From the Food Chemical News]

EAGLETON ASKS FOR PEER REVIEW OF MAJOR FDA-USDA REGULATORY DECISIONS

Chairman Eagleton (D-Mo.) of the Senate Appropriations Subcommittee on Agriculture and Related Agencies has called on the Food and Drug Administration and the Department of Agriculture to institute a peer review system for major regulatory decisions undertaken by the agencies.

Eagleton asked for institution of the peer review because of his concern raised by the reversal made by FDA and USDA on the use of nitrite as a preservative (See Food Chemical News, Sept. 1, Page 14).

In an Aug. 28 letter to Food and Drugs Commissioner Dr. Jere E. Goyan and Carol Tucker Foreman, Assistant USDA Secretary for Food and Consumer Services, Eagleton said it "is essential that your agencies undertake a study to find alternative ways to improve your peer review mechanisms," suggesting that the FDA and USDA explore the American Industrial Health Council's recommendation for a study of "alternative institutional means for making sure that scientific regulatory agencies have the best and most objective system of scientific evaluation."

EAGLETON ASKS FOR COST ESTIMATE FOR STUDY OF NEW PEER REVIEW MECHANISM

He asked the agencies to supply an estimate of the cost of any proposed study which could help them institute better peer review of agency decisions, noting that he had previously indicated his concern about taking "regulatory actions before evidence is available to and reviewed by the scientific community."

"Your recent actions concerning the use of nitrite reinforce my concern," Eagleton continued, "because they raise serious questions about the adequacy of your scientific review process for food additives and particularly your mechanism for ensuring peer review of scientific data."

He noted that after the agencies' decision to phase out use of nitrite had been made, the Newberne data had been challenged, but he pointed out it took nearly two years before FDA and USDA were persuaded to change their position, and not without raising "a cloud over" the heads of the affected industries.

"These events demonstrate, I believe," the subcommittee Chairman emphasized "some real problems in your review process that must be remedied."

Eagleton acknowledged that it may be necessary to take prompt action at times to protect the public, but he cautioned, "you must find ways to strengthen and accelerate the scientific review process so that your judgements can have the benefit of extensive review prior to major regulatory decisions."

The FDA-USDA rush to judgement on nitrite was explored in a commentary in the Sept. 5 issue of Science in which the magazine quoted former FDA Commissioner Donald Kennedy, now president of Stanford University, as saying that "the procedure for review we followed was correct."

Kennedy said the internal task force which reviewed the MIT data was competent to make the proper decision, and suggested that the agencies took the appropriate option in proposing the phaseout of the use of nitrite.

Science quoted from an internal memo in which Kennedy offered to resign if the "outcome" of the decision "proves more disastrous than this argument predicts." Former Health, Education and Welfare Secretary Joseph Califano's reluctance to go along with Kennedy, according to Science, "was a lasting source of friction between Kennedy and himself."

Science also recalled that Dr. Albert C. Kolbye, Jr., Associate Director for Toxicological Sciences in the Bureau of Foods, had complained to the General Accounting Office and the Congressional Research Service that he and other key officials of the Bureau had been excluded from decision making before the first public announcement.

ALTERNATIVE FOOD LABEL FORMAT SUGGESTED BY FIRM

Oscar Mayer has recommended that the tri-partite food labeling group give serious consideration to an alternative food label format similar to one used by the firm for eleven of its processed meat products (See Food Chemical News, Aug. 11, Page 40).

The company said the format consists of an abbreviated nutritional statement including calories, protein, fat, carbohydrate, cholesterol, sodium and potassium; the percentage composition of the product, as consumed, shown in terms of the common names of the major functional groupings; and the listing of ingredients in order of predominance.

Reaction to the label format from consumers, the trade and the food industry press has been positive, Oscar Mayer stated, pointing out that its labeling program was introduced in June following market research and a year's work with the Department of Agriculture.

D LEVELS IN INFANT FORMULA ARE GENERALLY LOWER THAN .01 P.P.M.

Reductions in product lead content to current low levels ranging from less than .01 to less than .0 p.p.m. on a ready-to-feed basis have been achieved for infant formulas, members of the Infant Formula Council reported to Food and Drug Administration officials recently.

MEMORIAL SLOAN-KETTERING CANCER CENTER,
New York, N.Y., October 8, 1980.

To the Hon. Hugh L. Carey and Members of the New York State Legislature, State House, Albany, N.Y.:

This letter transmits the report of the Panel to Review Scientific Studies and the Development of Public Policy on Problems Resulting from Hazardous Wastes. This Panel was created by Executive Order on June 4, 1980.

In fulfillment of its charge the Panel reviewed studies conducted under a variety of auspices, including the New York State Department of Health, the U.S. Environmental Protection Agency and private investigators. As a result of this review, the Panel has concluded that there has been no demonstration of acute health effects linked to exposure to hazardous wastes at the Love Canal site. The Panel has also concluded that chronic effects of hazardous wastes exposure at Love Canal have neither been established or ruled out as yet, in a scientifically rigorous manner. The studies conducted in the past two years have been inconclusive in demonstrating long term health effects due to hazardous wastes exposure.

The Panel finds that the continued uncertainty regarding chronic health effects is related to several factors:

Inadequate research designs for health effects studies particularly regarding chromosome damage and informal surveys of the Love Canal residents.

The inevitable necessity of time required for longitudinal prospective studies and complex retrospective studies concerning long term exposures to hazardous wastes.

Inadequate intergovernmental coordination and cooperation in the design and implementation of health effects studies.

Many of the events of the past two years have fueled rather than resolved public anxiety and questions regarding the possible health effects of hazardous wastes of Love Canal. The design, implementation and release of the EPA chromosome study has not only damaged the credibility of science but exacerbated any future attempts to determine whether and to what degree, the health of the Love Canal area residents has been affected. The Panel's recommendations attempt to assure that the circumstances which have resulted in inadequate science will not be repeated. It may be too late to remedy the mistakes of the Love Canal experience; but there remains an opportunity to avoid a repetition of such mistakes in the future.

I extend my appreciation to the members of the Panel for their high level of participation and commitment within a compressed time frame in completing this effort. I wish also to recognize the complete cooperation of State agencies and other organizations and individuals in supplying study materials to the Panel.

Respectfully,

LEWIS THOMAS, M.D., *Chairman.*

REPORT OF THE GOVERNOR'S PANEL TO REVIEW SCIENTIFIC STUDIES AND THE DEVELOPMENT OF PUBLIC POLICY ON PROBLEMS RESULTING FROM HAZARDOUS WASTES

(Members of the Panel: Lewis Thomas, M.D., Chairman; Saul J. Farber, M.D., Secretary; Richard A. Doherty, M.D.; Attallah Kappas, M.D.; and Arthur A. Upton, M.D.)

CANCER—OPPORTUNISM AND OPPORTUNITY

(By Philip H. Abelson)

When people are unable to evaluate the magnitude of risks in a situation, many are inclined to fear the worst. This has been especially true in attitudes toward the health hazards associated with chemicals. A tendency for some people to be "spooked" has been exploited by opportunists who have talked of a cancer epidemic allegedly created by chemicals. Some chemicals in the workplace are carcinogenic, but their contribution to cancer prevalence is small in comparison to that of smoking and probably to that of natual substances in raw and cooked foods.

Talk of a cancer epidemic seems to owe much to misinterpretation of a statement made by John Higginson of the International Agency for Research on Cancer. He has written, "between 80 and 90 percent of all cancers are dependent directly or indirectly on environmental factors." However, Higginson recently emphasized that the principal basis for his estimate was such factors as lung cancer from smoking and carcinogens such as aflatoxins in foods. He estimated that 1 to 5 percent of cancers are due to the occupational environment.

The cancer stampede has created opportunities for people in politics and others yearning for publicity: it has also been tempting to some scientists in government. A group from the National Cancer Institute, the National Institute of Environmental Health Sciences, and the National Institute for Occupational Safety and Health gave then HEW Secretary Califano alarmist estimates which he used in a speech on 15 September 1978. The speech, which was widely quoted, included the statment that during the next 30 to 35 years, 17 percent of all cancer deaths will be associated with previous exposure to asbestos. The backup report for the estimate (not in a peer review journal) was flimsy. For example, an important component of the cohort cited as being at future risk was people who had worked in shipyards during World War II. The authors provided no data about the age distribution of the workers. However, because of the military draft, the average age of working males was probably 40 to 45. By now, these people must already have made most of their contribution to cancer statistics. The report was attacked by many epidemiologists. Richard Doll, Regisu Pofessor of Medicinè at Oxford, wrote, "I regard it as scientific nonsense." An editorial in the British medical journal *Lancet* criticized the

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report, concluding with, "it is sad to see such a fragile report under such distinguished names."

The effort to prove a big role for industrial chemicals diverts attention from what is probably the best hope for reducing cancer incidence—careful study of foods and effects of cooking. It has long been known that the incidence of gastrointestinal cancers is highly variable, both temporally and geographically. For example, a variation of the incidence of esophageal cancer by a factor of 100 has been observed in China, and there is a strong corrleation between prevalence and food. Yet expenditures to examine the role of food in cancer has been comparatively small here. Leadership has been seized by Takashi Sugimura, director of the National Cancer Center in Tokyo. He has used the Ames test and other related procedures to detect mutagens and carcinogens in raw foods. He has also conducted experiments on the effects of elevated temperatures on proteins and amino acids and has observed the resulting formation of strong mutagens and carcinogens. He has pointed to differences in food preparation as the reason why incidence of stomach cancer in Japan is twice that here. Sugimura and colleagues have also studied mutagenic effects of flavonoids, including the highly mutagenic quercetin and kaempferol, which are present in many edible plants, vegetables, and fruits.

All people ingest the mutagens and carcinogens of food daily. Far fewer are exposed to hazards in the workplace. It is now feasible to monitor the mutagens naturally present in food and to evaluate changes arising from cooking. A comprehensive investigation of foods and the products of cooking should have high priority.

BRUSH WELLMAN, INC.,
Cleveland, Ohio, November 25, 1980.

Dr. PAUL KOTIN,
Senior Vice President, Health, Safety and Environment, Johns Manville, Greenville Plaza, Denver, Colo.

DEAR PAUL: David Bayliss left NIOSH this past summer to work for EPA. Before he left he was asked to submit a letter expressing his views on the Wagoner beryllium study. He sent a copy of the letter to Brian MacMahon and Neil Roth, who in turn sent it to me. In case you haven't seen it I am enclosing a copy. It certainly confirms everything we always suspected about the way Wagoner and Infante operate.

Sincerely,

MARTIN B. POWERS, *Vice President.*

Enclosure.

ALEXANDRIA, VA., *November 12, 1980.*

WILLIAM H. FOEGE, M.D.,
Director, Center for Disease Control,
Atlanta, Ga.

DEAR DR. FOEGE: The February, 1980 issue of the The Journal of Environmental Research contains a series of articles dealing with the health aspects of occupational exposure to beryllium. The longest of these articles is entitled "Beryllium: An Etiologic Agent in the Induction of Lung Cancer, Nonneoplastic Respiratory Disease, and Heart Disease among Industrially Exposed Workers", and lists me as the third of three authors. Drs. Joseph K. Wagoner and Peter F. Infante, in that order, are the other two authors listed.

The article is the outgrowth of an extensive retrospective cohort study of beryllium workers which I began in the latter half of the 1960's and on which I prepared two written reports which were circulated within the National Institute for Occupational Safety, and Health. Beginning in approximately 1972, Dr. Wagoner, who had not previously been involved in working on the study, assumed an ever-increasing role in it, and later, during and after the OSHA hearings on beryllium in August, 1977, Dr. Infante also became involved. Dr. Wagoner's intent, of course, as I well knew, was to have a report of the study published when he was satisfied with it, but because of questions raised beginning in the Summer of 1977, submission for publication was quite properly delayed to accommodate a succession of drafts. When the study was finally submitted for publication, it was done so without my permission or agreement and without my having approved or even seen or known of the precise contents of the submitted version.

In fact, it now appears that my two "co-authors" may have hurried the submission of the report in order to have it in the publisher's hands prior to the meeting of a panel of independent reviewers specially convened in Atlanta at the Center for Disease Control, perhaps with the thought that it would be easier to resist changes

sought by the reviewers if a manuscript had already been submitted. The Atlanta meeting took place on October 9, 1978. According to a note in the Journal, the manuscript was received on October 5, 1978, just four days before the meeting of the reviewers, and I recall being pressured by Dr. Infante in late September of that year to approve or disapprove a draft by September 27, 1978.

Puzzlingly, despite the fact that they apparently had already submitted the report to the Journal in early October, Drs. Wagoner and Infante, as late as October 13, 1978, as I understand it, presented a draft to the Director of the CDC for what was still being described as "publication clearance." I was not even told about this latter draft until November, and at that time did not learn of it from either Dr. Wagoner or Dr. Infante. I did not see a copy of it until at least December, 1978.

The versions of the study which I saw prior to publication and the version in which it was finally published contain several serious shortcomings which were called to the attention of Drs. Wagoner and Infante by me and by others prior to publication. Many of these shortcomings have not only not been corrected in the Journal article; they have not even been adequately acknowledged and in some cases, I suspect, have been deliberately and unfairly minimized.

After I voiced within NIOSH and CDC my considerable upset at having had the product of my extensive efforts removed from my control and having had the flawed study published without my approval of its contents (even though I had previously been hoping and expecting to have the study published, with me listed as the senior author, when the deficiencies which I identified had been remedied), NIOSH asked that I prepare and submit in writing the basis of my concerns, including my evaluation of the study from a scientific perspective and my recommendations for future activity. This letter is in response to the NIOSH request.

The deep seated nature of my concern can be understood only against the historical background out of which the study developed.

The request that an epidemiology study of beryllium workers be done came originally from the beryllium industry, and the cohort was developed in large part based upon employee lists and work histories provided by the industry. In 1972 I prepared a report which covered two beryllium facilities of one beryllium manufacturer and found no significant excess of lung cancer among the cohort. Dr. Wagoner criticized the study and objected to its publication on the grounds that the cohort was diluted by the inclusion of non-production and non-maintenance workers who had had minimal risk of exposure, such as office, sales and engineering employees (a criticism on which I will comment later in this letter), and that it did not allow a sufficient period of follow-up to take account of the latency factor. While I did not necessarily agree, at least not to the degree that Dr. Wagoner felt that there had been signficant dilution or that the period of follow-up was insufficient or rendered the report materially suspect, I did agree that more refinement and additional follow-up might yield further information, and I welcomed the anticipated assistance of Dr. Wagoner in conducting that work.

Despite my interest in proceeding with the work, however, my proposals to do so were regularly turned down by Dr. Wagoner, and the effort languished for over three years, until the fall of 1975, when the Occupational Safety and Health Administration issued the proposed standard for occupational exposure to beryllium, in which it proposed to lower the existing beryllium standard, on the basis that beryllium was a suspected human carcinogen. At Dr. Wagoner's instructions and under his direction, I began working on an update of the study. While it is hard to document except retrospectively and indirectly by reference to the published study itself and the events of 1977 and 1978, I noticed as the update work progressed and Dr. Wagoner became gradually more involved in the study, a perceptible shift in approach away from what I regard as the objective one that I had adopted in the prior phase of the study and was continuing to bring to the update phase. The approach of Dr. Wagoner, far from being objective, seemed motivated to a large degree by a desire to provide evidence in support of the proposed OSHA standard and of the position advanced by OSHA that beryllium should be treated as a human carcinogen. Ultimately the study was, at Dr. Wagoner's direction, rushed to what he then viewed as completion in time for the OSHA hearings on beryllium in August, 1977. The shift in approach concerned me as a scientist, but I felt that because I had been associated with the study for several years and was for that reason regarded both inside and outside NIOSH as the principal investigator, nothing would be released in final published form without my approval, and I could therefore prevent the objectionable approach of Dr. Wagoner from biasing the final product.

In the Summer of 1977 I entered upon a program of long-term study in North Carolina, and about the same time, without any prior consultation with me, Dr. Infante bagan his participation in the study. I ceased having daily contact with the study, but I did maintain some contact with it and was aware that there was a

succession of redrafts which were prepared by Drs. Wagoner and Infante following sharp criticisms leveled at the work by a panel of internal reviewers convened by the CDC and chaired by J. Donald Millar, M.D. (The work of this panel, of course, preceded the meeting of the independent reviewers in Atlanta, to which I previously referred.) These criticisms were, in my view, justified, and many were ones which I had myself voiced previously. I was not, however, permitted by Dr. Wagoner and Dr. Infante to play an effective role in deciding how the criticisms would be answered or how the succeeding versions of the report would be altered. Generally speaking my "co-authors" ignored my suggestions. The result of this process was that some changes were made by Drs. Wagoner and Infante, generally with reluctance, but a number either were not made or were made only in token fashion. Among those not made were some that would have corrected what I view as serious methodological flaws and editorial inaccuracies and oversimplifications.

A number of these flaws were focused upon by the internal CDC review panel in the course of its lengthy, repeated and careful examination of drafts of the study. The several memoranda prepared on behalf of the panel seem to me to reflect a gradual transition from an early desire and, in fact, insistence by the panel that the study be properly conducted and reported, to, in the later stages of the review, a reluctant concession that the best it could achieve under the circumstances was to see that the more blatant overstatements were omitted or modified and that the report contained some indications of its many substantial weaknesses. This shift is, from a practical standpoint, entirely understandable given the apparent recalcitrance of Drs. Wagoner and Infante and the panel's desire to bring debate on the matter into the open by having a version of the study published. I myself was, as the months passed in 1978, worn down by the conflicts with Drs. Wagoner and Infante, and was affected by the same syndrome, which is so clearly reflected in a September 26, 1978 memorandum from the Chairman of the panel to the Director, CDC:

"The Panel members feel somewhat frustrated by the authors' reluctant response (despite repeated requests by the Panel) to fully qualify the results of the study and to candidly interpret the study's weaknesses to avoid misleading the reader. On the other hand, the Panel members are impatient that the findings be published forthrightly as soon as possible to improve the scientific debate of the Issues already raised by preliminary reports of the study. Therefore the Panel offers a limited, specific solution which, if accepted by the authors, would enable the Panel to recommend approval of the paper for publication without any further delay."

I, however, think it is regrettable that the review panel considered itself forced into taking this position and, while respecting the difficulty of the task which the panel was asked to perform and the many conflicting considerations which it had to make, I do not believe the decision was wise. The panel justified its ultimate approach on the ground that the major weaknesses of the study were identified and "the careful reader has been given sufficient information to permit an independent conclusion regarding the findings." As those of us who have been involved in scientific (especially health-related) studies know—and this includes the members of the panel—studies of this kind, once published, tend to develop a life of their own and to have their conclusions accepted at face value and without critical, independent examination. Moreover, while the panel members, with their extensive and in-depth knowledge of the history of the entire study, the data which underlie it and the criticisms leveled against it, may themselves be able to see in the published report the indications of its inherent weakness, I have grave doubts that even a reader who is "careful" but who does not have the benefit of the panel's background knowledge and the months of debate and probing examination that occurred, can adequately discern the serious shortcomings in the study or appreciate their significance.

The result of all these events is that there is now in the public domain a report attributed in part to me and bearing the apparent imprimatur of agencies of the United States government, which is at best misleading and by even the lowest common denominator of scientific standards should not be permitted to stand unchallenged in its present form. My status as one of the listed authors of the report provides me with a special perspective on the situation and an opportunity to make a contribution of particular importance. In fact, it was in anticipation of having this opportunity and taking advantage of it if the necessary changes were not made in the report before actual publication, that in the end I did not take the steps required to have my name removed as one of the authors.

The beryllium study cohort, which had originally consisted of upwards of 6800 individuals, had by 1977 been reduced to slightly more than 3,000 records of white males who had been employed in production, maintenance or administrative positions at Kawecki Berylco Industries in Reading, Pennsylvania sometime during the

period January 1, 1942 through December 31, 1967. The original cut-off date for analysis in the reports which I prepared in the early 1970's had been December 31, 1967. The cut-off date for the study as later updated, and as published, was December 31, 1975. In preparing the earlier versions of the study, I had used a program based upon actual death rates through the 1967 follow-up date. In preparing the updated version, Drs. Wagoner and Infante, over my objection, did not use an updated computer program which included death rates from the period of additional follow-up. Rather, they used for the period, which covered the years 1968–1975, the same death rates applicable for the period 1965–1967. Because lung cancer death rates rose sharply between 1965 and 1975, the failure to use the proper rates produced a substantial understatement in the number of expected lung cancer deaths in the cohort, thus exaggerating the excess of observed vs. expected lung cancer deaths.

The published report makes passing mention of the death rate situation, offering, the explanation that more recent rates were "not readily available." This is simply not accurate. These rates were known and available no later than early 1978; in fact Dr. Brian MacMahon, who has criticized the study extensively, identified the discrepancy in January 1978 and ran a comparison which did update the rates. It is worth noting here that although Dr. MacMahon did in fact expose the discrepancy in expected values and surmised that it might have been due to the use of improper death rates, he was at that time unable to determine for certain what the reason for the discrepancy was, because Dr. Wagoner was, for obvious reasons, refusing to disclose the NIOSH life table program publicly. Dr. Wagoner, of course, undoubtedly knew all along the reason for the discrepancy.

Furthermore, in the Fall of 1978 the NIOSH life table program itself was revised to include the updated rates for the post-1967 follow-up period. Although the long delay in updating meant that the correct life table did not become available until shortly after the manuscript had been submitted for publication, we all knew before the submission that it would be available by about December, 1978 (a mere two to three months after the actual submission), necessitating only a brief postponement of submission. Furthermore, even if there had been some reason for submitting the paper in October, this would not preclude subsequent changes. Indeed it is the rule rather than the exception that changes, sometimes substantial ones, are made in manuscripts between submission and actual publication, and publication is frequently delayed to accommodate them. I do not think any reputable scientist would disagree with my view that in this situation, where a material flaw in the study could have beeen corrected after submission by using an updated, revised program in the acutal possession of NIOSH, the failure to do so is utterly unjustifiable.

What is more, although Drs. Wagoner and Infante must have been aware, even without using actual rates, of the approximate magnitude of the understatement in expected lung cancer deaths, both from their general experience and from the tables that had been presented by Dr. MacMahon, they do not make any comment on that magnitude in the published report. An earlier draft of the report which they prepared contained an unreasonably low estimate of the understatement (5.5.%), and when challenged by the CDC panel to support the figure (which should have been in the range of 10–11%), they elected to drop any reference to quantification.

Since returning from my long-term training in 1979, I have recomputed the expected values for lung cancer in the cohort using the updated NIOSH program. The resulting expected value is 38.2, as compared to the expected value of 34.3 reported by Drs. Wagoner and Infante in the published report. (Table 5). This difference, which is in excess of eleven percent, is especially meaningful here where the size of the reported excess of observed over expected is so small. Using the number of observed lung cancer deaths reported in the published version, 47, the excess over the expected of 34.3 was, as noted in the published report, statistically significant ($p<0.05$) using a one-tailed test. By contrast, the excess of observed vs. expected is not statistiscally significant when the number of expected deaths is calculated correctly using appropriately updated death rates for the period 1968–1975.

This updated program, when used with the beryllium cohort, also results in other changes in the figures set forth in the published report, most of which are not demonstrably material. Specifically, the new program causes changes in tables numbered 2 through 12 in the published report; tables 1, 13 and 14 are not changed. The revised tables are set out at in an appendix to this letter, numbered to correspond to the tables in the published report, and I have also included in the appendix a discussion of some of the changes not referred to in the text of the letter.

As I view it, there is one reason and one reason only why Drs. Wagoner and Infante, over the protests of me and others, including the CDC review panel, refused to use the proper death rates: they wanted to be able to describe the study as

demonstrating a statistically significant excess of respiratory cancer in beryllium workers—which is indeed precisely how the study is described in the abstract. The manipulation of input data to permit assertion of a pre-ordained conclusion is not, in my view, evidence of intellectual or scientific honesty. I do not wish to be a part of it, and I do not feel NIOSH should either.

The use of the proper death rates also has other ramifications which, though important, are less dramatic than the elimination of a statistically significant excess in the cohort as a whole. For exam- there is no longer a statistically significant excess of observed vs. expected lu. ancer deaths in the difference between the cohort as followed through 1967 (as i nad originally done) and through 1975 (as the published version now does), regardless of the time elapsed since original employment. (Table 9). Similarly, in the portion of the cohort first exposed more than twenty five years prior to death, upon which the published report places so much emphasis, the excess of observed vs. expected lung cancer deaths is reduced to the very margin of statistical significance. (Table 6).

Less critical in its effect on the reported results of the published article, but no less significant for its impact on the integrity of the study, is the inclusion in the cohort of one individual, John Prokopchak, who did not meet the definition of the cohort and was not occupationally exposed to beryllium. Mr. Prokopchak did, however, die of lung cancer.

Long before Drs. Wagoner or Infante were involved with the study, I participated in establishing the definition for inclusion in the study cohort, which was that in order to qualify for inclusion, a person had to be a white male who had worked at least one day at the plant. There were some individuals whose records reflected a beginning date of employment but no ending date, and for whom there was no other evidence of length of employment. In the absence of evidence to the contrary, we assumed that workers whose records showed a beginning date did work one full day, and they were therefore included. Where there was evidence that they did not work, we excluded them.

Mr. Prokopchak fell into the latter category. We had obtained his employment card along with many others from Kawecki Berylco. This card reflected that he had been rejected for employment following a physical examination which apparently demonstrated an irregular chest condition. He had been placed on the payroll provisionally and was paid for four hours, which was an attributable time for taking the physical examination, but he had never worked at the plant. Because he had been paid, however, his name and number appeared in a quarterly earnings report to the Social Security Administration in 1945.

I was aware of Mr. Prokopchak and became aware of his death from lung cancer, but I also knew he didn't meet the definition we had established. I had excluded him from the cohort in my 1972 report, and I had specifically designated the records relating to him as being excluded. He remained excluded up through the version of the study initially placed in the record of the OSHA beryllium hearings in 1977. Following the hearings, and most significantly after I had departed NIOSH for North Carolina, without my knowledge and without even consulting me about it, Drs. Wagoner and Infante inserted him into the cohort. When I discovered later that they had done this, I protested that Mr. Prokopchak didn't belong and should be excluded. Drs. Wagoner and Infante ignored all protests relating to his inclusion, however, claiming that they had included him because of his presence of his name in the Social Security earnings reports. At the same time, however, a large number of other names on the Social Security roster were not included in the cohort, supposedly on the ground that for these individuals there was not a NIOSH-held company employment record.

The rationale advanced by Drs. Wagoner and Infante for their approach may provide a convenient cover for slipping an additional lung cancer victim into the cohort while limiting the size of the expected value by artifically restricting the total size of the cohort, but it is not a sound or fair way to conduct an epidemiology study. Nor can it hide the fact that, once again, Mr. Prokopchak did not meet the definition of having ever actually worked at the facility being studied. The reason for Mr. Prokopchak's inclusion seems obvious: it serves to increase the observed number of lung cancer deaths, providing some further "evidence" in support of what I regard as the pre-conceived conclusion which my two "co-authors" set out to validate. I should also note that there were a number of individuals who appeared on the Social Security lists and for whom NIOSH had employment records but who were excluded from the cohort because they were salesmen whose duties did not call for them to report to work daily at the plant, in contrast to production and on-site administrative personnel. The thought behind exclusion of these dual-record people was that they had limited opportunity for exposure to beryllium, a circumstance

which applies undeniably and with even greater force to Mr. Prokopchak, who had no opportunity for exposure.

In certain respects the Prokopchak situation is even more insidious than the use of improper death rates, since the text of the published report contains not even a hint of the situation. Only a person who was aware of the raw data that lay behind the study would ever know of the impropriety of his inclusion in the cohort. Thus it could never be a matter of scientific debate based solely on the published article. The result is a gerrymandering which is both unconscionable and virtually indetectable.

Furthermore in an earlier version of the report Dr. Wagoner entitled the cohort study "Bronchogenic Cancer and Cardio-Respiratory Disease Mortality Among Beryllium Production Workers" and stated in the report that the study has been confined to production and maintenance workers only. However, when it became evident that six of the forty-seven observed lung cancers were not in the categories of either production or maintenance workers, the report was re-titled "Bronchogenic Cancer and Cardio-Respiratory Disease Mortality Among White Males Employed In A Beryllium Production Facility" and the definition was revised to include all on-site employees and exclude only outside salespeople. Although these changes were explained as the correction of error in the previous draft, the willingness or reluctance of Dr. Wagoner to correct "errors" appeared to me to have been based on whether or not they facilitated or hampered progress toward the pre-ordained target of identifying beryllium as a human carcinogen.

A third flaw in the study also indetectable on the face of the report, is the reference to a purported overstatement of expected values for lung cancer deaths owing to the use of national death rates rather than rates for Berks County, Pennsylvania, where the studied plant was located. For a number of well accepted reasons, it is extremely difficult to derive county death rates in which one can place confidence. Furthermore, the time spanned by the county death rate data referred to in published report does not correspond to the full period of follow-up; in fact the county data suffer from much the same flaw as the life table actually used for the report, since the county rates extend only through 1969, not through 1975, with the result that the rates are almost certainly understated. Lastly, the published report ignores the substantial and important evidence presented by Dr. H. Daniel Roth at the OSHA beryllium hearings that whereas the lung cancer death rates for Berks County as a whole may be lower than the national rates, the rates for the city of Reading itself are some 12% higher than the national rates. According to the 1970 census, only 34% of the residents of Berks County resided within the Reading city limits, while according to the published beryllium study 46% of the cohort that lived in Berks County lived in Reading, more than one-third more, proportionally, than in the general population. Use of the death rates for Berks County as a whole, then, would underestimate expected mortality for this cohort, not overestimate it as Drs. Wagoner and Infante contend. While in my opinion the national lung cancer death rates are the most appropriate rates to be used in this study, if other more localized rates are used, they must be properly weighted toward the relatively higher Reading city rates and should be updated through 1975. The use of uncorrected Berks County rates is demonstrably inappropriate.

The manner in which the published report employs the Berks County rates in the published report (i.e., to offset the effect of the refusal of Drs. Wagoner and Infante to use updated national lung cancer death rates) is, if anything, even more unjustified than the simple use of the unweighted, incomplete county rates would suggest. Drs. Wagoner and Infante have articulated no scientific basis for suggesting this particular offset, and I know of none. It is nothing more than a rehetorical convenience, which is well illustrated by the fact that on at least one past occasion, in the course of the OSHA beryllium hearings, before Dr. MacMahon exposed the problems arising from the use of improper death rate data, Dr. Wagoner had asserted that the supposed understatment of risk attributable to the use of national rather than Berks County rates should be offset against the overstatement evident from the smoking analysis. My two "co-authors" now obviously perceive the death rate situation as a more troublesome problem in their study, and have shifted their use of the Berks County rates to counter that problem, while leaving the smoking issue for treatment in a different fashion. Moreover, the published report does not quantify the understatement in expected values owing to the acknowledged use of outdated death rates—a circumstance which, of course, must be evaluated against the previously described background, and which tends to underplay this shortfall in the expected value; yet the report does quantify and provide a discussion in support of the claimed overstatement of expected values by not using Berks County death rates—an obvious effort to emphasize this situation, since it would be viewed as supporting the conclusion sought by Drs. Wagoner and Infante.

Finally, the treatment of the smoking problem, alluded to briefly above, is inadequate. The published report acknowledges passingly that the available data indicate the likelihood that the expected values are understated by about fourteen percent. This ignores evidence introduced during the beryllium hearings that would put the underestimate more in the range of twenty-five percent. Moreover, the published report seeks to blunt the significance of even the fourteen percent understatement by citing a study done by Smith and Suzuki of the histological types of lung cancer in the cohort, the data in which, according to Drs. Wagoner and Infante, reveal a "shift in the distribution of histological types such as to suggest a cause other than smoking."

The Smith and Suzuki study did not conclude that there was any such "shift". Rather it concluded that "the prevalance of histopathological cell types of bronchogenic carcinomas among workers occupationally exposed to beryllium cannot be defined at this time." Although Drs. Wagoner and Infante acknowledge this conclusion in passing, they dismiss it as being based on an assumption for which no valid supporting data are provided. They then proceed to cite and expand upon only a portion of the data in the cell-type study, totally ignoring other data derived from pathology reports, which data do in fact provide support for the conclusion drawn by Smith and Suzuki themselves and which run contrary to the conclusion which Drs. Wagoner and Infante wish to impose on these data.

Indeed Dr. Smith himself wrote a memorandum dated June 13, 1978 in which he expressed strong reservations about, and for that matter outrightly objected to, the use to which the Smith and Suzuki study (whose data Dr. Smith called "unrepresentative") had been put in an earlier draft of the cohort study. Dr. Smith's memorandum pointed out, among other things, substantial changes in the prevalence of relevant histological types of cancer over time and the unrepresentative nature of the specimens obtained for the study, and it recommended that, under the circumstances, references to the Smith and Suzuki paper be deleted. While the Smith and Suzuki reference in the published version has been revised to an extent, the revisions do not come even close to being an adequate response to the Smith memorandum. In my opinion, the manner in which the cohort study employs the study of cell types represents an unfair use of data and an abuse of the right to cite the work of others in support of one's conclusions. And it provides one of the best examples of the kind of result-oriented approach which Dr. Wagoner injected into the study and which I (and, it seems clear, the CDC panel as well) found so offensive. Dr. Smith observed this same tendency and noted in his memorandum:

". . . the use of this [cell-type] information to support an argument that certain observations are or are not attributable to a supposed confounding etiology is inappropriate. It almost appears as though the conclusions have been formulated in advance of an examination of the data."

In reviewing a portion of the transcript of the 1977 OSHA beryllium hearings I note that Dr. Wagoner testified to the importance of doing good epidemiology if one is to do epidemiology at all:

"I think one of the overriding basic tenants of epidemiology is that a study isn't worth doing well if it isn't worth doing at all [sic]. Basically if there is inherent weaknesses in the data set, we can only conclude one thing: garbage in, garbage out."

The substantial deficiencies in the published report of the beryllium cohort study, together with the highly selective treatment of data to support my "co-authors" bias, as noted by me and also by the CDC review panel, put the study in the category of "garbage out" because of "garbage in" and, in my opinion, reflect a failure to follow Dr. Wagoner's self-proclaimed rule that a study worth doing is worth doing well.

In memoranda of September 26 and 27, 1978 from the Chairman of the CDC internal review panel to the Director of CDC, the panel, despite what were obviously viewed as important flaws in the study, conceded that it would recommend approval for publication (on the "careful reader" assumption which I previously described) if certain changes were made. If these changes were not made, the memorandum called for the publication of what would amount to a NIOSH rebuttal or disclaimer concurrently with the publication of the study itself. My examination of the relevant materials indicates that not all of the changes were made, yet there has been no statement on the subject by NIOSH. But beyond the mere refusal to make all the "limited" changes urged by the panel, I think the entire history and circumstances of this unfortunate affair rendered it incumbent upon NIOSH to disavow any connection with or implied endorsement of the claimed findings, an action in which I would have expected NIOSH to give me the opportunity to join. Since NIOSH has not done this, I now have no alternative but to explain the situation publicly and publicly to disassociate myself from the published version. Put in its simplest terms,

I feel that my integrity and reputation are at issue here, and I intend to take appropriate steps to protect them.

FUTURE CONSIDERATIONS

Despite the recent written request from Dr. Infante to the current director of NIOSH urging a reopening and updating of the beryllium study under the direction of an "impartial" investigator "independent" of the current authorities, I do not believe that such an impartial investigation can be accomplished by NIOSH. NIOSH maintains close ties with Drs. Wagoner and Infante, even to the extent of selecting Dr. Infante, who currently works in the office of Carcinogen Identification and Classification of OSHA, which supposedly has the question of beryllium carcinogenicity under deliberative review based on the record of the OSHA beryllium hearings, as the NIOSH representative to the IARC Workshop held at Lyon, France, in October, 1979. At that conference, he again "insisted" that beryllium was unequivocally a human carcinogen, citing the NIOSH study of the Reading plant as proof positive regardless of the many flaws in that paper. I am opposed to any reopening of the beryllium study under NIOSH auspices. The entire study should be transferred out of NIOSH and placed in the hands of a truly independent research organization whose scientific integrity is unblemished and whose objectivity is uncomprised.

However, if NIOSH itself does reopen the beryllium study at a future date a major effort should be undertaken to "clean up" and "complete" the file, and to modify and extend the analysis. Irrespective of the findings that result from the future analysis, the project officer will then be in a better position to justify them. If, on the other hand, the basic data file and analysis are left unaltered and the investigators merely add several additional follow-up years, and lung cancer is again found in excess, justifiable criticisms will again be leveled at NIOSH that the file was "gerrymandered" to produce a desired result.

It is my opinion that the following steps must be taken:

1. Correct the underestimate of expected lung cancer deaths by discarding extrapolation in favor of timely, properly applied death rates.

2. Remove Mr. Prokopchak from the file. He does not meet the definition for inclusion in the cohort since he never worked at the plant. In the alternative, include all other persons who appear on the quarterly earnings reports and otherwise fit the cohort definition.

3. Make every effort to identify the "missing" members of the cohort and include them. This can be done through two means:

(a) Match the Social Security quarterly earnings reports against the current master file. Two non-match lists will result. The first will consist of individuals who are in the master file but do not appear in the Social Security quarterly earnings reports. Their presence in the master file should be confirmed by valid company records that show they fit the definition for inclusion.

(b) The second list of non-matches consists of individuals not in the master file but definitely in the Social Security quarterly earnings reports. The second list of non-matches should then be returned to the Social Security Administration for further information regarding race, sex, and date of birth. When this list is returned, no further effort should be expended to gather additional information on females and non-whites identified on the list, since they are not included. The remaining male whites from this group of non-matches should then be given to Equifax, which was used by NIOSH in the past in the study, or a similar organization, to develop occupational history information. This effort can be enhanced by checking the NIOSH microfilm of the data files collected by the Division of Occupational Health, Pennsylvania, during their survey of the Reading Plant beginning in 1946 (these are on microfilm in the Biometry Section of NIOSH), and direct communication with Kawecki Berylco. Apparently in the course of preparing for the OSHA proceedings, Kawecki Berylco itself identified additional personnel documents on some 300 individuals whom it would appear should have been included in the study but were not.

4. Since my earliest efforts in the late 1960's, there has been no attempt to correct and update the occupational histories of the members of the cohort to reflect an accurate picture of where they were located in the plant at any particular point in time. The same occupational codes that were found to be in error in 1969 are still in the master file and since the coding scheme that was devised then has never been corrected, one can get a misleading impression that they are correct. They should be either corrected or deleted.

5. More attention should be given to prior and post employment of the 46 legitimate lung cancers, albeit the information is somewhat limited. The jobs that were held previously, as reported on the employment record and jobs as listed in the

occupational section on the death certificate, do not exclude the possibility of exposure to carcinogens outside the study plant. A quick review of the jobs and companies listed would seem to indicate the possibility of exposure to substances suspected of being carcinogenic that are found in the jobs and plants listed. An attempt should be made, perhaps through the Social Security Administration, to get a complete, lifetime occupational history on all 46 cases.

6. In addition, more attention should be given to the possibility that the confounding effect of smoking may be causing the excess of lung cancer. Over half of the 46 legitimate cases contain mention of smoking habits in the autopsy and medical records. No information on smoking is given in the autopsy and medical records of the remainder. Kawecki Berylco apparently has independent evidence that about 80 percent of these individuals were smokers. Smoking information is usually never available on every member of a cohort derived from employment records of former workers. Hence it is difficult to estimate the incidence of lung cancer in smokers versus non-smokers. But since the excess was only marginally significant even in the category 25+ years since first employment, it would not require a much larger proportion of smokers in the beryllium cohort as compared to the U.S. population to account entirely.

7. The discussion of the significance of Berks County lung cancer rates should be deleted or at least revised in accordance with my prior comments.

I sincerely hope that what I have said in this letter will be of assistance to NIOSH both in placing the beryllium cohort in its proper historical and scientific perspective and in providing some guideposts for future work on it.

Yours truly,

DAVID L. BAYLISS.

APPENDIX

The frequency distribution of employees by time and length of employment remains essentially unchanged. (Table 2)

Since the tables that appear in the published version were generated, two new death certificates have been added to the file reducing to ten the "unknown" causes of death. (Table 3)

A new distribution of person-years by calendar time period and age shows an increase of 459.81 pys overall with a net 88.52 falling into the period 1960 through 1975, the time period in which the questionable extrapolation method was used and in which most deaths could have been expected to occur. (Table 4) No adequate explanation for this phenomenon has been advanced except that dealing with alterations in the formula for computing person years. The impact on the computation of expected deaths may not be negligible due to additional redistribution of the person years by age. More were added to the older age categories and actual decreases are seen in the younger. This alteration may tend to increase expected deaths since death rates have their greatest impact in the older age categories.

An excessive risk for "other respiratory disease" (479–479, 500–527) remains, as does that for "heart disease" (400–443). (Table 6) With respect to "non-malignant respiratory disease" (viral influenze and pneumonia), an increase of 1.88 expected deaths to 20.64 expected deaths is evident in the more recent tabulations. (Tables 5, 7). However, the excess risk appears to be restricted to those individuals employed less than 5 years (28 obs. vs. 16.86 exp., $P<0.05$). This excess risk occurs regardless how much time has lapsed since initial employment. (Table 7).

For the cause of death "heart disease" (400–443), the overall observed deaths exceed the expected deaths significantly (396 obs. vs. 348.6 exp., $P<0.05$). By duration of employment, this excess is evident in employees employed less than 5 years (312 obs. vs. 283.7 exp.) and those employed 5 or more years (84 obs. vs. 64.9 exp.) although the excess in the latter groups appears to be statistically significant ($P<0.05$). (Table 8). This excess occurs in every interval since initial employment irrespective of duration. A transposition of several deaths in the new calculations from the under 5 year duration of employment category to the 5 year or greater category, compared to the tables in the published version, has changed the results little.

As was reported in the published version, an excess in deaths due to non-malignant respiratory disease, heart disease, and lung cancer is seen in workers employed prior to 1950 (Tables 10, 11, 12), prior to the recommendation of a limit of two micrograms per cubic meter by the AEC in 1949. However, no excesses are seen in workers employed after 1949 from nonmalignant respiratory disease and heart disease. Only a slight excess (which is smaller in the new figures than the one reported in the published version) is seen for lung cancer but it is not enough upon which to base any objective conclusions. The numbers are too small (7 obs. vs. 5.11 expected). (Table 12)

TABLE 2.
(REVISED) DISTRIBUTION OF STUDY COHORT MEMBERS ACCORDING TO CALENDAR TIME PERIODS OF INITIAL EMPLOYMENT AND DURATION OF EMPLOYMENT

Calendar time Period of Initial Employment	No. of Employees By Duration of Employment (Months)						Total No.	Median Duration Employment (Months)
	<1	1-5	6-11	12-35	36-50	>60		
1930-1939	0	0	0	7	9	48	64	118
1940-1949	466	661	267	269	90	224	2004	3.9
1950-1959	114	141	64	107	38	221	685	14.5
> 1960	22	52	28	115	52	33	302	20.1
TOTAL	602	854	359	525	189	526	3055	7.2

TABLE 3.
(REVISED) VITAL STATUS AS OF DECEMBER 31, 1975 AMONG WHITE MALES EMPLOYED IN BERYLLIUM PRODUCTION FACILITY

Status		
Known to be alive	2101	
Known to be deceased	875	
Known to be deceased in U.S.		875
death certificates obtained		865
death certificates outstanding		10
Not known to be alive or deceased	79	
Total	3055	

TABLE 4.
(REVISED) PERSON-YEARS AT RISK OF DYING ACCORDING TO AGE GROUP AND CALENDAR TIME PERIOD AMONG WHITE MALES EMPLOYED SOMETIME DURING JANUARY 1942 THROUGH DECEMBER 1967 IN A BERYLLIUM PRODUCTION FACILITY AND FOLLOWED THROUGH 1975

	Calendar Time Period			
Age group	1942-1949	1950-1959	1960-1975	Total
< 30	4,751.90	4,862.06	1,988.55	11,602.51
30-44	3,540.40	10,387.61	15,363.40	29,291.41
45-59	2,555.46	4,773.28	15,074.15	22,402.89
60-74	954.23	2,417.07	4,979.28	8,350.58
≥ 75	14.98	272.40	1,091.73	1,379.11
Total	11,816.97	22,712.42	38,497.11	73,026.50

TABLE 5.
(REVISED) OBSERVED AND EXPECTED DEATHS ACCORDING TO CAUSE AMONG THE WHITE MALES EMPLOYED SOMETIME DURING JANUARY 1942 THROUGH DECEMBER 1967 IN A BERYLLIUM PRODUCTION FACILITY AND FOLLOWED THROUGH 1975

Cause of death	Code no. (ICD)[a]	Observed	Expected
Malignant neoplasms	140-205	143	142.45
digestive	150-159	43	46.13
lung	162-163	47	38.17
residual		53	58.15
Cerebral vascular accident	330-334	60	65.15
Heart disease	400-443	396**	348.62
Non-neoplastic respiratory diseases	470-527	48	42.16
influenza & pneumonia	480-493	17	21.66
other respiratory disease	470-479, 500-527	31*	20.50
External causes	800-999	82	83.90
All other causes not indicated above		136	139.78
Unknown causes		10	0
All causes		875*	822.06

a International classification of diseases, 7th revision codes.
* Significant at $P < 0.05$.
** Significant at $P < 0.01$.

TABLE 6.
(REVISED) OBSERVED AND EXPECTED DEATHS DUE TO LUNG CANCER ACCORDING TO DURATION OF EMPLOYMENT AND TIME SINCE ONSET OF EMPLOYMENT AMONG WHITE MALES EMPLOYED SOMETIME DURING JANUARY 1942 THROUGH DECEMBER 1967 IN A BERYLLIUM PRODUCTION FACILITY AND FOLLOWED THROUGH 1975

	Duration of employment (years)[a]					
Interval since onset of employment (yrs)	< 5 years obs.	exp.	≥ 5 years obs.	exp.	Total obs.	exp.
< 15	7	8.09	1	1.60	8	9.69
15-24	16	12.24	3	2.87	19	15.11
≥ 25	17*	10.93	3	2.43	20*	13.36
Total	40	31.26	7	6.90	47	38.16

a Employment histories were ascertained only through 1967.
* Significant at $P < 0.05$.

TABLE 7.
(REVISED) OBSERVED AND EXPECTED DEATHS DUE TO NON-NEOPLASTIC RESPIRATORY DISEASE (LESS INFLUENZA AND PNEUMONIA) ACCORDING TO DURATION OF EMPLOYMENT AND TIME INTERVAL SINCE ONSET OF EMPLOYMENT AMONG WHITE MALES EMPLOYED JANUARY 1942 THROUGH SEPTEMBER 1968 IN BERYLLIUM PRODUCTION FACILITY FOLLOWED THROUGH 1975

	Duration of employment (years)[a]					
Interval since onset of employment (yrs)	< 5 years obs.	exp.	≥ 5 years obs.	exp.	Total obs.	exp.
< 15	6	3.62	1	0.72	7	4.34
15-24	11*	6.65	1	1.55	12	8.20
≥ 25	11*	6.59	1	1.51	12	8.10
Total	28**	16.86	3	3.78	31*	20.64

a Employment histories ascertained only through 1967.
* Significant at $P < 0.05$.
** Significant at $P < 0.01$.

TABLE 8.
(REVISED) OBSERVED AND EXPECTED DEATHS DUR TO HEART DISEASE ACCORDING TO DURATION OF EMPLOYMENT AND TIME INTERVAL SINCE ONSET OF EMPLOYMENT AMONG WHITE MALES EMPLOYED SOMETIME DURING JANUARY 1942 THROUGH SEPTEMBER 1968 IN A BERYLLIUM PRODUCTION FACILITY AND FOLLOWED THROUGH 1975

	Duration of employment (years)[a]					
Interval since onset of employment (yrs)	< 5 years obs.	exp.	> 5 years obs.	exp.	Total obs.	exp.
<15	108	101.64	24	19.53	132	121.17
15-24	121	105.99	39**	26.57	160**	132.56
≥ 25	83	76.06	21	18.78	104	94.84
TOTAL	312*	283.69	84*	64.88	396**	348.57

a Employment histories ascertained only through 1967.
* Significant at $P < 0.05$.
** Significant at $P < 0.01$.

TABLE 9.
(REVISED) OBSERVED AND EXPECTED DEATHS DUE TO LUNG CANCER FOR WHITE MALES ACCORDING TO PERIOD TO FOLLOW-UP AND TIME INTERVAL SINCE ONSET OF EMPLOYMENT IN A BERYLLIUM PRODUCTION FACILITY

Interval since onset of employment	Period of follow-up 1942 thru 1967 Obs.	Exp.	1942 thru 1975 Obs.	Exp.	Difference (1942-67 vs 1942-75) Obs.	Exp.
< 5	7	8.75	8	9.69	1	0.94
15-24	14	10.40	19	15.12	5	4.72
≥ 25	2	.72	20*	13.36	18	12.64
Total	23	19.87	47	38.17	24	18.30

Significant at $P < 0.05$.

TABLE 10.
(REVISED) OBSERVED AND EXPECTED DEATHS DUE TO NON-NEOPLASTIC RESPIRATORY DISEASE (LESS INFLUENZA AND PNEUMONIA) FOR WHITE MALES ACCORDING TO DATE OF INITIAL EMPLOYMENT AND TIME SINCE ONSET OF EMPLOYMENT IN A BERYLLIUM PRODUCTION FACILITY

Interval since onset of employment (years)	Date of initial employment <1950 Obs.	Exp.	>1950 Obs.	Exp.	Total Obs.	Exp.
< 15	7*	3.39	0	.95	7	4.34
15-24	12*	7.03	0	1.16	12	8.19
≥ 25	12	8.08	0	.02	12	8.10
Total	31**	18.50	0	2.13	31*	20.63

* Significant at P < 0.05.
** Significant at P < 0.01.

TABLE 11.
(REVISED) OBSERVED AND EXPECTED DEATHS DUE TO HEART DISEASE FOR WHITE MALES ACCORDING TO DATE OF INITIAL EMPLOYMENT AND TIME INTERVAL SINCE ONSET OF EMPLOYMENT IN A BERYLLIUM PRODUCTION FACILITY

Interval since onset of employment (years)	Date of initial employment <1950 Obs.	Exp.	≥1950 Obs.	Exp.	Total Obs.	Exp.
< 15	109	103.54	23	17.63	132	121.17
15-24	150**	116.96	10	15.60	160**	132.56
≥ 25	104	96.63	0	.22	104	94.85
Total	363**	315.13	33	33.45	396**	348.58

Significant at P < 0.05.

TABLE 12.
(REVISED) OBSERVED AND EXPECTED DEATHS DUE TO LUNG CANCER FOR WHITE MALES ACCORDING TO DATE OF INITIAL EMPLOYMENT AND TIME INTERVAL SINCE ONSET OF EMPLOYMENT IN A BERYLLIUM PRODUCTION FACILITY

Interval since onset of employment (years)	Date of initial employment <1950 Obs.	Exp.	>1950 Obs.	Exp.	Total Obs.	Exp.
15	5	7.37	3	2.32	8	9.69
15-24	15	12.37	4	2.74	19	15.11
25	20	13.32*	0	*.05	20*	13.37
Total	40	33.06	7	5.11	47	38.17

Significant at P< 0.05.

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March 6, 1978
WCC-82

The Honorable Joseph A. Califano
Secretary of the Department of
Health, Education, & Welfare
200 Independence Avenue, S.W.
Washington, D.C. 20201

The Honorable Ray Marshall
Secretary of the Department of Labor
200 Constitution Avenue, N.W.
Washington, D.C. 20201

Gentlemen:

I have read the open letter to you, dated February 10, 1978, by Doctors Eisenbud, Goldwater, Higgins, MacMahon, Rogers, Roth, Tabershaw, and Van Ordstrand, expressing concern over the quality of some of the research performed in recent years by the National Institute for Occupational Safety and Health. I agree completely with the views expressed by the distinguished authors and wish to add my formal concurrence. As former Director of the Division of Occupational Health before I retired from the Public Health Service in 1963, I have strong feelings about the importance of objectivity and credibility.

The authors of the open letter said they were "convinced problems comparable to those that have surfaced in the context of beryllium pervade studies in many areas that have been the object of OSHA regulatory decisions in recent years." I can supply one such example. Enclosed are copies of correspondence I had with the Director of NIOSH nearly two years ago, pointing out serious flaws in a study which purported to show that there was an excess of lung cancer and non-malignant respiratory disease in the Homestake gold mine due to asbestiform minerals at average concentrations of about 1/10 the OSHA standard. I will not go into the study's flaws in detail, as they are described in the attachments, but can assure you that the conclusions drawn were preposterous and unworthy of anyone claiming to be an epidemiologist. Nevertheless, the study was included by OSHA as major evidence in the documentation of a lowered asbestos standard (Federal Register, October 9, 1975, p. 47656).

I feel sure that by now you have been furnished with other examples of questionable studies or conclusions, such as those on vinyl chloride and reproductive problems. Since I have not been directly involved with these, I will leave their referral to others.

The open letter made such a forceful and eloquent case for addressing and solving this problem that anything I could add appears redundant. It is highly important, however, to restore some degree of mutual confidence, even in an adversary world, so as to get on with the business of developing and enforcing rational standards to protect worker health. We can all agree that the latter is the ultimate objective.

Respectfully yours,

W. Clark Cooper, M.D.
Consultant in Occupational Medicine
Professor of Occupational Medicine
in Residence, University of
California, Berkeley (Retired)

cc: Merril Eisenbud, ScD
Leonard J. Goldwater, M.D.
Ian Higgins, M.D., FRCP
Brian MacMahon, M.D., Ph.D.
Adrianne E. Rogers, M.D.
H. Daniel Roth, Ph.D.
Irving R. Tabershaw, M.D.
Howard S. Van Ordstrand, M.D.
Marcus Key, M.D.
J. Donald Millar, M.D.
Dr. Eula Bingham

WCC:bw

February 10, 1978

The Honorable Joseph A. Califano
Secretary of the Department of
Health, Education & Welfare
200 Independence Avenue, S.W.
Washington, D. C. 20201

The Honorable Ray Marshall
Secretary of the Department of Labor
200 Constitution Avenue, N. W.
Washington, D. C. 20201

Gentlemen:

We, the undersigned, are writing this open letter to inform you of our concern over the quality, and therefore, the credibility, of that segment of Government sponsored health research performed by the National Institute for Occupational Safety and Health (NIOSH) and utilized by other government agencies, most notably by the Occupational Safety and Health Administration (OSHA) for regulatory purposes.

The responsibility assigned to NIOSH under the OSHA Act is critical to the establishment and maintanance of a healthful occupational environment for the American worker. The image of NIOSH as an objectively honest, scientifically competent agency dedicated to the protection of the worker is essential to ensure the national confidence and support necessary to bring about that objective. Incompetent or biased studies which lead ultimately to confusion, controversy and erosion of credibility within the scientific community, do irreparable harm to that image.

As stated by Senator Kennedy in the Congressional hearings on FDA preclinical testing:

> "Inaccurate science, sloppy science, fraudulent science – these are the greatest threats to the health and safety of the American people."

The resources of this nation – financial, scientific and technical – are not unlimited and should be marshaled most efficiently to provide the maximum national benefit from them. Studies which misstate the nature or extent of health hazards and misdirect the utilization of those resources, for whatever reasons, do the nation a disservice.

The Honorable Joseph A. Califano
The Honorable Ray Marshall

February 10, 1978

The attached articles which appeared in the December 2, 1977, and the January 27, 1978, issues of Science describe a situation of concern to all. The human and animal studies cited by NIOSH and OSHA in the recently concluded beryllium hearings are shocking examples of the shoddy scholarship and questionable objectivity utilized in making important national regulatory decisions. We do not address here the question of the carcinogenicity of beryllium. While this question is important there is an even more fundamental issue. The Assistant Secretary of Labor for OSHA has an obligation to issue standards based on scientifically sound data. Workers have a right to an honest analysis of the health hazards to which they may be exposed. Industry has the obligation to protect its workers but, with that, the right to an honest assessment of what protection is needed.

The beryllium issue is probably the one in which the deficiencies of government-sponsored studies have been most clearly documented. We enclose one critique in this area. We are convinced, however, that problems comparable to those that have surfaced in the context of beryllium pervade studies in many areas that have been the object of OSHA regulatory decisions in recent years.

National confidence in the competence and objectivity of Government health studies is essential. As scientists we feel a responsibility to call to your attention the charges of prejudice and incompetence on the part of NIOSH investigators as reported in the Science articles and request that you give attention to this very serious situation.

If you feel that we could be of service in further informing you on this matter, we hope you will feel free to call on us, individually or collectively.

Respectfully yours,

Merril Eisenbud, ScD
Professor of Environmental Medicine
New York University Medical Center

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Professor Emeritus of Occupational Medicine
Columbia University
Faculty of Medicine

Continued on Pg. 3

The Honorable Joseph A. Califano
The Honorable Ray Marshall

February 10, 1978

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Enclosures (3)

cc: Dr. Frank Press - The White House

The Future of Business Regulation—Private Action and Public Demand

(By Murray L. Weidenbaum)

In addition to the foolishness and uneconomical effects that can flow from government regulation, consideration must be given to the arbitrary power exercised by the personnel of regulatory agencies. For example, many people are outraged by the arbitrary no-knock powers of federal investigative agencies, yet they ignore the no-knock power used by federal agencies in their regulation of private business. The limitations (use of search warrants) imposed by the Supreme Court on OSHA's activities in industry in May 1978, however, can be seen as a favorable trend in the limitation of regulatory powers. Nonetheless, the awesome power exercised by government regulators often goes unappreciated by the public as well as by the regulators themselves. The case of the ban on spray adhesives (a type of art supply) is worthy of some attention.

On the surface, the ban appears to have been at most only a matter of excessive caution on the part of the Consumer Product Safety Commission. On August 20, 1973, the commission banned, as an imminent hazard, certain brands of aerosol spray adhesives commonly used to attach multicolored foil paper to posters. Its decision was based primarily on the preliminary findings of one academic researcher that the sprays could cause birth defects if used by pregnant women. After more careful research failed to corroborate the initial report, the commission lifted the ban on March 1, 1974. Why mention this case? Depriving artists of spray adhesives for less than seven months does not seem to too harsh in view of the desire to avoid serious threats to human health. In fact, the admission of error on the part of the commission is commendable. Prompt rescission of the initial action would seem to be unprecedented.

But there is more to the story. According to a survey by researchers at the New York State Department of Health and the Albany Medical College, at least nine pregnant women who had used the spray adhesives reacted to the news of the commission's initial decision by undergoing abortions for fear of producing babies with birth defects. Unlike the regulatory commission, those women could not reverse their decisions.[18]

To the extent that management attention is diverted from product development, production, and marketing concerns to meeting governmentally imposed social requirements, a significant but subtle bureaucratization of corporate activity will result. In the employee pension area, for example, the federal government enacted the Employee Retirement Income Security Act of 1974 (ERISA). The intervention shifted much of the concern of the management of pension funds from maximizing the return on the contributions to following a more cautions approach of minimizing the likelihood that the fund managers will be criticized or even sued for their investment decisions. It thus becomes safer—although not necessarily more desirable to the employees covered—for the pension managers to keep more detailed records of their deliberations, to hire more outside experts (so that the responsibility can be deluted), and to avoid innovative investments. The federal rules also tend to make the pension fund manager unwilling to invest in other than blue-chip stocks, and they thereby deprive smaller, newer, and riskier enterprises of an important source of venture capital.

From the experience with pension fund regulation, we can see that the nation is paying yet another price for the expansion of government power: the attenuation of the risk-bearing and entrepreneurial characteristics of the private enterprise system which have contributed so effectively to rapid rates of innovation, productivity, growth, and progress. The ultimate negative impact on the business system that results from government intervention is the abandonment of specific activities and entire enterprises. Although that surely was not the intention, the advent of ERISA has led to the termination of numerous pension plans, especially in the case of smaller companies.

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[18] Ernest B. Hook and Kristine Healy, "Consequences of a Nationwide Ban on Spray Adhesives Alleged to Be Human Teratogens and Mutagens," *Science*, February 13, 1976; Comptroller General of the United States, *Banning of Two Toys and Certain Aerosol Spray Adhesives*, MWD-75-65 (Washington, D.C.: U.S. General Accounting Office, 1975), pp. 13-30.

[From the Wall Street Journal, Oct. 20, 1980]

Review & Outlook—Toxic Science

Love Canal has already gone into the language as the most potent symbol of the danger of toxic chemical disposal. So it comes as a bit of a surprise to discover that upon review of the evidence, a distinguished medical panel has concluded that so far there is no scientific basis for concluding that it has damaged public health.

In a report to Governor Hugh Carey of New York, five respected physicians led by Dr. Lewis Thomas, chancellor of the Memorial Sloan-Kettering Cancer Center, have sharply criticized the existing "scientific" literature on the subject, as well as the role of government officials in aggravating the fears and anxieties of Love Canal residents.

The panel argues, for example, that there was no scientific justification for the New York State Health Department to declare that Love Canal was an "environmental nightmare," a "great and imminent peril" capable of causing "profound and devastating effects"—as it did in a September 1978 brochure entitled "Love Canal—Public Health Time Bomb."

Health Department investigators had found an abnormally high number of miscarriages and infants with low birth weight in the Love Canal area—a discovery which led to the evacuation of 235 families in August 1978. But in the absence of suitable control groups, the Thomas panel argues that these "data cannot be taken as more than suggestive."

The panel dismisses as "literally impossible to interpret" a 1979 study by Dr. Beverly Paigen, which claimed to show increased nervous disorders and birth defects in the areas of greatest chemical seepage. Dr. Paigen, according to the panel, failed to include adequate control groups, to validate medically the illnesses she cited or to distinguish between different age groups in her study. Her work, says the panel, "cannot be taken seriously as a piece of sound epidemiological research."

And the panel is especially critical of the chromosome study sponsored by the Environmental Protection Agency and released last May. This study, which claimed to find chromosome breakdowns in 11 of 36 Love Canal residents, led to an understandable wave of new fear among local homeowners and prompted the evacuation of 710 more families, even though the study contained no simultaneous controls and was therefore scientifically meaningless.

Shortly after the evacuation, moreover, suspicions about the EPA study mounted when its director, Dr. Danta Picciano, refused to show his slides to a review panel from the Department of Health and Human Services. And when an EPA panel headed by Dr. Roy Albert of New York University got a chance to look at photocopies of the Picciano slides, it saw no evidence for any chromosome breakdown observations. An article in Science magazine declared the study to be "botched."

Dr. Picciano never tried to pretend that this was in any sense a full-fledged scientific study. It was rather a pilot study, designed to help the Justice Department in its Love Canal lawsuit against Hooker Chemical Co. But in the words of the Thomas panel, "such a poorly designed investigation as this one should not have been launched in the first place. With so much at stake for the residents involved, to have set up experiments that led to public conclusions of such magnitude, without prior review of the protocol by qualified uninvolved peer scientists, and without any after-the-fact independent review by competent scientists before release of the results, was a disservice to the citizens most intimately concerned."

The Thomas panel doesn't rule out any public health dangers from Love Canal. It argues instead that those dangers—past, present and future—are still unknown. Nor does the panel try to argue that Love Canal residents shouldn't have been evacuated. Indeed, Dr. Thomas has been quoted as saying he personally believes that the anguish caused by the presence of noxious chemicals underneath homes was reason enough to leave the area.

But the Thomas panel does suggest that poorly conducted scientific studies can threaten people's well-being just as much as improperly disposed of toxic wastes can. The residents of Love Canal, according to the panel, "have been subjected to more than two years of the most intense anxiety and fear. [Many] have come to believe that their health is in fact irreversibly damaged, that they are at future risk of cancer, congenital malformations in their offspring, and an increased incidence of miscarriages and abortions." In the future, one hopes that both scientists and public authorities will treat scientific findings more circumspectly, and not try to encourage fears that may be unjustified.

In the meantime, it may be best to remain a little skeptical of the more alarming pronouncements in our debates about toxic wastes. Toxic waste dumps do pose public health threats, and it is important both to clean them up and to monitor

them carefully. But not every waste dump is a festering Love Canal. And even Love Canal, when subject to the careful scrutiny of distinguished scientists, may not be as dangerous as we have been led to imagine.

[From the New York Times, Oct. 17, 1980]

Those Disastrous Studies at Love Canal

The latest critique of all the investigations into people's health at Love Canal is the most damning yet. A committee of scientists appointed by Governor Carey now concludes that bungling by public and private investigators "fueled rather than resolved public anxiety." It still isn't clear, after two years of intense study, whether people were physically harmed by the poisons seeping out of the area's abandoned chemical dump. But the damage to the residents' peace of mind, and trust in government, is unmistakable. What accounts for such a fiasco? How can another be avoided?

A panel chaired by Dr. Lewis Thomas of the Sloan-Kettering Cancer Center has found an astonishing amount of scientific and managerial incompetence in several key studies of the affair. It confirmed that a study of alleged chromosome damage by Biogenics Corp. was so poorly designed that it should never have been undertaken—and that the Federal Environmental Protection Agency was to blame because it failed to recruit qualified scientists to review the work. The panel also criticized Dr. Beverly Paigen, a consultant to Love Canal's homeowners, saying that her claim to have found evidence of bodily harm "cannot be taken seriously" and has "the impact of polemic."

Dr. Thomas's panel has harsh words, too, for the New York State Health Department. It is rightly accused of arousing hysterical fears two years ago with a brochure that described Love Canal as an "environmental nightmare" threatening, "profound and devastating effects." That irresponsible rhetoric was apparently designed to obtain Federal disaster aid. By inflaming the community, it made objective scientific studies extremely difficult.

In addition, it is now plain that state and Federal officials failed to communicate and cooperate as public agencies should. New York's Health Department, for instance, asked for Federal funds for chromosome studies but was turned down by the Environmental Protection Agency. Yet that agency then proceeded to sponsor its own—now discredited—chromosome study, without even consulting the state. There is no excuse for that kind of incoherence in responding to a public emergency.

Fed up with E.P.A.'s mismanagement, the Thomas panel recommends that the Federal Center for Disease Control or the National Institute of Environmental Health Sciences take charge of such studies. The proposal has merit; both agencies have solid scientific reputations. But no agency is immune from error. The only way to prevent similar fiascoes is to require that scientific investigations affecting public sensitivities be thoroughly evaluated by neutral experts before they can influence major decisions affecting public health. The failures at Love Canal have so tortured the residents there that they plainly qualified for special help, whether or not any chemical actually hurt them.

AIHC AMERICAN INDUSTRIAL HEALTH COUNCIL
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AIHC Responses to May 18, 1981 Questions
from the Subcommittee on Regulatory Reform

1. Q. Should the determination of what is a major rule be subject to some form of judicial review? If you believe that there should be some limited judicial review, please explain how such review should be limited.

A. The primary responsibility for overseeing agency compliance with the regulatory analysis requirements of S.1080 should rest in the Executive Office of the President. We have suggested that S.1080 be amended to authorize such executive branch oversight, and that the President's designee should have the authority to designate rules as major rules. See AIHC suggested amendments to S.1080, attached.

Final responsibility for ensuring agency compliance with the provisions of the Administrative Procedure Act, as amended by S. 1080, must rest with the Federal courts. While there may be some need to prevent interlocutory review for compliance with certain of the bill's provisions, particularly where responsibility for oversight of such compliance has been lodged with the President, AIHC believes that it would be inappropriate to limit, more than S. 1080 does at present, the scope of review of a court reviewing the whole record upon which a final rule is based.

2. Q. Assuming that the President or his designee is given the authority to designate certain rules as "major," do you feel that the President or his designee should also have the power to waive regulatory analysis for certain major rules? If you support such waiver authority, please give specific examples (in addition to IRS rules) of rules for which such a waiver power would be needed. If you favor such waiver power, but with criteria set out in the statute, please elaborate on the details of such criteria. In addition, if you favor the addition of a waiver power, please explain why you do not feel that putting such discretion in the Executive inserts a major loophole in the requirements of S. 1080. Should the exercise of such a power be subject to judicial review?

A. AIHC suggests amending S.1080 to authorize the President's designee to designate any rule a major rule, thereby triggering the regulatory analysis provisions of the bill. In exercising this authority, the designee should not be limited to the definition of "major rule" contained in section 551(16). Rather, the designee should be empowered to identify for review especially burdensome or controversial regulations which have a significant impact, even if they would not ordinarily qualify as major under the statutory definition.

3. Q. When considering the definition of a major rule, most witnesses addressed subparagraph (i), dealing with $100 million in compliance costs. Do you feel that subparagraphs (ii) and (iii) are too vague to be practically useful? Are these subparagraphs necessary?

A. Sections 551(16)(A)(ii) and (iii) are very useful guidelines to agencies in determining whether a rule is a major rule. While a definite criterion such as a $100,000,000 effect on the economy in compliance costs is important, it does not reach all rules with major impacts. The requirements in subparagraphs (ii) and (iii) should assure, among other things, that actions with profound local or regional economic effects or consequences for employment in an industry are given adequate consideration by responsible officials, regardless of the $100,000,000 threshold. These subparagraphs also provide useful guidance to the public and to oversight authorities in monitoring agency compliance with the requirements of S.1080.

4. We did not receive question 4.

5. Q. One of the witnesses spoke of the different balances of regulatory benefits and costs set by Congress in other statutes. Has Congress set such "balances" in other statutes? If so, do those Congressional judgements in other statutes preclude the application of S.1080's regulatory analysis? Please be specific in your references to provisions in other statutes.

A. AIHC is aware of few statutes in which Congress has mandated that an objective be achieved without regard to cost. However, certain agencies have, in the past, advanced extreme readings of enabling legislation. For instance, OSHA has taken the position that the compliance costs of a standard issued pursuant to the Occupational Safety and Health Act, ("OSH Act") are relevant only where the standard would cause massive dislocation of an industry or imperil the industry's existence.

We believe the statutory judgments reached by Congress in enacting the OSH Act, the Toxic Substances Control Act, and other safety and health legislation are entirely consistent with the regulatory analysis provisions of S.1080. In any event, S.1080 provides that no explanation that benefits justify costs is required "where the enabling statute pursuant to which the agency is acting directs otherwise". This provision would seem to be adequate to permit flexibility in application of the regulatory analysis requirements.

6. Q. In the past, some have suggested that all judicial review of rule making be vested in the Court of Appeals. Do you support such a change in jurisdiction? If so, please discuss the practical application of such a change. How would such a jurisdictional change affect post-enforcement review of rules? Don't the District Courts offer more opportunities for settlement than the more rigid procedures of the Courts of Appeals?

A. AIHC opposes having all rules reviewable only in the appellate courts. While appellate courts are appropriate fora for review of many rule makings, particularly those where there is a well-developed or uncontested factual record, other rule makings involving the resolution of contested facts are not all suited for initial review in an appellate court. Commentators have acknowledged that, in the absence of a formal adjudicatory record, district court review of agency action should be favored as a general matter. See Currie and Goodman, Judicial Review of Federal Administrative Action: Quest for the Optimum Forum, 75 Columbia Law Review 1, 57 (1975). As the question suggests, post-enforcement review is more readily exercised by the district courts, and opportunities for settlement are greater there.

7. Q. Should a deregulatory rule making be subject to regulatory analysis?

A. We believe section 551(16) of S.1080 should be interpreted to require a regulatory analysis only where the rule, whatever its nature, imposes additional costs or other adverse effects specified in that section. A "deregulatory" rule that imposes no such costs but in fact reduces them should not be considered a major rule.

8. Q. Many have said that regulatory analysis should not be the sole criterion of a rule making. What impact should regulatory analysis, as provided in S.1080, have on a particular regulatory decision? What other criteria should be guiding a regulator in addition to the regulatory analysis?

A. The regulatory analysis should highlight the economic and other impacts of regulatory action, throwing into sharp focus the costs and benefits of a rule and indicating cost-effective alternatives. The analysis is appropriately seen as a management tool. While the factors prescribed by S.1080 for consideration by agencies in regulatory analyses are broad, they are sufficiently flexible that the regulator is not confined to artificial or mathematical approaches to problem solving. For example, indirect effects such as the impact on prouctivity and innovation should be considered. The regulatory analysis should not become the sole criterion for regulation, as the ultimate guide to the regulator is the statute mandating or authorizing the specific regulatory action.

Where regulation involves scientific issues, it is important that objective science and health risk determinations guide the regulator. AIHC has suggested amendments to S.1080 which would lay the groundwork for sound scientific decision making by agencies. See AIHC suggested amendments to S.1080, attached, and the AIHC Statement on S.1080, submitted to this Subcommittee on May 15, 1981, at 14-18.

9. Q. Some have supported a requirement for agency descriptions of the effects of a rule, but have at the same time opposed any requirement for an agency determination concerning the relationship of those trade offs. Do you feel such a determination (as in S.1080, the

benefits "justify" the costs, and the rule is a "cost-effective" alternative) is necessary to make regulatory analysis worthwhile?

A. It is very important to require, as S.1080 does, agency determinations that the benefits of a rule justify its costs, and that a rule is the most cost-effective alternative. Such determinations are the focus for agency analysis of the essentially factual descriptions of costs, benefits, and alternatives, and should assure that there is a reasonable relationship between costs and benefits. AIHC strongly supports the guidelines in S.1080 for agency evaluation of costs and benefits, which require quantification where feasible, but which specify that an agency is not required to evaluate the relationship between costs and benefits primarily on a mathematical basis. It is important to recognize that in describing and analyzing rules, both direct and indirect effects must be considered.

10. Q. One witness contended that the regulatory situation was getting "worse." Does this mean that E.O. 12291 is not working? Why is legislation needed?

A. E.O. 12291, and the efforts of the President's Task Force on Regulatory Relief, appear to be working. AIHC commends the Administration on its diligent pursuit of regulatory reform. However, legislation is needed for several reasons. The regulatory impact analysis and other requirements of the Executive Order should be applicable to the independent agencies. Executive oversight mechanisms, to be effective, must be firmly in place and not removable at the whim of changing administrations. The role of the courts in ensuring agency compliance with the regulatory analysis and other requirements of S.1080, such as the requirement that agencies describe all data upon which they substantially rely in a rule making, can only be addressed by legislation.

11. Q. What will happen to Executive Order 12291 if S.1080 becomes law?

A. For the most part, the requirements of the Executive Order mesh with those of S.1080. Accordingly, agency compliance with the revised Administrative Procedure Act would constitute compliance with E.O. 12291. Additional requirements of the Executive Order, such as the responsibilities assigned to the Office of Management and Budget in conjunction with the Task Force, e.g., to require an agency to obtain and evaluate, in connection with a regulation, any additional relevant data from any appropriate source, to identify duplicative rules, etc., presumably would continue in effect.

12. We did not receive question 12.

13. Q. Why not have a standard for rule making that a final rule should be the one that saves the most lives and avoids the most injuries, unless the agency offers an explanation to the contrary?

A. This standard would be inapplicable in most rule makings, since it applies only to the relatively few regulations affecting health and safety. For health and safety regulations, such a standard is too simplistic and would frequently be counterproductive. As in the case of certain existing regulations, the cost of saving lives and avoiding injuries where it is not technically feasible to do so may be astronomical, and expenditure of limited resources in such cases reduces the total resources available to reduce more pressing hazards. In commenting upon OSHA's proposed standard for exposure to coke oven emissions, the Council on Wage and Price Stability concluded that the standard would cost $4.5 million per life saved, and stated:

> If we were to spend $4.5 million per cancer death in an attempt to save all lives lost to cancer, we would commit ourselves to an annual expenditure roughly equal to our entire gross national product. Since we obviously cannot spend that sum, it is very important first to be sure that our cost benefit figures are correct and second to be sure we understand why society is beng asked to spend $4.5 million per life saved in this area of cancer prevention to the exclusion of other areas of cancer hazard. Putting it bluntly, at least we ought to determine whether this $241 million ... or the more conservative estimate of $160 million per year in expenditure of real resources could not save more lives if it were expended on alternative programs.

Martin J. Bailey, Reducing Risks to Life 13 (American Enterprise Institute 1980). As this statement indicates, it is essential that agencies utilize some form of risk assessment and allocate their resources in a cost-effective manner.

14. We did not receive question 14.

15. Q. In his 1977 article, "Lessons of the Economic Impact Statement Program," Mr. Miller wrote:

> The fourth thing we learned is that the program [the EIS program] costs the agencies little in terms of resources. One reason is that the OMB circular promulgating the program stated that it would be met within the existing budget. The argument was that agencies already possessed a capability for economic analysis and that the EIS program would merely redirect that effort. Predictably, this has proved to be a bone of contention, and nearly every agency has urged that this policy be reconsidered. It appears, however, that few additional resources have been required. Existing policy staffs

have been utilized a bit more intensively than they were, with their efforts supplemented on occasion by other personnel in the agency.

Has this experience under President Ford's EIS Program been repeated under E.O. 12291? Have the agencies requested additional staff and larger budgets in order to satisfy the requirements of E.O. 12291? If so, please describe the requests, including specific staff and budgetary increases sought, and the responses made to such requests.

A. Information required to answer this question is not readily available to AIHC.

16. Q. OMB or the Regulatory Relief Task Force operates without the procedural safeguards for fairness mandated by the Administrative Procedure Act. Is it wise to shape regulatory policy in a manner insulated from those procedures, through a mechanism like OMB or the Task Force?

A. The President's Task Force on Regulatory Relief was formed in reaction to an existing regulatory environment which unduly burdens the nation's productive capability. It is entirely appropriate for an Administration to develop mechanisms to review and, where appropriate, to suggest revision or elimination of unneeded regulations. In revising or eliminating a rule, an agency is required to follow the procedural safeguards of the Administrative Procedure Act.

Similarly, it is the responsibility of the executive branch to oversee the activities of regulatory agencies to ensure that they accomplish their objectives in the most cost-effective manner. Such oversight does not interfere with agency execution of legislatively mandated programs, but provides policy input as to the manner in which the legislation should be implemented. It is important to note that the suggestions made by AIHC and others for executive branch oversight leave to each agency the primary responsibility for analyzing and describing its regulatory initiatives, in accordance with the requirements of S.1080. While OMB can make recommendations to the agency, the agency must provide notice and an opportunity for comment prior to revising or eliminating a rule.

17. Q. The "General Requirements" of E.O. 12291 (Section 2) are imposed "to the extent permitted by law." What does this phrase mean? What law does not permit the requirements of E.O. 12291 to be applied to regulatory action? What law limits the application of E.O. 12291?

A. The provision in section 2 of the Executive Order is apparently intended to ensure that the Order imposes no substantive requirements for agency action which conflict with existing law. As indicated in response to question 5, AIHC is aware of few laws which specifically require agency action without regard to the cost and benefit criteria in E.O. 12291. In any event, the requirement in S.1080 that agencies explain that the benefits of a rule justify its costs, and that the rule is more cost-effective than

alternatives, is not applicable where the enabling statute pursuant to which the agency is acting directs otherwise. Accordingly, the regulatory analysis requirements are effectively imposed only to the extent permitted by law. AIHC is opposed to the inclusion of language in S.1080 such as that quoted in the question. Such language is a potentially ambiguous constraint, which could produce confusion and delay where agencies are uncertain as to which impacts they are required to describe and take into account in the regulatory analysis.

Amendments to S. 1080

page 6, line 24

Insert after "studies,":

"scientific evaluations,"

page 7, line 4

Insert the following new paragraph:

"(F) Where the proposed rule requires the resolution of scientific issues, a notice of where scientific evaluations, and data or other information not exempt from disclosure pursuant to section 552(b)(4) of Title 5, may be inspected by the public, and a description of any action undertaken by the agency to validate the data and to assure that its resolution of scientific issues is consistent with current independent expert scientific opinion."

Renumber existing subparagraphs(F) and (G)

page 12, line 2

Insert after "studies,":

"scientific evaluations,"

page 12, line 7

Insert the following new paragraph:

"(F) Where the rule requires the resolution of scientific issues, a notice of where scientific evaluations, and data or other information not exempt from disclosure pursuant to section 552(b)(4) of Title 5, may be inspected by the public, and a description of any action undertaken by the agency to validate the data and to assure that its resolution of scientific issues is consistent with current independent expert scientific opinion."

page 20, line 11

Insert the following new section:

"§561. Executive Oversight

"(a) A designee of the President within the Executive Office of the President shall have authority to monitor, review, and ensure compliance by agencies with the requirements of this subchapter and shall establish such procedures as may be necessary to exercise such authority. At the request of an interested person, or upon his own initiative, the designee may designate any rule a major rule. The designee shall from time to time report to the President and the Congress on agency compliance or noncompliance with the requirements of this subchapter.

"(b) Where agency action subject to the requirements of this subchapter substantially depends upon the resolution of scientific issues, a designee of the President within the Executive Office of the President shall monitor and review the validity and adequacy of scientific evaluations, data, and other information relied upon by the agency."

Suggested Report Language to Accompany Amendments to S.1080

Sections 553(c)(1)(F) and 553(e)(1)(F) supplement, for rules involving scientific determinations, the requirements that agencies describe the scientific evaluations, data, and other information upon which they substantially rely in a rulemaking. These provisions are intended to ensure that scientific evidence relied upon by an agency is made available for public inspection, unless it is trade secret or commercial or financial information exempt from the disclosure requirements of the Freedom of Information Act. An agency's scientific evaluations must also be made available, along with the agency's descriptions of its efforts to assure that its scientific determinations are based on sound scientific principles. It is intended that, where applicable, these provisions will make the scientific evidence and evaluations available to the public with a meaningful opportunity for comment, in much the same way that regulatory analyses are made available for public review of economic evaluations of major rules. These provisions should also result in public awareness of the processes and criteria used by the agency for validation of the data base, including any peer review.

Section 561(a) provides a simple and direct mechanism for executive branch oversight of agency compliance with the regulatory analysis requirements. The President's designee is specifically authorized to designate any rule a major rule. It is significant that in designating a rule a major rule, therefore triggering the regulatory analysis provisions of the bill, the designee is not limited to the definition contained in section 551(16). Rather, the designee is empowered to identify for review especially burdensome or controversial regulations, or closely related rules which, in the aggregate, have a significant impact, even if they would not ordinarily qualify as major under the statutory definition.

Section 561(b) addresses the need for a mechanism to secure review by independent scientific experts of the scientific evidence and evaluations relied upon by agencies, where such review is warranted. This provision authorizes the President's designee to monitor and review agency actions requiring the resolution of scientific issues, to determine whether they are consistent with current independent expert scientific opinion and to determine whether they provide substantial support for the rule. This oversight authority is comparable to executive branch oversight of agency compliance with the regulatory analysis requirements for major rules, set forth in section 561(a).

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PREPARED STATEMENT OF THE AMERICAN HOSPITAL ASSOCIATION

After years of dealing with a federal regulatory system that has become increasingly costly, burdensome, and unwieldy, the American Hospital Association and its member institutions are heartened by recent Congressional and Administration initiatives to reform the regulatory process. We are pleased to present our views on S.1080, the Regulatory Reform Act of 1981. The Association represents over 6,300 health care institutions--including most of the nation's hospitals, as well as many long-term care institutions, mental health facilities, and hospital schools of nursing.

For the past several years AHA has been an active participant in the movement for regulatory reform, and in 1975, its Board of Trustees appointed a panel of experts to study hospital regulation. After an intensive 18-month study, that panel issued its report in May 1977, entitled Hospital Regulation, Report of the Special Committee on the Regulatory Process, which documents the evolution of the current, piecemeal hospital regulatory system, analyzes the system's deficiencies, and presents some 33 specific recommendations on steps that should be taken to achieve a more rational, coordinated, and open system of regulation for the hospital industry.

In the 96th Congress, AHA testified before House and Senate committees on implementation of Executive Order 12044, the Carter Administration regulatory reform directive, and on major regulatory reform proposals which received extensive Congressional consideration. Although comprehensive regulatory reform legislation was not passed by Congress in 1980, we viewed with approval the enactment of the Regulatory Flexibility Act (P.L.96-354) and the Paperwork Reduction Act (P.L.95-511). In 1979 AHA also provided information and assistance to the U.S. Regulatory Council and participated in its hospital project, a study of the impact of regulations on hospitals.

In 1981, AHA welcomed President Reagan's action in issuing Executive Order 12291, and has worked to assist in its successful implementation. Recently we identified and submitted to the Presidential Task Force on Regulatory Relief, chaired by Vice President Bush, a list of 10 priority hospital regulations in

need of reform. A copy of that submission is attached to our statement for the subcommittee's information. In addition, AHA is presently developing recommendations for the Health Care Financing Administration's (HCFA) task force on deregulation, established to identify rules which might be revised or deleted. And, finally, we welcome this opportunity to participate in the renewed Congressional debate on regulatory reform by presenting our views on S.1080.

Our statement will address the following: (1) hospital involvement with the regulatory process; (2) the need to enact regulatory reform legislation; (3) general observations about S.1080; and (4) major issues in S.1080, together with AHA's recommendations for improving the legislation. In connection with the discussion of major issues we also would like to comment on the subject of legislative veto, including our recommendation for a workable alternative. Although this issue is embodied in legislation (S.890) currently before the Judiciary Committee's subcommittee on agency administration, legislative veto is a major topic in the regulatory reform debate, and we believe this Subcommittee will find it useful to have our views on this matter.

HOSPITAL INVOLVEMENT WITH THE REGULATORY PROCESS

Although the subject of regulation is usually considered in the context of business and industry, health care is clearly one of the most highly regulated activities in this country. AHA recognizes that some regulation in the health field is appropriate since the government must protect the public interest and ensure responsible use of tax dollars in the purchase of health care services.

However, over the past few decades, government regulation of hospitals at the federal, state, and local levels has increased enormously, creating a patchwork of uncoordinated and frequently duplicative regulations. Today, almost every aspect of hospital operations is subject to regulation. A variety of regulations are aimed especially at controlling hospital activity--many governing hospital involvement in federal and state health programs--such as professional standards review organizations (PSROs), utilization review, certificate of need, areawide planning, Medicare conditions of participation, and reimbursement regulations. Hospitals also are subject to the wide variety of

regulations which apply to employers and businesses generally, including requirements of the Occupational Safety and Health Administraion (OSHA), as well as tax, labor, and environmental protection regulations. These examples, while by no means exhaustive, demonstrate the broad range of federal, state, and local regulations that affect hospitals.

The extent of federal regulation of hospitals is further evident in our Association's activity in Washington on behalf of its member institutions. In the three-year period of 1978-1980, AHA reviewed 3,448 federal agency notices published in the Federal Register, of which at least 753 were notices of proposed or final regulations affecting hospitals and the delivery of health care services. This review activity resulted in the submission by the Association of 226 formal comment letters or testimony at agency hearings.

The costs to hospitals of complying with federal regulations are enormous. Some of these costs are easily identified, such as increases in paperwork, time, and involvement of personnel. For example, AHA estimated that the cost of compliance with the uniform reporting requirements of HHS's proposed Annual Hospital Report (AHR, formerly the System for Hospital Uniform Reporting, or SHUR) would average between $20,000 and 40,000 per hospital, or a total of $120 million to $240 million nationwide. However, there are other long-range costs to society which are more difficult to isolate and quantify, such as the reduced incentive for innovation that occurs in a highly regulated environment.

THE NEED FOR REGULATORY REFORM LEGISLATION

AHA was pleased by President Reagan's swift action in issuing Executive Order 12291 shortly after taking office, and we believe this initiative--with its more extensive regulatory analysis requirements, its requirement for memorandums of law demonstrating compliance with legislative intent, and the enhanced oversight role it provides for the Office of Management and Budget (OMB)--will improve agency compliance with regulatory reforms beyond that which resulted from the directive it superceded, E.O.12044.

An OMB evaluation of agency compliance with Executive Order 12044, issued in September, 1979, recognized hospitals' concern that agencies within HHS (then HEW)--specifically the Health Care Financing Administration and the Health Resources Administration--had not complied fully with the revised regulatory procedures mandated by the executive directive. The report noted that the department in certain instances had not performed regulatory analyses on proposals that would have a substantial economic impact. Specifically cited were regulations on Medicare reimbursement for malpractice insurance costs, Hill-Burton uncompensated care, and SHUR. The report further noted that only a handful of the 425 regulations under development at that time had been scheduled for regulatory analyses.

Pressure from OMB, AHA, and other organizations, as well as adverse publicity associated with the findings we have described, subsequently led HEW to bring its regulatory procedures into closer alignment with the spirit of Executive Order 12044, and the performance of the department in issuing regulations improved in the last years of the Carter Administration. Nevertheless, AHA believes that Presidential reform directives, because of their transitory nature, cannot provide a permanent solution to the problem of excessive and inequitable federal regulation. We feel that enactment of regulatory reform legislation, along the lines of S.1080, is necessary to bring about permanent improvement in federal regulatory practices.

GENERAL OBSERVATIONS ON S.1080

AHA views S.1080 as a very constructive approach for bringing about meaningful regulatory reform. We endorse the bill's objective to implement most of its proposed reforms by amending existing Chapter 5 of the Administrative Procedures Act (APA) rather than by embodying its changes in a new Chapter 6. A key advantage to this approach, in our view, is that the bill's procedural reforms would be integrated into the well-recognized main body of the APA's requirements for the issuance of regulations. In so doing, the bill would make most agency procedural actions, including the decision on whether a proposed rule requires the completion of a cost-benefit analysis, subject to judicial review. The bill would exclude from judicial review only questions on

the adequacy of the analyses and, in certain cases, questions on an agency's not having provided an opportunity for oral presentations, including cross-examination where needed to resolve factual issues.

Other provisions which we strongly support include the following:

Cost-Benefit Analysis: AHA supports new Section 553(c)(2), which would require that agencies perform analyses of the projected benefits, costs, and adverse effects of all major rules, and of reasonable alternatives to achieve agency goals. Such analyses would help to form the basis for a rational and systematic process of agency consideration before the issuance of final regulations.

60-Day Comment Periods: New Section 553(d)(1) would require a minimum 60-day comment period for all proposed rules. AHA has recommended statutory enactment of such a requirement for a number of years and supports this provision of S.1080.

Removal of APA Exemption for Loans, Grants, and Contracts: The provisions of new Section 553(a) and (b) would have the effect of removing the present APA exemption for matters relating to ". . .loans, grants, benefits, or contracts." AHA has long been concerned that this provision technically exempts Medicare and Medicaid regulations from all APA requirements. Participation in Medicare and Medicaid is mandatory for most hospitals, and these programs are currently used as the primary vehicle for a variety of significant federal regulations designed to control or modify the entire health care delivery system. Unquestionably, regulations of such magnitude should be subject to the APA's rulemaking procedures.

The decision to voluntarily follow APA procedures was made several years ago by HEW, but without statutory change hospitals are still vulnerable to agency misuse of this exemption. AHA has had a long-standing commitment to work toward deletion of this APA provision, and we are pleased to see this change included in S.1080. We have a clarifying amendment to suggest for this provision, which we will present later in our statement.

Use of Consultants: New Section 553(e)(3) would limit agency use of consultants to the collection of information in their development of cost-benefit analyses of major rules. AHA believes agencies could achieve a better understanding of the impact of proposed major rules if they performed regulatory analyses entirely in-house. We recognize that most agencies do not at present have adequate in-house resources for performing their own analyses and that S.1080 anticipates this problem by delaying the effective date of this provision until 1983 and by allowing agencies a limited use of consultants in preparing analyses. Consequently, we support the intent of this provision.

Avalability of Data: New Sections 553(c)(1)(E), 553(e)(1)(E), 553(e)(4), and 553(f)(1), when combined, would require that all data, methodologies, reports, studies, or other information used to develop a rule be identified and described (including their sources), and that this information be placed in the rulemaking file and be available for public inspection and/or copying. AHA strongly supports these provisions. In the past we have experienced many problems in obtaining access to data used in the development of regulations, particularly in connection with revisions by HCFA of the annual Section 223 limits on hospital reimbursement for routine costs under Medicare.

MAJOR ISSUES IN S.1080; AHA RECOMMENDATIONS FOR IMPROVING THE BILL

Definitions

Major Rule: AHA agrees that the criteria for a "major rule" should not be tied solely to the judgment of the issuing agency. However, we are concerned that the definition of "major rule" in S.1080 does not include a recognition of the cost-shifting that can result from changes in federal regulations. Earlier in this statement we mentioned the regulations governing reimbursement for hospitals' malpractice insurance costs, for which then-HEW performed no regulatory analysis despite its own estimate that this regulatory change would result in a shift in costs from the federal government to the private sector of more than $300 million in the first year. The department refused to recognize this cost-shifting as a basis for a regulatory analysis, maintaining that the requirement for an analysis applied only to "new" costs. Accordingly, AHA believes that the definition of "major rule" should be amended to include any

proposed regulation which would cause a substantial shift in costs borne by the federal government to the private sector.

Last year, AHA was successful in having clarifying language added to the House Judiciary Committee's report on H.R.3263 (H.Rept. 96-1393, p.39), to the effect that a consideration of cost-shifting was intended to be covered under the bill's criterion deeming a major rule to be one which the issuing agency estimates will result in "a substantial change in costs or prices for individual industries..." (emphasis added). This same criterion currently is included in H.R.746, the major regulatory reform bill under consideration in the House. AHA is concerned that S.1080's definition of "major rule" has, as a parallel criterion, "a substantial increase in costs or prices for wage earners, consumers, individual industries, federal, state, or local governments, or geographic regions" (emphasis added).

It might be argued that a major cost shift resulting from, for example, a Medicare regulation would lead to increased expense to several of these parties (i.e., wage earners, consumers, and individual industries), since part of the cost to providers would likely be passed on to private insurance companies, and from them to businesses and consumers in the form of higher health insurance premiums. However, it also might be argued that such a regulation would decrease costs to another party covered in the criterion--namely, the federal government. AHA believes that rules which cause major cost shifts clearly should be made subject to regulatory analysis, but the criterion in S.1080 cited here is ambiguous in its application to this type of regulation. Consequently, AHA recommends the addition of a separate major rule criterion to address the cost-shifting phenomenon.

Emergency Rule: AHA is pleased to note that the definition of "emergency rule," combined with the provisions of new Section 553(b)(3), would allow agencies to issue such rules as final only on a temporary basis, and would require the agencies eventually to promulgate the rules anew under appropriate procedures. However, S.1080 provides no deadline for doing so, only requiring [in Section 553(b)(3)(B)] that it be done "as soon as practicable" and that the emergency rule not be effective longer than for "a reasonable period nec-

essary to complete agency compliance" with standard regulatory procedures [Section 553(b)(3)(C)]. AHA recommends that these provisions be modified to establish a definitive guideline of 180 days for reissuuance of emergency rules through the established regulatory process.

Judicial Review

Determination of "Major Rules": As noted earlier, a key advantage of making most of S.1080's reforms in the form of amendments to Chapter 5 of the APA is that this would make most questions of agency compliance, including the decision of whether a proposed regulation is a major rule, subject to judicial review. AHA strongly supports this aspect of S.1080.

Modified "Bumpers Amendment": The original Bumpers amendment, passed by the Senate in 1979, drew widespread support but also raised serious questions about the long-range effect of (1) shifting the burden of proof from the challenger to the agency and (2) prohibiting the courts' traditional deference to agency interpretations on questions of law. Opponents argued that the Bumpers amendment, by upsetting a relatively fine-tuned system of shared judicial and administrative responsibility for interpreting legislation that granted broad agency discretion, would create a serious burden of litigation for the nation's courts. Further, opponents argued that the Bumpers proposal would create confusion in litigation because the resulting need to draw a definitive line between law and fact would require evidentiary proceedings in court, a needless duplication of the administrative process. AHA supported the intent of the Bumpers amendment but also found merit in the arguments against the proposal. Consequently, the Association did not take a position on the amendment in the 96th Congress.

AHA believes that the modified Bumpers amendment, included in new Section 706 of S.1080, adequately addresses the major concerns associated with the original proposal. AHA supports this modified provision.

Legislative Veto--AHA's Recommended Alternative

As introduced, S.1080 does not contain a legislative veto provision, but we would like to take this opportunity to present our views on this important issue, which is embodied in a proposal (S.890) currently before the Judiciary Committee's subcommittee on agency administration and in other legislative proposals now before Congress. We would like to present an alternative which builds upon an existing requirement in S.1080, one which we believe would achieve many of the goals of legislative veto yet avoid many of its problems, and controversy as well.

AHA has long supported efforts to provide effective Congressional oversight of the federal regulatory process, and in 1975 our Association testified in favor of the one-house legislative veto concept which was the predecessor of the provision currently embodied in S.890 and, in the House, in H.R.1776. Since our original endorsement of legislative veto, however, the Association has given more extensive consideration to the potential effectiveness and legal implications of this proposal.

Supporters of legislative veto view it as a solution to the problems created by three aspects of the federal government--an increased delegation of authority from Congress to the executive branch, a Congressional oversight process that is random and lacks adequate staff resources, and an overburdened judicial system. However, none of the major forms of legislative veto now before Congress holds much promise for remedying these problems. The one-house veto, while offering the advantage of achieving quick action on a regulation which has exceeded Congressional intent, may be more susceptible to political pressures than a two-house veto, and also raises serious questions of constitutionality. The two-house veto, now included in H.R.746 and introduced in the Senate as S.344 by Senators Levin and Boren, would involve a time-consuming process which might well come to naught should the President subsequently veto the required Senate/House joint resolution of disapproval.

Consequently, AHA does not believe it can support legislative veto as a means to better assure agency compliance with Congressional intent. However, in

keeping with our policy of working for improved Congressional oversight over regulation, we wish to present an alternative procedure for the Subcommittee's consideration.

There is a new procedural requirement in Executive Order 12291 which, if modified, could accomplish the goals of legislative veto. Section 4(a) of the Executive Order states that before an agency approves a final major rule it must:

> "Make a determination that the regulation is clearly within the authority delegated by law and consistent with Congressional intent, and include in the Federal Register at the time of promulgation a memorandum of law supporting that determination."

S.1080, in new Section 553(e)(1)(C), would conform to the Executive Order by requiring publication of a memorandum of law for final rules. AHA believes that this memorandum-of-law concept--if it were broadened to require publication at the Notice of Proposed Rulemaking (NPRM) stage as well as with the final rule, and to mandate minimum content of the memorandum--would make it more difficult for agencies to ignore or circumvent Congressional intent. Currently, agency statements of statutory authority and legislative intent are contained in preambles to regulations and are usually perfunctory in nature. More complete agency analyses of authority and intent often are privileged documents held within an agency and are not subject to public inspection under the Freedom of Information Act. In addition to making more certain agencies' adherence to Congressional intent, we believe that publication of a memorandum of law, particularly at the NPRM stage, would enhance the quality of debate on regulations at the proposed stage.

Accordingly, AHA recommends that the memorandum-of-law requirement be applied to the NPRM stage by broadening new Section 553(c)(1)(B) [statement of statutory authority] to require publication of such a memorandum for proposed as well as final rules. Further, we recommend adding an appropriate definition of "memorandum-of-law" to Section 551. AHA is currently working on a definition of this term and will be pleased to share it with the Subcommittee when it is completed.

AHA believes the memorandum-of-law alternative offers a number of advantages over the various legislative veto proposals. It would: (1) not create a

cumbersome Congressional process; nor would it create an administrative burden for agencies since it would simply require public disclosure of information routinely developed; (2) not engender conflicts over the constitutional separation of powers; and (3) support and strengthen existing oversight mechanisms, including public comment, Congressional oversight, OMB oversight, and judicial review.

AHA strongly recommends consideration of this memorandum-of-law alternative to the subcommittee, and will gladly offer additional information and assistance in this matter.

Other Legislative Issues

APA Exemption: As mentioned earlier, AHA supports removing the existing APA exemption for loans, grants, and benefit programs. However, one element of the proposed new language is troublesome. New Section 553(b)(1)(D) would exempt any "rule for which the agency for good cause finds that notice and public comment are unnecessary due to the routine nature of the matter or the insignificant impact of the rule." It is conceivable that HHS might interpret this provision as an exclusion of notice and public comment on the annual revision of Section 223 limits on hospital reimbursement for routine costs--a regulatory change which has an economic impact of several million dollars each year. AHA believes this potential problem could be eliminated by changing the "or" to read "and." Revisions of Medicare reimbursement limits may be considered routine, but they are never insignificant.

Extended Comment Periods: As we also mentioned earlier, AHA supports the minimum 60-day comment period for proposed rules that would be required by new Section 553 (d)(1). In addition, new Section 553(d)(2) would require that an agency grant a 30-day extension for comments if requested to do so by an affected party within a stipulated time period. However, this provision would allow agencies to deny the request by issuing a written finding that doing so would be "contrary to the public interest." We believe this language is overly broad and could result in an arbitrary denial simply for the convenience of the agency. AHA recommends that the provision be amended by borrowing language from S.1080's proposed definition of "emergency rule" to limit

denials to those cases in which an extension might "seriously injure an important public interest or seriously damage a person or class of persons without serving any important public interest."

Requests for Agency Clarifications: H.R.746, the House's major regulatory reform proposal, contains an important provision which we would recommend be added to S.1080. Section 201(c) of that measure would amend Section 553 of the APA to require that agencies respond to requests for clarification or interpretation of a regulation, and that they establish procedures for doing so, including setting time limits for issuing a response. Agencies' lack of response to such requests has been a problem for our Association, but more so for individual hospitals, particularly with regard to Medicare reimbursement regulations. Many hospitals have tried to obtain reliable HCFA interpretations on whether a certain planned expenditure would, if made, be regarded as an allowable cost for Medicare reimbursement purposes. HCFA generally has neglected to provide this clarification, leaving the hospital in the position of having to make the expenditure and find out later, during its cost report audit, whether the cost was deemed allowable. When such expenditures have not been deemed allowable, providers frequently have incurred substantial legal costs in appealing the ruling, all because of an agency's refusal to respond to a request for clarification. AHA recommends inclusion in S.1080 of language similar to the House bill's requirement.

CONCLUSION

AHA believes S.1080 is a very constructive regulatory reform proposal, and we look forward to working with the Subcommittee as it further refines and improves the bill. We appreciate this opportunity to present our views on this legislation and we stand ready to provide the Subcommittee with additional information on any issue addressed in our statement.

(Attachment to AHA's statement on S.1080)

AMERICAN HOSPITAL ASSOCIATION
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WASHINGTON OFFICE

May 1, 1981

Dr. James C. Miller III
Executive Director, Presidential Task Force
on Regulatory Relief
Old Executive Office Building
Washington, DC 20503

Dear Mr. Miller

The American Hospital Association, representing more than 6,100 member hospitals and health care institutions, as well as more than 30,000 personal members, is pleased to submit to you the hospital industry's first ten priority regulations which we recommend for review by the Presidential Task Force on Regulatory Relief. We applaud the Administration for the unprecedented attention it has devoted during its first few months in office to the enormous and vital task of reforming government regulation. Inviting those who are impacted by federal regulation to become directly involved in the reform process is a refreshing and most appropriate approach.

During the last decade, our industry has become increasingly the focus of government regulation at all levels. While federal pressure has been applied on hospitals to contain costs, we have simultaneously been faced with numerous and burdensome regulations which have contributed to the rise in health care costs. It has been the cumulative effect of the number of complex rules hospitals must cope with which has had the greatest impact on the industry. Thus, the task of selecting our top ten regulations for review was a most difficult exercise.

Because of the complexity of the issues we have addressed and the brevity of our submission, we would be most willing to furnish the Task Force with supplemental information on request.

We congratulate you again for your efforts to reduce the regulatory burden on hospitals, and we look forward to working with you closely to meet our mutual objectives.

Sincerely

Allen J. Manzano
Senior Vice President

CABLE ADDRESS: AMERHOSP

The Hospital Industry's Ten Priority Regulations for Review by the Presidential Task Force on Regulatory Relief

Summary

I. Direct Apportionment of Costs Under Medicare (42 CFR Sections 405.451, 405.452, 405.453, and 405.454).

II. Health Planning Deregulation

(A) Removing State Sanctions (Section 1521(d); P.L.93-641 as amended);

(B) Revising Certificate of Need Requirements (42 CFR Part 122 Subpart D and Part 123 Subpart E);

(C) Eliminating Appropriateness Review Process (42 CFR Part 122 Subpart F and Part 123 Subpart G).

III. Limitations on Reimbursable Costs-Section 223 (Section 223 of P.L. 92-603, and Medicare Regulations: 42 CFR, Sections 405.460 and 405.461).

IV. Hill Burton Uncompensated Care and Community Services Assurances Regulations (42 CFR Part 124 Subparts F and G).

V. Annual Hospital Report (Section 19a of P.L.95-142).

VI. Provider Reimbursement Review Board (Social Security Act, Section 1878 [42 USC Section 1395/oo]).

VII. Lower of Cost or Charges Under Medicare (42 CFR 405.455 and Section 1814(b) of the Social Security Act; Medicare regulations: [42 USC Section 1395f(b)]).

VIII. Cost to Related Organizations (Medicare regulations: 42 CFR Section 405.427).

IX. Occupational Safety and Health Administration (OSHA) Standards

(A) The General Duty Clause (Section 5(a)(1) and Section 22(c) of the OSHA Act).

(B) OSHA Electrical Standards (Federal Register, Vol.46, No.11, pp.4034-76, January 16, 1981).

X. Federally Required Quality Assurance Requirements: PSROs and Utilization Review (42 CFR Part 460; Medicare/Medicaid provisions: 42 CFR Section 405.1035 and Part 456).

Issue: I. Direct Apportionment of Costs Under Medicare

Source of Rule: Department of Health and Human Services, Health Care Financing Administration

Citation: Medicare regulation:42 CFR, Sections 405.451, 405.452, 405.453, and 405.454

Description of Problems:

Current Medicare rules prescribe a rigid cost allocation process that inaccurately allocates overhead specifically related to the 24 hour per day, 365 day per year inpatient operation of the hospital to other service areas. The

result is that hospital based outpatient, home health, skilled nursing, and renal dialysis services appear to be more costly and, thus, less competitive than similar services provided in freestanding facilities.

The AHA believes that existing cost allocation principles must be modified to permit hospital based services to compete on a cost basis with freestanding units.

Estimated Cost: Implementation of revised cost allocation principles will not result in additional costs.

Estimated Benefits: A revised cost allocation methodology will result in lower unit costs for outpatient, skilled nursing, home health, and renal dialysis services.

Originator: Martin A. Wall, Assistant Director, Division of Federal Agency Liaison, AHA, 444 North Capitol Street, N.W., Suite 500, Washington, DC 20001, (202) 638-1100.

Issue: II. Health Planning Deregulation

The Administration's fiscal year 1982 budget has proposed a three-year phaseout of the National Health Planning and Resources Development Act (P.L. 93-641 as amended). During this interim period it is essential that the budetary phaseout be coupled with a corresponding reduction in mandated regulatory activities and sanctions for state noncomformity with federal requirements in order to insure a smooth transition to voluntary, community based planning and to meet the intent of administration health policy. Three issues need to be addressed immediately. They are: (A) removing state sanctions, (B) revising certificate of need requirements, and (C) eliminating the appropriateness review process.

Issue: II(A). Removing State Sanctions

Source of Rule: Department of Health and Human Services, Health Resources Administration, Bureau of Health Planning

Citation: Section 1521(d); Public Law 93-641 as amended by P.L.96-79 and P.L.96-538

Description of Problems:

The 1979 amendments to the Health Planning Act (P.L.96-79) granted state legislatures a short period of time to enact the substantial changes in state certificate of need laws mandated by the legislation. A penalty--in the form of a gradual reduction in federal public health program funding for states (25% the first year)--is imposed for noncompliance with the October 21, 1980 regulations implementing P.L.96-79. P.L.96-538, enacted in late 1980, extended the deadline for one year giving most states only until January 1982 to bring their laws into compliance or risk the withholding of federal public health service funds. Since the Administration opposes federally mandated certificate of need programs, any imposition of sanctions would be counterproductive. This provision would need to be removed by legislative amendment.

Estimated Cost: The Bureau of Health Planning estimated that in fiscal year 1980 states received $5.3 billion under the four covered public health service programs. Twenty five percent or approximately $1.3 billion would be lost to states during the first year of state nonconformity.

Estimated Benefit: The threat of sanctions against states or the actual imposition of sanctions has no cost benefit for states or hospitals.

Other Impact: There is a short term political impact on states. State legislatures currently are in a quandry over whether to pass legislation conforming with federal requirements that would eventually be eliminated if the Administration's program phaseout is accomplished. The January 1982 deadline is still in effect since the Administration's phaseout is over a three-year period.

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Issue: II(B). Revising Certificate of Need Requirements

Source of Rule: Department of Health and Human Services, Health Resources Administration, Bureau of Health Planning

Citation: 42 CFR Part 122 Subpart D and Part 123 Subpart E

Description of Problems:

If health planning funds are cut as proposed, it is essential that the October 21, 1980 regulations addressing certificate of need requirements--which far exceed congressional intent--be withdrawn through administrative action and that legislation be proposed to eliminate restrictive federal criteria thereby leaving the program to state discretion. The 1980 regulations include broad interpretation of law through such ways as requiring a CON for terminating or reducing services and adding new restrictive access criteria. In addition, the threshhold for CON review, currently $150,000, should be raised through legislative amendment. Since CON is a state function, the federal role needs to be severely limited through these and other administrative and legislative remedies.

Estimated Cost: In California, for example, it is estimated that one certificate of need review costs a hospital an average of $50,000. According to a Bureau of Health Planning study covering 1979 and 1980, HSAs spent $21.1 million and state health planning and development agencies $4.7 million on project review activities. These figures reflect a 90% response from HSAs but only a 50% response from state agencies.

Estimated Benefit: Studies measuring the savings of federally mandated certificate of need requirements have failed to reach a consensus concerning the net benefit in quantitative terms.

Other Impact: The current federally mandated CON process with its uniformed, inflexible and complex procedures results in an inefficient and ineffective planning process documented by costly delays to hospitals, the community, and government in the review of projects and through its concentration on relatively small, nonclinically related projects which meet the law's low CON threshhold. However, flexibly conceived and administered state CON programs with high enough thresholds to limit review to major clinically related capital projects would have the potential to have a positive cost impact.

Originator: Martin A. Wall, Assistant Director, Division of Federal Agency Liaison, AHA, 444 North Capitol Street, N.W., Suite 500, Washington, D.C. 20001, (202) 638-1100.

Issue: II(C). Eliminating the Appropriateness Review Process

Source of Rule: Department of Health and Human Services, Health Resources Administration, Bureau of Health Planning

Citation: 42 CFR Part 122 Subpart F and Part 123 Subpart G

Description of Problems:

Appropriateness Review--an ill-defined and burdensome process for hospitals and planning agencies alike--is first being implemented by health systems agencies and should be immediately terminated. This can be accomplished by withdrawing the December 19, 1979 regulations which far exceed the letter and spirit of the planning law and through a legislative amendment repealing the function. Under the 1979 regulations, states are required to implement state legislative and/or administrative programs to conduct appropriateness reviews of existing health services. Given the inadequate development of the concept of appropriateness review and the likelihood of inadequate funds to support the program, states should not be forced to rush into implementation of this process. Now would be an appropriate time to stop the process since planning agencies are first beginning to gear up and implement this function.

Estimated Cost: An unofficial Bureau of Health Planning estimate indicates that each appropriateness review will cost local and state planning agencies a combined average of $12,000 in 1982. The cost in administrative time to hospitals subject to review has yet to be determined.

Estimated Benefit: Since appropriateness review is an untested process there is no proven cost benefit.

Other Impact: If health planning appropriations are reduced as proposed by the Administration without simultaneous reduction in such mandated functions as appropriateness review the system could be severely disrupted.

Originator: Martin A. Wall, Assistant Director, Division of Federal Agency Liaison, AHA, 444 North Capitol Street, N.W., Suite 500, Washington, D.C. 20001, (202) 638-1100.

Issue: III. Limitations on Reimbursable Costs - Section 223

Source of Rule: Department of Health and Human Services, Health Care Financing Administration

Citation: Section 223 of Public Law 92-603, and Medicare Regulations, 42 CFR, Sections 405.460 and 405.461

Description of Problems:

The statute requires that the Secretary establish limitations to ensure that costs reimbursed by Medicare are necessary for the efficient delivery of needed services. The Health Care Financing Administration (HCFA) has established limitations on routine inpatient hospital operating costs, skilled nursing facilities, inpatient routine service costs, and home health agency costs per visit which are intended to preclude reimbursement for luxury services or inefficiently rendered services.

The current system of limitations, however, does not accurately identify either luxury or inefficient services. Rather the limitations utilize an arbitrary and imprecise classification system that penalizes efficient hospitals. Instead of meeting congressional intent, the limitations have evolved into a cost containment vehicle. In addition, the administration of the program is confusing for hospitals. For example, hospitals, under certain cir-

cumstances, may be granted an exemption or exception to the limitations. However, the process to be used and the criteria for an exemption or an exception are not clear.

The AHA believes that the Section 223 limitations must be revised by the HCFA in order to accurately determine inefficient or luxury providers. In addition the HCFA should:

- o publish an accurate, timely, and detailed account of its exception and exemption process; and,
- o make available to hospitals the data base on which the limits are based in order to assist hospitals in seeking relief from the limits.

Estimated Cost: According to an AHA estimate, the estimated cost of the inpatient penalty will be $204 million in fiscal year 1981.

Estimated Benefit: Maintaining the limits as currently established, unfairly penalizes efficient hospitals and shifts costs to other payers. Revising the limits in accordance with congressional intent will ensure that inefficient providers only are penalized.

Originator: Martin A. Wall, Assistant Director, Division of Federal Agency Liaison, AHA, 444 North Capitol Street, N.W., Suite 500, Washington, DC 20001, (202) 638-1100.

Issue: IV. Hill-Burton Uncompensated Care and Community Services Assurances Regulations

Source of Rule: Department of Health and Human Services, Health Resources Administration, Bureau of Health Facilities

Citation: 42 CFR Part 124 Subparts F and G

Description of Problems:

On May 18, 1979, the Department of Health, Education and Welfare (now the Department of Health and Human Services) issued final regulations revising Hill-Burton uncompensated care and community services assurances obligations affecting 3,600 hospitals in the United States. These regulations--despite intense opposition from the American Hospital Association (AHA), state and local hospital groups, and individual institutions--expanded requirements and imposed complex procedures and paper work burdens on obligated hospitals. The AHA, having exhausted all administrative remedies available at that time filed a suit against HEW on June 27, 1979 in the Federal District Court in Chicago, Illinois. Although the issue is still before the courts, this should not preclude a regulatory review from being undertaken since the suit will deal solely with issues of the legal validity of the regulations rather than their administrative wisdom or necessity.

Problems with the regulations are numerous. In summary, the AHA complaint cites the arbitrary and unreasonable nature of the rule which impairs an obligated hospital's already existing contract with the Department. The AHA challenges a number of unlawful provisions in the rule including the elimination of the open door option to achieve compliance and a broad expansion of charity care and community service obligations. In addition, the AHA challenges the exhaustive administrative burdens mandated by the regulations and opposes federal interference in internal hospital management decisions including matters related to medical staff.

Estimated Cost: In its regulatory analysis of the regulations, HEW estimated that the cost to hospitals will be $467.5 million in 1982, $504.4 million in 1983 and $537 million in 1984. This estimate does not include HHS's estimated $58 million

per year in administrative costs to hospitals and $1.5 million in administrative costs to HHS, but does take into account an inflation factor.

Estimated Benefit: Using the cost figures cited above, a recent article in the Maryland Law Review reveals a low cost-benefit ratio for the program when compared with Medicare. The article reveals that for every dollar spent on administering the uncompensated care program, only $6.60 in health care services are actually delivered. This compares to $20.50 in health care services delivered for every dollar in administrative costs expended under the Medicare program.*

Other Impact: The impact of these rules on obligated hospitals is manifested in numerous ways which involve complex legal issues, excessive administrative compliance and reporting burdens and through government interference in internal hospital management matters.

Originator: Martin A. Wall, Assistant Director, Division of Federal Agency Liaison, AHA, 444 North Capitol Street, N.W., Suite 500, Washington, DC 20001, (202) 638-1100.

Issue: V. Annual Hospital Report (AHR)

Source of Rule: Department of Health and Human Services, Health Care Financing Administration

Citation: Section 19a of Public Law 95-142

Description of Problems:

The Medicare and Medicaid Anti-Fraud and Abuse Act (P.L.95-142), required that the Secretary establish, by regulation, a uniform system for reporting various financial information for health care facilities. In response to this requirement, the Health Care Financing Administration (HCFA) developed a uniform reporting system, the Annual Hospital Report (AHR). The reporting system was issued as a notice of proposed rulemaking (NPRM) in February 1980. However, the final rule has never been issued because of the deficiencies of the proposed system.

The hospital industry believes that the AHR as proposed, will not result in the collection of uniform and meaningful data. Rather, if implemented, it will impose excessive recordkeeping and related costs on hospitals because it requires a total reclassification of all of the hospital's financial and statistical data. In addition, HCFA's proposal to link the AHR to the Medicare cost report will significantly alter the Medicare payment system. The impact of these changes has not been adequately assessed by the HCFA.

The AHA believes that the AHR, as proposed should not be implemented. In order to provide the uniform data required by law, HCFA should develop a less complex reporting system requiring the direct cost of selected departments and certain non-financial data.

Estimated Cost: According to AHA estimates, implementation of the AHR will cost between $124 million and $248 million.

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*Brown, Ellyn, "Hill Burton Act 1946-1980": "Asyncrony in the Delivery of Health Care to the Poor", Maryland Law Review Vol.39, No.2, pg.370 (1979).

Estimated Benefit: The proposed AHR will result in a significant burden to hospitals with little off-setting benefit. Substantially simplifying the regulatory reporting requirements will contain costs and control the recordkeeping burden.

Originator: Martin A. Wall, Assistant Director, Division of Federal Agency Liaison, AHA, 444 North Capitol Street, N.W., Suite 500, Washington, DC 20001, (202) 638-1100.

Issue: VI. Provider Reimbursement Review Board (PRRB)

Source of Rule: Department of Health and Human Services

Citation: Social Security Act - Section 1878 [42 USC Section 1395oo]

Description of Problems:

The Provider Reimbursement Review Board (PRRB) was established in order to provide expert, impartial, expedited and generally final administrative review of Medicare cost reimbursement issues. However the PRRB's authority has been steadily eroded by various regulatory and administrative practices that have been adopted by the Department of Health and Human Services.

In particular, the Health Care Financing Administration's (HCFA's) increasing use of the secretarial function of "own motion" review to reverse PRRB decisions favorable to hospitals has changed the Board into yet another procedural hurdle that hospitals must overcome before judicial relief can be achieved. The situation is further exacerbated by the fact that the decisions of the PRRB or district courts that hear appeals on Board decisions do not establish a precedent for altering Medicare reimbursement policy. As a result, each hospital or group of hospitals that disputes a policy must wage an expensive battle in order to obtain relief. For example, the HCFA continues to refuse to reimburse hospitals for costs incurred in operating nursing education programs jointly with another institution despite repeated findings by the PRRB, U.S. District courts and at least one federal appellate court, that such payments are appropriate. Similarly, the PRRB has ruled on numerous occasions that the days counted for patients in the labor and delivery room must be excluded from the total day count in computing the per diem for Medicare purposes. The HCFA, however, continues to require that the labor days be included in the total day count which negatively impacts reimbursement.

AHA believes that the PRRB must be returned to the position of authority that was originally intended by Congress and the costs and complexities of the current system be reduced. Specifically, we believe that the use of "own motion" review must be eliminated and that decisions of the Board and the courts must establish precedents for HCFA reimbursement policy. A bill introduced by Representative Heftel (D-HI) in the last session of Congress would have accomplished this and made other necessary changes in the review process. This bill is expected to be reintroduced during this congressional session. The Administration's support of the bill will help to reduce administrative burden and costs.

Estimated Cost: Group appeals of reimbursement issues cost between $30,000 and $100,000. Such appeals would be greatly reduced if previous PRRB or court decisions affected Medicare reimbursement policy.

Estimated Benefit: The costs of bringing suits as cited above would be eliminated.

Originator: Martin A. Wall, Assistant Director, Division of Federal Agency Liaison, AHA, 444 North Capitol Street, N.W., Suite 500, Washington, DC 20001, (202) 638-1100.

Issue: VII. Lower of Cost or Charges Under Medicare

Source of Rule: Department of Health and Human Services, Health Care Financing Administration

Citation: 42 CFR 405.455 and Section 1814(b) of the Social Security Act Medicare regulations: [42 USC Section 1395f(b)]

Description of Problems:

Medicare currently pays hospitals the lesser of the reasonable cost of inpatient services furnished to Medicare patients or the customary charge made by the hospital for the same servies. However, public providers of services that render services free of charge or at a nominal charge are paid fair compensation for the services rendered to Medicare patients. In order to determine if the customary charge exceeds the reasonable cost, time consuming recordkeeping and complex calculations are necessary. These administrative chores are in addition to the recordkeeping required to determine the reasonable cost of the services rendered.

The original intent of this provision was to ensure that Medicare paid no more than other payers for the same service. We believe, however, that the current provision is not cost-effective particularly because the majority of hospitals with charges less than costs (public providers) are exempt from the penalty. Eliminating the provision will reduce administrative burden without an adverse impact on the Medicare program.

Estimated Cost: According to AHA analysis, administrative costs equal the amount of the penalties imposed.

Estimated Benefit: Eliminating the penalty will reduce administrative burden. This would require a legislative change.

Originator: Martin A. Wall, Assistant Director, Division of Federal Agency Liaison, AHA, 444 North Capitol Street, N.W., Suite 500, Washington, DC 20001, (202) 638-1100.

Issue: VIII. Cost to Related Organizations

Source of Rule: Department of Health and Human Services, Health Care Financing Administration

Citation: Medicare regulations: 42 CFR Section 405.427

Description of Problems:

Recently, groups of hospitals have begun to organize cooperative ventures that provide a variety of needed services (e.g., group purchasing, laundry, etc.) to members at reduced cost. In some instances these shared service organizations (SSOs) are controlled to a significant degree by the member hospitals. Whenever the Medicare program determines this situation exists, the SSO and hospital are defined as a related organization.

Currently, Medicare reimbursement for services furnished by a related organization is limited to the related oraganization's costs rather than charges. Thus, whenever a SSO meets the definition of a related organization, Medicare reimbursement excludes the margin above cost that is necessary to finance working capital and provide the funds necessary for replacement of equipment and capital reinvestment. Failure to adequately compensate SSOs provides no incentive for establishing SSOs, which have been demonstrated to generate savings for the health care system as a whole.

We believe that the restrictions governing reimbursement for SSOs should be lifted. Services furnished by an SSO should be reimbursed on the basis of charges, as long as the charge does not exceed the charge for comparable services purchased elsewhere.

Estimated Cost: Cost estimates have not been determined.

Estimated Benefit: Adequate compensation for SSO services will spur the creation of such organizations and result in cost savings to the system as whole.

Originator: Martin A. Wall, Assistant Director, Division of Federal Agency Liaison, AHA, 444 North Capitol Street, N.W., Suite 500, Washington, DC 20001, (202) 638-1100.

Issue: IX(A). Occupational Safety and Health Administration (OSHA) Standards

Source of Rule: Department of Labor, Occupational Safety and Health Administration

Citation: Section 5(a)(1) of the Occupational Safety and Health Act imposes a general duty to furnish a place of employment "free from recognized hazards that are causing or likely to cause death or serious physical harm to employees." Section 22(c) of the Act establishes the authority of the National Institute for Occupational Safety and Health (NIOSH) to develop and establish recommended occupational safety and health standards.

Description of Problems:

In 1977, the Occupational Safety and Health Administration (OSHA) began enforcing a NIOSH criteria document for a recommended standard of 25 parts per million for exposure to Nitrous Oxide (N_2O) (a gas commonly used to anesthetize patients in each operating room in every hospital in the country) by issuing citations and fines on several hospitals with N_2O levels in excess of 25 ppm. No regulations have been published on this standard nor have interested parties had the opportunity to comment on the validity of the NIOSH recommendation or any other standard under the notice and comment procedures required by the Administrative Procedures Act. Moreover, the level of the standard is based on limited research which is contradictory, inconclusive, and not based on tested cause and effect relationships between trace concentrations of anesthetics and any reproductive disorder. In addition, the standard cannot be met with current technology unless medical procedures are changed which could compromise independent medical judgement to the detriment of patient safety.

Estimated Cost: Substantial litigation costs would be incurred to oppose unachievable standards and to defend against lawsuits.

Estimated Benefit: Little benefit would result due to existing hospital accreditation standards which assure minimum exposure to waste anesthetics.

Other Impact: Strict enforcement of the standard would prohibit currently accepted medical practice and jeopardize patient safety.

Originator: Martin A. Wall, Assistant Director, Division of Federal Agency Liaison, AHA, 444 North Capitol Street, N.W., Suite 500, Washington, DC 20001, (202) 638-1100.

Issue: IX(B). OSHA Electrical Standards

Source of Rule: Department of Labor, Occupational Safety and Health Administration

Citation: Federal Register, Vol. 46, No. 11, pages 4034-76, January 16, 1981. Section 6(a) of the Occupational Health and Safety Act.

Description of Problems:

Under 6(a) of the Act, which encourages the adoption of national consensus standards, OSHA adopted the National Electrical Code (NEC) NFPA 70-1971 as its electrical safety standard. The Federal Register notice retroactively enforces the electrical code on existing buildings and is unnecessary as it is duplicative of efforts at the state and local level. Section 6(a) is troublesome to hospitals because some of the standards developed by national voluntary associations and subsequently referenced and enforced by the federal government are not based on solid technical justifications but tend to be expensive optimal standards, and do not consider cost-benefit principles. Moreover, the standard setting process itself lacks accountability on the technical issues.

Estimated Cost: Upgrading costs to hospitals would be substantial as well as federal costs for OSHA enforcement.

Estimated Benefit: Because of duplication of enforcement activity with state and local activities, there would be little quantitative benefit.

Originator: Martin A. Wall, Assistant Director, Division of Federal Agency Liaison, AHA, 444 North Capitol Street, N.W., Suite 500, Washington, DC, 20001, (202) 638-1100.

Issue: X. Federally Required Quality Assurance Requirements: PSRO and Utilization Review

Source of Rule: Department of Health and Human Services, Health Care Financing Administration

Citation: Social Security Amendments of 1972 (P.L. 92-603). 42 CFR Part 460 and Medicare/Medicaid provisions: 42 CFR Section 405.1035 and Part 456.

Description of Problems:

The Administration has proposed that federal support for PSROs be phased out by the end of fiscal year 1983 and that federal requirements for utilization review be eliminated. The AHA is in agreement with these proposals. However, in the absence of a functioning PSRO program during the 1981-1983 phaseout period, residual regulations of the Medicare and Medicaid programs will immediately become operative. These regulations, relating to utilization review (UR) and fiscal intermediary payment determinations, raise a number of operational issues. Hospital experience has identified a number of significant problems with these requirements including the following:

- Intermediary involvement in claims review for medical necessity creates potential inconsistencies within hospital quality assurance activities.
- Requirements for UR committee composition and "impartiality" cannot be met by many small and rural hospitals;
- Certain separate requirements for the Medicare and Medicaid UR programs have led to inconsistencies and unnecessary confusion;
- Confidentiality of UR data has become a substantial concern in light of PSRO confidentiality experience;
- Part of the payment decision process requires determination by the intermediary that the services provided are (a) medically necessary; (b) of a quality that meets professionally recognized standards and (c) provided at the appropriate level of care. If a PSRO is making

these determinations, they are binding on the intermediary. If no approved PSRO program exists, the intermediary must assume this responsibility. The nature and scope of intermediary involvement in medical necessity and appropriateness determinations will intensify as PSROs are phased out.

In addition, regulations proposed in 1980 have raised other potential problems:

- o Elimination of the remote facility variance, which permits approval of deviations from established UR time frames for institutions that have insufficient numbers of available medical and other personnel to conduct the required activities;

- o Prohibition of UR participation for all individuals with significant financial interests in any hospital.

On March 3, 1980, HHS issued a NPRM revising the entire UR requirements. This notice should be reviewed, reproposed with the above problems addressed, and, if appropriate, issued as a final rule in order to provide guidance to hospitals as to their continuing responsibilities during the phaseout of the PSRO program. Some guidance and immediate legislative relief is necessary as hospitals individually strengthen and expand their UR and quality assurance activities, and voluntary accrediting standards are implemented.

Estimated Cost: HHS's amended March 1981 budget justification estimates the additional cost of the utilization review requirements during the PSRO phaseout to be $1.7 million in fiscal year 1981 and $9.4 million in fiscal year 1982. This seems to be an extremely conservative estimate.

Estimated Benefit: Cost benefits are difficult to estimate although implementation of these recommendations will reduce the amount of costly ineffective paperwork compliance.

Originator: Martin A. Wall, Assistant Director, Division of Federal Agency Liaison, AHA, 444 North Capitol Street, N.W., Suite 500, Washington, DC 20001, (638-1100).

Prepared Statement of the American Meat Institute

This statement is submitted on behalf of the American Meat Institute (AMI), a trade association representing over three hundred meat packers and processors in the fifty states. Regulatory reform is particularly important to the members of AMI. The production and marketing of food was the first sector of the economy subject to modern federal health and safety regulation. The member companies of the American Meat Institute continue to be subject to extensive federal regulation, and are actively involved in administrative proceedings in which regulations are being developed.

We in the food industry are under no illusion that the public's demand for regulatory reform includes an abandonment of sensible health and safety regulation. Nor should it. The promotion of a safe and plentiful food supply is in the best interests of industry and consumer alike.

At the same time, the public is rightfully demanding real regulatory reform. The public now recognizes that the costs of excessive and burdensome regulations are borne by consumers as well as industry. The Congress needs to ensure that those regulations that are issued are sensible -- that they accomplish reasonable goals at reasonable costs. Similarly, the process by which regulations are issued should be fair.

We think S. 1080 is a laudable attempt to meet the twin goals of a sensible and fair regulatory process. S. 1080 reflects the extensive efforts of this Committee to fashion responsible regulatory reform legislation during the 96th Congress. We commend the Committee members and staff for your continuing efforts. In order to continue the refinement of this legislation, the American Meat Institute offers the following additional comments on the major provisions of S. 1080.

In general, we support S. 1080. We think the rules that ultimately emerge from the regulatory process as a result of S. 1080's provisions will be fairer and more sensible. We are concerned, however, that some of the provisions of the bill provide opportunities for needless delay and litigation, which could

lead to even more frustration with the regulatory process. With some minor changes, these problems could be remedied.

The American Meat Institute supports the requirement for a regulatory analysis. An agency should, as the bill requires, rigorously analyze the projected benefits and adverse effects of a proposed rule. The bill properly limits the regulatory analysis requirement to "major" rules, so that only the most important agency initiatives will undergo this analysis. Thus, we support the bill's express exclusion of so-called "gateway" regulations from the definition of major rule. Delay has been a major problem in getting a food additive approved and in obtaining "generally recognized as safe" status for a food. A regulatory reform bill should not add to this delay problem. We understand, however, that the exclusion for these "gateway" regulations is not intended to exempt from the regulatory analysis requirements food labeling and other agency initiatives which would impose substantial costs on industry. This is the proper approach.

It should be clear from the above comments that we support a flexible approach to the regulatory analysis requirements. For this reason, we are concerned about the provisions for judicial review of the regulatory analysis. The bill would apparently allow judicial review of an agency determination of whether the rule is major and of an "inadequacy" in the regulatory analysis. Proposed section 553(f)(3). Courts will have difficulty interpreting the broad definition of major rule and deciding whether the analysis is "adequate." Substantial litigation over these issues is a certainty. Moreover, we question whether the courts should be deciding what are essentially questions about the use of a management tool, the regulatory analysis. Although AMI opposes judicial review of the decision to conduct an analysis and whether the analysis is adequate, inclusion of the analysis as part of the record for purposes of judicial review makes sense.

Executive Order 12291 recognizes that agency use of the regulatory analysis is a management question, and provides for OMB oversight of the use of this management tool. We support this approach. S. 1080 should be amended to make clear that

nothing in the bill limits OMB's powers under E.O. 12291.

We support, too, the bill's narrowing of the Administrative Procedure Act's exemption for interpretative rules and general statements of policy. Too often agencies have used this exemption to deprive the meat industry of notice and an opportunity to comment on important policies which significantly affect us.

We also favor several of the "hybrid rulemaking" provisions in the bill which would require more than simple notice and comment procedures for major rules. At the same time, we are concerned that the provisions for oral presentations and cross-examination, when combined with the opportunity for judicial review, will mean more delay and litigation with no assurance of a better regulatory decision.

The bill affords a right to an oral presentation in every major rulemaking. The opportunity for oral presentation must include an opportunity for cross-examination (1) when requested by interested persons for the resolution of material issues of fact and (2) when other available procedures are determined (presumably by the agency in the first instance) to be inadequate. The agency is authorized to establish reasonable procedures to regulate the course of oral presentations.

Although oral presentations and cross-examination can be effective ways to challenge factual and legal premises, use of these procedures often results in more obscure and less defined administrative records than desirable. These procedures, which can work well in courtrooms with small numbers of parties, are often difficult to manage in major proceedings where scores of interested persons might want to assert their rights to oral presentation and cross-examination. Statutorily imposed hybrid rulemaking at the Federal Trade Commission under the Magnuson-Moss Warranty Act has been less than a resounding success in part because the agency has been reluctant to firmly limit the use of the procedures. See, Boyer, "Trade Regulation Rulemaking Procedures of the Federal Trade Commission," Report to the Administrative Conference of the United States, 1979. While S. 1080 provides for the exercise of agency discretion in

the use of these procedures, the bill's provisions for judicial review undercut that discretion; agencies are likely to allow unnecessary oral presentation and cross-examination just to avoid extensive litigation. Thus, we suggest that the Committee (1) tighten the standards for use of oral presentations, especially cross-examination and (2) narrow the standards or eliminate the opportunities for judicial review of an agency's choice of procedures.

The AMI supports the provisions in S. 1080 which require publication of regulatory agendas and calendars of federal regulations. These provisions should help keep the public informed of agency regulatory activities, while imposing minimal costs on the government.

We also support the bill's requirement that agencies review all of their existing major regulations over a ten year period. We hope that committee report language, though, can help avoid interpretative and practical problems that might arise. For example, must an agency review only those existing regulations that would currently qualify as major, i.e., that are currently having an annual effect on the economy of $100 million? What about regulations that were major when adopted three years ago but no longer impose significant costs on the regulated industry? Moreover, how is an agency supposed to make these threshold determinations? Must an agency conduct a mini-regulatory analysis for each of its existing rules or should some other method be used? These questions should be resolved.

Finally, we support the provisions in S. 1080 which would require courts to take an independent look at legal issues presented for review of a regulation. As the bill recognizes, agency legal determinations should not be accorded any favorable presumption. Both private parties and the agencies should have equal footing before a reviewing court.

In summary, the American Meat Institute generally supports S. 1080. The bill forms the basis for regulatory reform legislation which could benefit the American people for years to come. The AMI stands ready to assist the members of the subcommittee and its staff in any way it can.

American Petroleum Institute
2101 L Street, Northwest
Washington, D.C. 20037
(202) 457-7300

Charles J. DiBona
President

May 26, 1981

Honorable Paul Laxalt
United States Senate
315 Russell Senate Office Building
Washington, D.C. 20510

Dear Senator Laxalt:

The American Petroleum Institute supports the approach and concept of regulatory reform embodied in S. 1080, the Regulatory Reform Act. While the bill does not solve all problems relating to regulation, it does mitigate many of the important ones. If the bill's regulatory analysis concept is implemented in a reasonable fashion, it will lead to a significant improvement over the present situation.

The petroleum industry has been particularly burdened by regulations which would not have passed the reasonable tests required by your bill. We recognize, as does your bill, that regulation involves in principle two kinds of decisions, though they are often intertwined. The first is the decision about whether a particular goal (for example, reduction of exposure from a particular chemical to a specific level) should be sought. The second decision involves selecting between alternative ways of achieving that goal.

In determining if a particular goal should be sought, analysis and calculation can help, but the ultimate choice is often at least partly a judgment about what the community will regard as an acceptable goal. Such judgments may involve consideration of scientific evidence, the relation of total costs to benefits, the distribution of costs and benefits, the nature of the affected population, and other factors, often imperfectly measured and subject to change as time passes and knowledge grows. While this step should employ scientific evidence and analysis where possible, the ultimate decision will often involve an element of judgment which cannot be quantified. We think your bill makes it possible for this combination of analysis and judgment to be employed, and that this is appropriate.

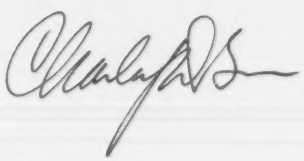
The second step, the choice of a way to achieve the goal, is often much more an analytic issue, and your bill makes possible greater reliance on analysis at this stage. More specifically, your bill requires an agency to provide, for a major rule, a description of the quantifiable and nonquantifiable benefits and costs; a description of alternatives to the rule; an explanation of how benefits of the rule will justify costs; and why the rule is more cost-effective than alternatives.

We hope - and expect - that the level and complexity of analysis applied to regulations will not "get out of hand" and become an unreasonable burden in itself. The federal regulatory agencies will determine this to some extent, and only experience will reveal whether the requirement for analysis becomes onerous. Certainly S. 1080 does not require such a result. We agree that your designation of January 1, 1983 as the effective date for amendments to Sections 2, 3, and 5 of the Act is an important feature of your bill for two reasons. First, we believe the government and industry both need time to prepare to analyze regulations as your bill requires. New procedures, new data, and new people may be required. Second, it is important that many of the regulations passed without application of the standards established by S. 1080 be reviewed before the new rulemaking procedures are required.

Finally, recent Administration testimony suggests that the President (or his designee, who would presumably be the Director of OMB) should have authority to designate particular rules as major ones when that is appropriate, and conversely to waive some of the rules relating to requirements for analysis, when that is appropriate. It may, for example, be appropriate to waive the requirements for analyzing existing rules that did not receive the careful scrutiny called for in your bill, when revision or reformation of such rules is under consideration. We hope such procedures can be worked into S. 1080 in a reasonable fashion.

After so many years of Congressional discussions, we agree that it is time to legislate. Although experience may call for further legislation later, as often occurs, the S. 1080 approach represents a significant improvement over the present situation. Therefore we support the passage of S. 1080.

Sincerely,



Prepared Statement of the Health Industry Manufacturers Association

The Health Industry Manufacturers Association (HIMA) is a national trade association consisting of 256 United States corporations that manufacture medical devices and diagnostic products. Though the Association represents virtually all major companies that manufacture health care products, nearly 70 percent of HIMA's members are small businesses with less than $10 million in annual sales. Thus, the costs of overregulation are particularly burdensome to our industry.

The medical device industry is principally regulated by the Food and Drug Administration (FDA), which has authority to review products before marketing, to regulate products being sold and to remove products from commerce. In addition, the industry is subject to a number of proposed and current rules of the Health Care Financing Administration, the Health Resources Administration, the Environmental Protection Agency and the Occupational Safety and Health Administration.

HIMA believes many regulations to which our industry is subjected are unneeded and costly. We applaud efforts to reform the process by which agencies issue regulations and support S. 1080 as an important step toward that reform. S. 1080 would in many respects codify -- and thus give statutory sanction -- to provisions of Executive Order 12291, which HIMA believes will help reduce unneeded regulation. While S. 1080 contains a number of significant provisions, HIMA will restrict its brief comments to two areas we view as particularly important to the medical device industry.

First, S. 1080 would require that agencies describe and analyze benefits, costs and other factors before issuing major new rules. HIMA believes it is important that agencies justify a rule's costs and issue only those rules representing cost-effective methods for achieving regulatory objectives. For example, FDA recently issued a Mandatory Device Experience proposal that HIMA estimated would cost industry as much as $600 million annually. In the face of strong opposition from HIMA and others, it appears FDA is now rethinking its position. The Office of Management and Budget has written to FDA saying that insufficient cost data has been provided. S. 1080 would have required FDA to conduct this analysis before issuing the proposal.

Second, the legislation recognizes the importance of private sector participation in the rulemaking process. Participation of this nature is essential for agencies to evaluate proposed rules fully and to become aware of alternatives to proposed rules.

HIMA appreciates this opportunity to comment on S. 1080 and stands ready to assist the Committee in its deliberations.

HIMA appreciates this opportunity to comment on S. 1080 and stands ready to assist the Subcommittee in its deliberations.

Prepared Statement of the Interstate Natural Gas Association of America

I.

INTRODUCTION

This statement is submitted on behalf of the Interstate Natural Gas Association of America (INGAA) a national non-profit trade association whose membership is comprised of virtually all of the major interstate natural gas pipeline companies operating in the lower forty-eight states. These companies are comprehensively regulated pursuant to a great number of regulations adopted by agencies to implement a wide variety of Federal statutes. Some of this regulation pertains to statutes concerned with health and welfare such as the National Environmental Policy Act, the Clean Water Act, the Clean Air Act, the Occupational Safety Act and others. In addition, our industry has been subject to extensive economic regulation since 1938, pursuant to the Natural Gas Act, and more recently as a result of the National Energy Act of 1978. This economic regulation pertains to entry, licensing of facilities and service, and the regulation of the charges for such service.

II.

INGAA'S POSITION

The need for regulatory reform is something about which most can agree. How best to obtain it is something else. The common agreement as to need is generally based on the fact that the presence of the Federal government in our everyday lives and businesses has become increasingly pervasive with the passage of each bill increasing the size of the Federal bureaucracy, directing the reporting of more data, providing for more levels of review before final action, and allowing the adoption of rules without consideration for the ratio between costs and benefits. In addition, the Congress has not, through its oversight authority, been able to devote adequate time to determine whether there is an actual need for the ever increasing number of agency rules. As a result, the Federal bureaucracy has been allowed to interfere unnecessarily in the lives and businesses of the public it is supposed to serve. The result is endless red tape, delay and uncertainty

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affecting everyone. This identifies the common problems. How best to address them elicits many different responses, as this Committee knows.

In our view, the procedural omnibus approach taken in S. 1080 would have little impact on reducing these problems. In fact, it could worsen them by requiring additional layers of reporting and review. This could adversely affect the natural gas pipeline industry in its efforts to get critically needed energy projects approved in a timely manner. It could also adversely affect obtaining timely approvals for maintaining and expanding existing facilities and markets. Regulatory reform must be less red tape, delay and uncertainty, not more. To properly address these problems one must go to their source, the various enabling statutes. Different statutes with different goals and objectives have been implemented through regulations formulated by a wide variety of Federal agencies. All too often, these agencies have gone beyond what the Congress intended. Frequently, this has been due to a lack of direction in the enabling legislation to limit agency action. Also, times change and so do regulatory needs.1/ In our view, the only way to assure meaningful regulatory reform is to provide for effective oversight on an agency-by-agency, statute-by-statute basis. Neither the instant legislation nor the various legislative veto proposals would be a viable substitute. It has taken years for the problems to develop. They cannot be legislated away over night.

To commence the type of reform we believe is needed, there should be established a Congressional commission similar to the one outlined in Attachment A hereof to review each agency's statutory charter and how that charter has been implemented through the years. The Commission would, on a set time frame, present a reorganization plan to the Congress for each agency. The Congress would then be in an optimum position to proceed with whatever steps necessary to alter statutory charters so as to achieve Congressional objectives and purposes and, where possible, cut back on red

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1/ The impact of changing times on the Federal Energy Regulatory Commission in its implementation of the Federal Power Act and the Public Utility Regulatory Policies Act is reflected in former FERC Chairman Charles B. Curtis' January 23, 1980, Report to Congress, entitled Decisional Delay in Wholesale Electric Rate Cases: Causes, Consequences and Possible Remedies. See also the testimony of Robert R. Nordhaus, presented to this Committee on May 14, 1981, in connection with S. 1080.

tape, delay and regulatory burdensomeness. After completion of Congressional action on this review, provision should be made for strengthened Congressional oversight to assure that the revised regulatory functions of each agency are, in fact, accomplishing what Congress intended. Thus, we concur with Mr. James C. Miller, III, in his statement on behalf of the Administration, presented May 12, 1981, on S. 1080 before the Senate Committee on Governmental Affairs wherein he said, "[T]he organic statutes must be reexamined and we would welcome consideration of legislation that would provide for the periodic and comprehensive review of existing legislated regulatory programs."

Although we do not believe the omnibus approach to regulatory reform will achieve the substantive results that an agency-by-agency review would, we could support S. 1080 with the modifications suggested hereinafter, as a means of improving existing regulatory procedures.

III.

COMMENTS ON SPECIFIC POINTS IN S. 1080

1. Rulemaking Procedures (Sections 2 & 3) - Included in these Sections are extensive additions to Chapter 5, Sections 551 & 553 of the APA. Among the major items in these proposed amendments are the management procedures that agencies must follow when issuing "major rules". These procedures direct an agency when it publishes a notice of proposed rulemaking for a major rule to state therein (i) the benefits expected from the rule, (ii) its costs, (iii) a description of reasonable alternatives, and (iv) how the benefits will justify the costs (except where the agency is directed otherwise by its enabling statute).

All too frequently, agencies have adopted rules of general applicability with apparent disregard for viable alternatives as well as the costs and benefits to be derived therefrom. Therefore, we agree that agencies should be required to address these critical factors before finalizing a major rule. We also agree that the agencies should not be required to make their cost-benefit evaluations "primarily on a mathematical or numerical basis." This recognizes the practicalities of the situation. In addition, we agree that these regulatory analysis requirements should not be subject to judicial review. No showing has been made as to the appropriateness or need for involving the courts in enforcing compliance with these procedures. Moreover,

this is consistent with the Administration's position in Executive Order 12291 and as ennunciated by Mr. Miller in his May 12, 1981 statement on behalf of the Administration, supra.

Accepting the desirability of a regulatory analysis of major rules, we would suggest that instead of including the directives to the agency in Section 553 of Chapter 5 of the APA, they be included in Chapter 6. A regulatory analysis for major rules is a mechanism similar to the Regulatory Flexibility Analysis (Reg Flex Analysis, Analysis) relating to the impact of agency rules on small business that was recently placed in Chapter 6 of the APA. These analyses are not subject to judicial review. Agencies are responsible in October and April of each year to publish in the Federal Register a regulatory flexibility agenda. In making an initial Reg Flex Analysis, the agency must describe, inter alia, why the action is being considered, its objectives and legal basis, an estimate of the "small entitites" that would be affected by the rule, etc. The final analysis would require a statement of need, a summary of issues raised in public comment, and a description of significant alternatives. Clearly, these are the same types of consideration that agencies will have to make in connection with the regulatory analysis provisions of S. 1080. For these reasons, Chapter 6 of the APA is, in our view, a better location for these basic directives to agency management than the rulemaking provisions of Section 553 of Chapter 5. It would also be a more logical place to put matters not subject to judicial review. Congressman Danielson's bill in the House, H.R. 746, approaches the regulatory analysis in this manner and we urge this Committee to revise this bill similarly.

2. Extensions of 60 day period for comment (Section 3(d)(1)) - A minimum 60 day period in which to participate in rulemaking proceedings through the submission of written data, views, arguments, and statements as provided in this section is consistent with Executive Order 12291 and we believe it to be an adequate time in which to prepare and submit written commetns. However, the provision in subparagraph (2) that an agency "shall extend the time for participation in the rulemaking for a period of not less than thirty days..." (emphasis supplied) is in our view unnecessary and inappropriate. It would in most rulemaking proceedings virtually assure a 30 day extension

of time by any interested person. This would result in needless delay. The provision for the administrative officer to deny an extension upon a written finding that such would be "contrary to the public interest" would not, in our view, significantly impact on the unwarranted use of this provision by those who could profit from delay. In some proceedings, 90 days or longer may be justified, but this length of time is not justified or appropriate in all or even a majority of proceedings. It is also unclear as to whether, after granting one extension of time, an agency would be foreclosed from granting further extensions. INGAA submits that the minimum comment period of 60 days is appropriate but that the length of extensions of the 60 day period should be left to the agency upon a showing of "good cause" by the person requesting time. There is no need to lock the agency into the length of time or number of extensions it may grant. The facts in support of each particular request should be the agency's criteria for action.

3. "Hybrid Rulemaking" (Section 3(d)(3)) - This subparagraph would require agencies publishing notices of proposed rulemaking for major rules to include an opportunity for:

1) oral presentation "relevant to a significant controversy in the rulemaking; and

2) cross-examination, but only when "requested by interested persons for the resolution of material issues by fact and... when other available procedures for the resolution of such issues, including oral and written rebuttal, are determined to be inadequate."

Oral presentations in rulemaking proceedings involving major rules, can be valuable tools to create understanding amongst the agency and the parties. However, limiting each presentation to "information relevant to a significant controversy" is overly restrictive. Areas of "significant controversy" are frequently not apparent until after oral presentations or written comments have been made. Agencies should be encouraged to utilize public hearings where they believe an open exchange of ideas with interested persons would be helpful and one or more members of the agency should preside at such hearings. However, agencies should not, in our view, be mandated to conduct public hearings in all situations.

We are opposed to statutory directives providing for cross-examination in rulemaking proceedings. We are concerned that the provisions for cross-examination, even with the restraints provided, would tend to judicialize rulemaking proceedings. This is not the purpose of rulemakings which are traditionally characterized as part of the agency's legislative function. Moreover, rulemaking proceedings are generally limited to oral and/or written presentations on behalf of an individual or company. The oral presentations are characterized by a relatively informal exchange of ideas and views which are transcribed on the public record. Providing for cross-examination would engraft adjudicatory procedures on the agency's legislative functions. This is neither necessary nor warranted. We believe it to be more appropriate in rulemaking proceedings where oral presentations are provided for to allow individuals participating therein to reserve a portion of their time to respond to statements made by others. In addition, more opportunity should be provided for interested persons to submit reply or rebuttal comments based on the comments of others. The legislative function of rulemaking proceedings must not be confused with the agency's adjudicatory function.

Accordingly, we recommend that subparagraph (3) on "hybrid rulemaking" be rewritten to read:

> "When the agency publishes a notice of proposed rulemaking for a major rule, participation in the rulemaking as provided by paragraph (1) shall include an opportunity to make oral presentations either upon the request of an interested person or at the agency's discretion when it reasonably believes there are questions that can be better dealt with through oral presentation and written comments as opposed solely to written comments. The opportunity for oral presentation shall also include an opportunity to interested persons to submit oral and written rebuttal. The agency may establish such other reasonable procedures as it deems necessary to regulate the course of oral presentations to insure an orderly and expeditious proceeding."

4. Statements to accompany final rules (Section 3(e)(1)) - In subsection (e)(1)(C) there is a requirement for "a memorandum of law supporting

the determination of the agency that the final rule is within the authority delegated by law and consistent with congressional intent". A memorandum of law could entail needless time and paperwork. All that should be required is a statement by the agency in all final rules that "this rule is issued pursuant to [statutory authority]." It should not be necessary to go further or show consistency with congressional intent, unless comments filed by interested persons raised questions relating thereto. One of the desired goals of regulatory reform is to eliminate unnecessary paperwork and the delay it entails. This provision would be contra to that goal.

Accordingly, it is suggested that subsection (e)(1)(C) be amended to provide:

> (C) A statement of the law or laws from which the agency's jurisdiction or authority to issue the rule derives. However, when comments have been submitted that question the agency's jurisdiction or statutory authority to legally promulgate the proposed rule, or, that raise questions as to the proposed rule being contrary to congressional intent, the agency shall include in its final rule a memorandum of law on these points and its interpretation of congressional intent in support of its action.

5. Review of Agency Rules (Section 4) - Although superficially attractive, Section 560 would do little to reduce existing regulatory burdens. This is not to say that all agencies should not periodically review their regulations and forms, but it should not be so formalized a procedure as that set forth in this Section. The approach described in this Section would result in a triple layer of paperwork; the "draft schedule of review" prepared by the agency; the comments received thereon from interested persons; and then the final report. The additional pages required in the already beleaguered Federal Register to publish these schedules and reports would be considerable. Since the pages in the Federal Register increased at an average of 10,000 per year, from 1940 to 1980, it is not in the public interest to contribute unnecessarily to further growth in this average. In addition, the final report would almost certainly generate more paperwork on its own. It would be preferable for agencies to

adopt a more flexible approach which would utilize notices of inquiry, informal conferences, advisory committees and other such means for identifying problems and seeking appropriate solutions in timely fashion. Such an approach would, we believe, be more useful and realistic toward improving the regulatory process than the stylized paper generating approach taken in Section 560. Furthermore, the approach in the proposed Section 4 would undoubtedly require additional manpower, or at a minimum, require more time of existing manpower.

6. Judicial Review (Section 5) - Proposed amendments to Section 706 of the APA incorporate a modified version of the so-called "Bumpers Amendment". It is a great improvement over its predecessor in the last Congress, and few would argue with its general purpose of precluding agencies from transgressing the boundaries of their authority. However, we believe that the standards enumerated in this Section are for the most part already embedded in our juridical system and their recitation here would only serve to invite more litigation. We fail to see where Section 706 would serve to speed up the decisional process. However, we do see its potential for encouraging court challenges of agency decisions by disgruntled parties seeking to invoke the litany of grievances embodied in this Section.

7. Regulatory Agenda and Calendar (Section 7) - A regulatory agenda of rules an agency proposes to promulgate in the succeeding twelve months would be required to be published twice a year. We question the value of this requirement in streamlining and expediting the regulatory process. It would require more paperwork by the agency and would not contribute to the more immediate need of reducing red tape and delay. This would be especially true at independent agencies such as the FERC where the vast bulk of its paperwork is not self-generated, but the result of filings made by others.

In addition, the helpfulness of such agendas is questionable. They are subject to change and, more often than not, assurance that a rule is going to be proposed cannot be had until it is noticed for comment in the Federal Register. However, since they are called for in Executive Order No. 12291, there is a good opportunity to gain more experience as to their possible usefulness before requiring them by law. The six month grace period in Section 8(d) would not provide sufficient time. Moreover, if a Committee or Member of the

Congress is interested in such an agenda for use in oversight or otherwise, and it is not available, it can be requested. However, to require all government agencies to prepare such an agenda twice a year, when no real need has been shown, would be a waste of personnel and time.

Similarly, statutory provision for the publication by the President twice yearly of a Calendar of Federal Regulations would be a poor utilization of time and manpower. It would also require more reporting and publication by the Director, OMB, in the Federal Register, of information of dubious interest or use. We therefore advocate that this provision be stricken from the bill.

8. Legislative Veto - Although there currently are no provisions in S. 1080 for legislative veto, it is understood that there may be attempts to include such provisions in an amendment. The problems that would result from such a provision, constitutionality aside, are numerous and would create more delay and uncertainty in a system rife with it already. For example, if it were to apply to all agency rules as that term is defined in 5 U.S.C. 551(4), it would include FERC rules on individual pipeline certificate and rate cases under Sections 4 and 7 of the NGA. Thus after a hearing on the record where all interested persons were given an opportunity to file protests or petitions to intervene, the effectiveness of FERC's action would be delayed while the Congress determined whether or not to exercise its veto power. The opportunity for lobbying without the constraints of the record amassed in the adjudicatory procedure before the Commission is apparent. In addition, questions would arise as to when an agency's final rule is ripe for judicial review; what effect Congressional "non-veto" or "non-action" would have on such review; whether the time for filing petitions for individual review after final agency action would be tolled, and so forth. In addition, if the provisions for legislative veto were to apply to existing rules, the results would be unconscionable, especially with regard to pipeline rate and certificate matters. Rates would not be final pending Congressional action and if certificates to construct were acted upon, they might be subsequently revised. This would be clearly contrary to well established legal principles and would also result in making it increasingly difficult to finance either critically needed new projects or upgrading and maintaining existing projects. The financial community would simply not risk money in the face of such uncertainty. Furthermore,

the Congress would also be confronted with some critical problems. To begin with, as previously noted, the Congress had had trouble keeping pace with agency oversight. To provide it with yet another means for oversight would not assure that that means would be used anymore effectively than its predecessors. There are thousands of agency rules issued each year. Undoubtedly too many, but even with optimal efforts at limiting them, there will still be more than can be handled by existing Congressional staff. This would necessitate hiring additional staff. Thus, the Congress that has been mandated to cut down on the size of government would in essence be increasing it. Moreover, the Congressional staff increase would necessarily be permanent and on-going; and therefore, not remotely comparable to the creation of a special Commission to conduct an agency-by-agency review over a set period of time. Again, we submit, that legislative veto is not the answer or even a part thereof to obtaining regulatory reform.

CONCLUSION

Regulatory reform is one of the most important legislative matters facing this country today. While some of our comments on S. 1080 may seem to take a negative approach, we nevertheless believe, that if modified, as proposed herein, there will be some beneficial improvements in the regulatory rulemaking process. However, true reform will not result from omnibus type procedural reforms. Congress must deal with the basics of regulation--the statutory charters that it has issued to numerous agencies and how each is being administered in terms of Congressional intent, current national needs and overall public interest. We therefore urge this Committee and the Congress, to address the many-faceted problems of regulatory reform by focusing on the regulatory functions of individual agencies rather than by creating, what, in our view will result in further regulatory burdens.

AGENCY-BY-AGENCY REVIEW

(1) The Congress finds that government regulation has expanded over the years, much of it adopted piece-meal to meet specific needs and it appears that much of such regulation may be duplicative, no longer needed or requiring modification or consolidation based on current conditions. Some regulation may not be comparable with changed market conditions or beneficial new technology; some regulation may be contributing unnecessarily to inflation by arbitrarily restricting the operation of a free competitive market or burdening large and small business with excessive paperwork and unreasonable delay; and, some regulation may not be carrying out Congressional intent due to lack of precise guidelines or adequate standards.

(b) It is the purpose of this Title to require over an eight year period for a comprehensive review by a Congressional Commission of the various areas of regulatory activity set forth below. This Commission shall present reorganization plans based on this review to the Congress for its consideration, modification, if necessary, and adoption. In adopting these plans, the goal shall be to prevent unnecessary or harmful regulation, to consolidate or eliminate agencies or functions of agencies and to amend the statutory charters of regulatory agencies so as to better achieve Congressional objectives and purposes.

Within 100 days of the passage of this Act, the President pro tempore of the Senate and the Speaker of the House of Representatives shall establish an Agency Reorganization Commission, hereinafter referred to as the Commission.

(2) The Commission shall be comprised of 9 members, 4 appointed by the President pro tempore and 5 by the Speaker. The President pro tempore shall designate one member to be Chairman. The chairman shall be compensated at the rate provided for Level II of the Executive Schedule under Section 5314 of title 5, United States Code. The other members of the Commission shall be compensated at the rate provided for Level IV of the Executive Schedule under Section 5315 of title 5, United States Code. Such members shall include individuals with demonstrated ability, broad regulatory background, training and experience so as to especially qualify to assess fairly the needs and concerns for a more efficient federal regulatory system.

(3) The Commission shall have power to hire an Executive Director and 2 Assistant Executive Directors and a small professional staff of 10 persons to assist it in its work; to employ experts and consultants; and to hire the necessary clerical and administrative support personnel.

(4) Unless extended by Congress, the existence of the Commission shall expire on September 30, 1987.

(b) Not later than the date referred to in paragraphs (A) through (D) of this subsection, the Commission shall submit to the President pro tempore of the Senate and the Speaker of the House of Representatives a plan containing the information required to be included under subsection (c) with respect to the following areas:

(A) Regulation of energy, the environment, housing, and occupational health and safety by the Federal Government, by the last day of September 1981, for the following agencies: (a) Environmental Protection Administration; (b) Energy Regulatory Administration; (c) Federal Energy Regulatory Commission; (d) Nuclear Regulatory Commission; (e) the relevant regulatory functions of the Department of the Interior; (f) Federal Housing Administration, Department of Housing and Urban Development; and (g) Occupational Safety and Health Administration, Department of Labor.

(B) Regulation of Transportation and communications by the Federal Government, by the last day of April 1983, for the following agencies: (a) Civil Aeronautics Board; (b) Interstate Commerce Commission; (c) Federal Maritime Commission; (d) Department of Transportation; and (e) Federal Communications Commission.

(C) Regulation of banking and finance, international trade, and Government procurement by the Federal Government, by the last day of September 1984, for the following agencies: (a) Office of the Comptroller of the Currency, Department of Treasury; (b) Federal Deposit Insurance Corporation; (c) Federal Home Loan Bank Board; (d) Board of Governors of the Federal Reserve System; (e) National Credit Union Administration; (f) Federal Savings and Loan Insurance Corporation; (g) International Trade Commission; (h) Commodity Futures Trade Commission; (i) Securities and Exchange Commission; (j) Farm Credit Administration; and (k) General Services Administration.

(D) Regulation of food, consumer health and safety, economic trade practices, and labor-management concerns by the Federal Government, by the last day of September 1986, for the following agencies; (a) Consumer Product Safety Commission; (b) Federal Aviation Administration, Department of Transportation; (c) Federal Trade Commission; (d) Food and Drug Administration, Department of Health, Education,

and Welfare; (e) the relevant regulatory functions of the Department of Agriculture; (f) National Highway Traffic Safety Administration, Department of Transportation; (g) National Labor Relations Board; (h) Federal Mediation Board; and (i) Equal Employment Opportunity Commission.

(c) Each plan submitted under subsection (b) shall include provisions relating to such other agencies as the Commission elects to include, or the Speaker of the House of Representatives and the President pro tempore of the Senate may require. Notice of any additional agency to be included in such plan shall be sent to the Commission not later than eighteen months preceding the date such plan is required to be submitted.

(d) A plan submitted pursuant to subsection (b) shall contain the following information with respect to agencies which are included in any such plan pursuant to paragraphs (A) through (D) of subsection (b): (1) recommendations for the transfer, consolidation, modification, or elimination of functions; (2) recommendations for organizational, structural, and procedural reform; (3) recommendations for the merger, modification, establishment, or abolition of Federal regulations or agencies; (4) recommendations for eliminating or phasing out outdated, overlapping, or conflicting regulatory jurisdictions or requirements of general applicability; (5) recommendations for eliminating agency delays; and (6) recommendations for increasing economic competition.

(e) Along with each plan submitted by the Commission pursuant to subsection (b), the Commission shall report on the cumulative impact of all Government regulatory activity reviewed, up to that date, on specific industry groupings. The report shall include recommendations to insure that the cumulative impact of Government regulation is in the Nation's best interests. Wherever practicable, in the formulation of each plan, the Commission shall give explicit consideration to the particular impact of Government regulatory activity on the following relevant industry groupings: (1) transportation and agriculture industries; (2) mining, heavy manufacturing, and public utilities industries; (3) construction and light manufacturing industries; and (4) communications, finance, insurance, real estate, trade, and service industries.

(f) If for any reason the Commission cannot submit plans to Congress on the data specified in subsection (b) the Chairman of the Commission shall report such fact to the President pro tempore of the Senate and the Speaker of the House of Representatives of the reasons therefore and request amendment of the Title to incorporate the date, not more than 6 months from that specified in subsection (b).

(g) Upon receipt of the plan or plans from the Commission, the President pro tempore of the Senate and the Speaker of the House of Representatives shall refer the plan or plans to the appropriate committees for joint consideration by such committees of the Senate and House. The Committee shall hold hearings on such plan or plans at which members of the Administration, representatives from the agency, and, members of the public shall be afforded an opportunity to comment. Such plan or plans shall become pending business in the Senate and the House of Representatives not later than 9 months from the date of receipt of such plan or plans from the Commission.

Prepared Statement of the National Food Processors Association

The National Food Processors Association appreciates the opportunity to present this statement on S. 1080, and in particular on the cost-benefit provisions of the bill. NFPA is a national trade association representing about 600 member companies that pack processed-prepared fruits, vegetables, meats, fish and specialty products, including canned, frozen, dehydrated, pickled and other preserved food items. Also included among the association's members are companies that provide equipment, supplies and services to the food processing industry.

The support of the National Food Processors Association for the cost-benefit aspects of this legislation reflects the continuing interest of the Association and its members since 1974 in the establishment of procedures under which federal agencies would be required to identify and evaluate the costs and benefits of major regulations so that unreasonable and unnecessary burdens on the public and on the productive capacity of the nation's industries may be avoided. Seven years ago at the Agriculture and Food Economic Conference called by President Ford, NFPA (then the National Canners Association) expressed concern that "the cumulative effect of the increasing number of federal laws and regulations had imposed a burden that the economy cannot reasonably be expected to carry."

The 1974 NFPA statement pointed out:

> "The proponents of a new regulatory program . . . are not required to determine what the program will mean in terms of added costs to industry -- and thus to consumers in the marketplace. Without a conscientious effort to compare public benefits and consumer costs, virtually any proposal for added controls . . . can be said to be justified solely in terms of the claimed social benefit, however tenuous or remote. If the question is posed solely in terms of more consumer information or less, more environmental controls or less, greater assurance of employee or public safety or less, the answer in favor of controls is inevitable.
>
> "The net effect has been that the price of a can of corn no longer measures the value of that product in relation to other

> consumer goods. Hidden in the price are any number of added costs reflecting not improvement of product, but compliance with new government requirements."

For these reasons, NFPA proposed that for all new government controls the "benefits be evaluated in terms of their real costs to the economy and consumers," and that Congress enact legislation "establishing a mechanism by which the consumer cost of any proposed program can be determined and balanced against the benefits to be achieved."

The Association and its members were thus quite gratified that shortly after the 1974 economic summit the President promulgated Executive Order 11821 to require inflation impact statements for all major regulations and legislative proposals. Subsequent executive orders built upon this initial requirement to require economic impact statements, and finally to require regulatory analyses for regulations identified as having major economic consequences for the general economy, or for individual industries, geographic regions or levels of government.

Although these programs under Presidential executive orders have provided some relief from the problem of excessive and unduly costly federal regulation, a number of factors have prevented those programs from providing significant relief on a broad scale throughout the federal government. Accordingly, our Association and others continue to participate in the drafting and proposal of legislation that would carry out a more effective program for regulatory reform, would be applicable to all federal agencies, and would impose a statutory obligation on those agencies to consider and take into account the costs and benefits of new regulations.

We are particularly mindful of the economic impact of federal regulatory programs, for beginning with the enactment of the first federal pure food law in 1906, food processors have been as much involved with federal controls as perhaps any other segment of the economy. As a consumer goods industry, processing agricultural commodities for national distribution, food processors have found themselves

regulated from the field to the retail shelf by a wide variety of specialized regulatory controls. Even more broadly applicable legislation, such as the Federal Water Pollution Control Act, frequently has particularly heavy impact on food processing because of the nature and highly seasonal character of its operations.

Our testimony in support of cost-benefit legislation does not reflect a cavalier laissez-faire attitude on the part of the industry, for on many occasions NFPA has endorsed legislative and regulatory programs for the protection or benefit of the public. The Association takes some pride in its past record of cooperation with Congress and the federal agencies. In our support for cost-benefit evaluation of major rules NFPA does not seek an end to controls that provide real and proportional benefits in terms of consumer safety, health, inflation and well being. But we are gravely concerned with the enthusiasm on the part of some in support of regulation for regulation's sake.

The substantial cost and price increases that result from escalating regulatory controls are invariably said to be justified on the basis of the public's desire and demand for particular benefits. The difficulty is, however, that the costs of these controls are not borne separately and directly, but instead are reflected in higher prices for the services and goods produced and sold by the industry upon which those controls are imposed. The public thus tends to ignore the claimed benefits provided by new federal controls -- or if it recognizes those benefits, it chooses not to pay for them -- because the price increases that pay for the "benefits" are regarded as inflationary, and demands are immediately made for higher wages so that the higher prices can be paid without any diminution in the standard of living.

If it is true that new regulatory provisions improve the quality of life, or add significant consumer, safety or environmental benefits, then it should be understood that the higher prices reflecting these new values

and benefits must to some extent replace other goods or services. As it is now, the public pays the higher prices, but demands wage and salary increases in order to reflect the higher "cost of living."

There may be no easy solution to this spiral of new government programs to provide new public benefits, resulting in higher consumer prices, which in turn trigger increased salary and wage demands. An important element of any solution, however, would be explicit recognition of the costs that are imposed by government programs, so that the agencies, the Congress and the public can fully realize that the benefits of those programs can be obtained only at the expense of other benefits, goods and services.

Turning to the provisions of S. 1080, our consideration of regulatory reform legislation over the past seven years has led us to certain basic conclusions as to the desirable scope of a regulatory analysis requirement. In the remainder of our statement we will undertake to discuss what our industry regards as the principal elements that should be included in such legislation, with particular reference to the provisions of S. 1080.

1. Appropriate Statutory Vehicle. Legislative proposals for cost-benefit or regulatory analysis requirements have taken any number of statutory approaches. On balance, we are persuaded that the most logical and least confusing approach is that of S. 1080 -- the enactment of cost-benefit provisions as a part of the United States Code comprising the Administrative Procedure Act. It is vitally important, in our view, that the cost-benefit requirement be fully integrated with the existing statutory and judicial requirements relating to the rulemaking process. A major cause of the uncertainty and litigation resulting from the National Environmental Policy Act has, in our opinion, been attributable to the fact that the relationship between NEPA and the APA was not spelled out in the legislation.

For these reasons we support the concept of including the regulatory analysis requirement directly in the APA provisions of the U.S. Code.

2. Applicability To All Federal Agencies. A very substantial shortcoming of the Presidential executive order programs for economic impact or regulatory reform is that the executive orders have been regarded as inapplicable to the independent regulatory agencies. Clearly, the cost-benefit requirements should apply to all federal agencies, whether they are independent or directly subject to the control of the President, or somewhere in between. We applaud the fact that S. 1080 would make the regulatory analysis requirement applicable to any agency, as that term is presently defined in the APA.

3. Applicability To Regulations. S. 1080 provides for the applicability of the cost-benefit requireemnts to rules, as distinguished from other kinds of agency action, such as licenses, adjudicative determinations, or enforcement action. In our view it is entirely appropriate to limit the applicability of the cost-benefit requirement in this manner, for there can be little doubt that the major impact of agency action on the public and the economy is through the adoption of regulations which have prospective applicability on a broad basis, as distinguished from agency actions which relate to past activity and particular parties.

4. The Definition Of A "Major Rule." The cost-benefit requirement of the bill is applicable only to a rule if it comes within the definition of a "major rule." This term is defined to mean any rule which, in the judgment of the agency, is likely to result in an effect on the economy in any one year of $100 million or more in enforcement and compliance costs; any rule that the agency estimates will cause a substantial increase in costs or prices for workers, consumers, individual industries, geographic regions, or levels of government; or any other rule which is likely to cause significant adverse effects on competition, employment, productivity or investment.

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In our view the flexible approach of S. 1080 in this regard is far preferable to the more restrictive provisions found in some other legislative proposals. For a rule of national scope and impact the $100 million threshold level may well be appropriate, but in our experience a high percentage of federal regulations do not apply across the board to all industries, companies or citizens. More frequently rules having a narrower scope impose a substantial burden on particular segments of the economy or regions of the country. The impact upon those affected may be very substantial in spite of the fact that it may fall short of the $100 million threshold.

We also endorse the exclusion from the definition of a major rule those rules which authorize the marketing of a product or service. The effect on the economy of a new product is to increase consumer choice and provide additional benefits. It is difficult enough to obtain government approval of new products or services, where approval is necessary for marketing, without imposing an additional cost-benefit evaluation requirement which would have little or no relevance to such permissive -- as distinguished from regulatory -- action by an agency.

5. Proposed And Final Cost-Benefit Statement. It is particularly important that a cost-benefit requirement be integrated with the rulemaking process that is otherwise prescribed by the APA or the particular statute involved. Effective public participation can be assured only if the agency is required to accompany any proposed regulation with a preliminary or draft statement for consideration and review by the public and other interested federal agencies. The final statement can then take into account comments, information and data received during the public comment period. S. 1080 adopts this two-stage approach that we regard as so important to the effectiveness of a cost-benefit requirement.

6. Contents Of The Notice Of Proposed Rulemaking. The Administrative Procedure Act now specifies certain

minimal provisions which must be included in a notice of proposed rulemaking, such as the time and place of the rulemaking proceeding, reference to the legal authority for the rule, and either the terms or substance of the proposed rule or a description of the subjects and issues involved. S. 1080 would add certain additional requirements for virtually all rulemaking proceedings, not just those relating to major rules. For example, the actual proposed text of the rule would have to be published, along with a statement of the need for and objectives of the rule. In addition, the notice would have to include a description of the data, methodology and other information upon which the agency intends to rely. If the notice relates to a major rule, then it would also have to include a description of the benefits, a description of the costs and a description of reasonable alternatives. Finally, the notice would be required to state how the benefits are likely to justify the costs and adverse effects.

This approach of requiring greater specificity for all rulemaking proposals, and of integrating the cost-benefit procedure as a part of the proposed rulemaking, is a substantial improvement over other regulatory reform proposals. Although many agencies now provide more information in rulemaking notices than the minimum required under the APA, it would clearly be salutory for all agencies to be required to include this additional information. Certainly it is vitally important that for major rules the agency indicate at the outset how it views relevant costs, benefits and alternatives.

7. Expanded Rulemaking Procedures. S. 1080 would spell out in greater detail the rulemaking procedures which must be followed for all rules, including provisions for appropriate extensions of time and for maintenance of a public file for each rulemaking proceeding. The rulemaking procedures for major rules would have to include an opportunity to make oral presentations, which must include cross-examination when other procedures for determining facts are deemed

to be inadequate. Although it might be questioned whether oral presentations are necessary in every instance, there can be no doubt but that such live presentation of data and information might prove particularly effective in giving emphasis to specific aspects of a proposed rule. The opportunity for cross-examination may also be beneficial, but since the failure of the agency to afford an opportunity for such cross-examination is not reviewable, experience will have to determine whether agencies will abuse their discretion in this regard.

8. The Statement Of Basis And Purpose For Final Rules. Here also the bill would significantly expand on the provisions which must accompany the promulgation of the final rule. Although a number of agencies have already recognized the importance of making clear the factual, legal, and policy bases for regulations, it is clear that the inclusion of these requirements in the APA will be beneficial. And for major rules the statement of basis and purpose would be required to include a description and comparison of the benefits, costs and adverse effects of the rule, along with a determination that the benefits of the rule justify its costs and adverse effects, unless the basic statute would preclude such determination.

9. The Weight To Be Given To Benefits, Costs And Adverse Effects. One of the most difficult issues raised by a cost-benefit requirement for rulemaking is whether the agency should not only undertake a description of such benefits, costs and effects, but whether it also should take these into account in deciding upon the provisions to be included in the final rule. As previously noted, S. 1080 directs that the statement of basis and purpose for final major rules must include a determination that the benefits of the rule justify the costs and adverse effects. This requirement would not apply where the enabling statute "directs otherwise." We interpret this provision to mean that absent such a determination the rule could not be adopted, since the agency would not be complying with this

explicit statutory requirement. We believe this approach is reasonable, and should assure that unreasonably costly and burdensome regulations could no longer be adopted.

10. Judicial Review. S. 1080 would retain the judicial review provisions of the APA, and would add an additional requirement that any agency rule must be set aside if it is found to be without substantial support in the rulemaking file viewed as a whole, for the asserted or necessary factual basis (as distinguished from the policy for legal basis) of the rule. Although the significance of this new language will not be entirely clear until courts have had an opportunity to interpret and apply it, this provision probably reflects the practice of those courts that are most familiar with and accustomed to the judicial review of agency rulemaking.

The bill would impose two significant limitations on judicial review, however. As already noted, a reviewing court could not set aside an agency rule for the failure of the agency to afford an opportunity for cross-examination in informal rulemaking proceedings. Second, a court could not set aside a rule because of the inadequacy of a cost-benefit statement accompanying a proposal or final rule. In all other respects, however, judicial review would be fully available. Of particular importance, a reviewing court would be required to consider the cost-benefit determinations for major rules and to take these into account in determining whether the rule must be set aside on the grounds that it is arbitrary and capricious or without substantial support in the rulemaking file for the factual basis of the rule.

We believe that these judicial review provisions are a reasonable accommodation of competing considerations.

11. Emergency Rules. From the outset of our support for cost-benefit determinations we have recognized that it was important to waive or modify the requirements for emergency actions. In our view the provisions of S. 1080 for emergency rules are reasonable and appropriate.

12. Effective Date. Without question, earlier regulatory reform proposals have been seriously deficient in failing to specify how new procedures should be applicable to proceedings in progress. S. 1080 avoids this difficulty by providing that the new procedures would apply to proceedings for which a notice of proposed rulemaking has been issued after January 1, 1983. Although we question the need for such a protracted effective date, it may be just as well for agencies to have ample time to revise their procedures to bring them into accordance with the new law.

Other Provisions Of The Bill

As for the remaining provisions of the bill, we also favor the long-term review of major rules already in effect, the venue provisions designed to avoid unseemly races to the courthouse, and the requirement that agencies publish a regulatory agenda. In short, we urge that this Committee favorably report S. 1080 to the Senate.

National Association of Home Builders
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Herman J. Smith
1981 President

May 11, 1981

The Honorable Paul Laxalt
Chairman, Subcommittee on Regulatory Reform
Senate Judiciary Committee
2226 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Senator Laxalt:

On behalf of the more than 123,000 members of the National Association of Home Builders, I wish to express our strong support for the legislation you and Senator Leahy introduced, S. 1080, the Regulatory Reform Act of 1981. This legislation is an essential first step towards improving the federal regulatory process.

The predominant portion of our membership is made up of small businessmen. Approximately 80% of our membership employs less than 10 individuals while in excess of 90% of our membership employs 25 people or less. Approximately 50% of our membership builds less than ten houses per year while approximately 70% of our membership builds less than 25 houses per year.

The burden of federal regulations on the homebuilding industry is onerous. Duplicating, overlapping and unnecessary regulations continue to fuel the flames of inflation in the housing industry. These regulations require the consumption of enormous numbers of man-hours and costs in meeting the paperwork and compliance requirements by homebuilders. There are numerous examples of instances where builders are bounced from one agency to another in an attempt to meet conflicting regulatory requirements. The impact on small businesses, such as homebuilders who do not have the luxury of large staffs and professionals to handle the paperwork and regulatory maze adds substantially to the nonproductive costs of housing production.

Your efforts to require the regulatory process to be more responsive is eagerly supported. The passage of the Regulatory Reform Act of 1981 is an essential first step towards requiring the regulatory process to be responsive and responsible in the promulgation of rules. The requirements in your legislation for cost/benefit analysis and the required statement of the basis and purpose of a proposed rule are important elements in achieving meaningful regulatory reform. Secondly, requiring agencies to review major rules every ten years to determine if they should be revised or withdrawn is also an essential element in meaningful regulatory reform. Thirdly, your proposal to prohibit a court from presuming that agency interpretations of laws are valid and requiring agency factual determinations made during informal rulemaking to have substantial support in the record are other vital elements of meaningful regulatory reform. Lastly, your proposed regulatory agenda and calender provisions are important elements in improving the regulatory process and increasing meaningful public participation.

I can assure you that the National Association of Home Builders will continue its strong and vigorous support of this legislation.

Sincerely,

Herman J. Smith

Herman J. Smith

PREPARED STATEMENT OF THE NATIONAL MACHINE TOOL BUILDERS' ASSOCIATION

I. INTRODUCTION

The National Machine Tool Builders' Association (NMTBA) is a national trade association representing over 400 members accounting for some 90% of the United States' machine tool production. Although the total U.S. machine tool industry employs approximately 90,000 people, most NMTBA member companies are small businesses with payrolls of 250 or fewer employees.

As a modern association well aware of the intricacies of the contemporary business-government interrelationship, the National Machine Tool Builders' Association is in the forefront of private sector advocates for rigorous, effective and equitable rules, regulations and standards designed to achieve improved health, safety and competitive conditions. For this reason, Mr. Chairman, we are indeed grateful for the opportunity to comment on your bill, S.1080, the "Regulatory Reform Act".

At the outset, we commend your legislative initiative and that of the numerous co-sponsors of your bill which attempts to forge long overdue modifications in the federal regulatory system. We fully concur in the growing belief that federal regulatory agencies must be made to be more fiscally prudent when promulgating new or evaluating existing regulations, so that these regulations will function efficiently, and not become counter-productive to the economy which they were designed to serve.

Because of the complexity of the problem, regulatory reform proposals necessarily have become multifaceted omnibus legislative vehicles. Consequently, at this time, rather than trying to speak to all of the many facets of this comprehensive legislation (most of which have already received very adequate comments by other witnesses), we wish to focus our remarks on several issues of particular interest to our industry. Specifically, they are:

1. Performance vs. design standards.

2. Hybrid rulemaking.

3. Judicial reviewability of "major rule" determination.

II. PERFORMANCE VS. DESIGN STANDARDS

The first issue of concern to our highly technical industry is one which has been obliquely addressed in S. 1080, but which we believe is quite significant and, therefore, worthy of further emphasis. Specifically, we refer to the belief that standards intended to ensure the achievement of specific social goals should, wherever possible, be based on performance criteria and not on design specifications. In other words, standards should specify the problems to be solved and, in most cases, not restrict the solutions of those problems to detailed and mandatory methods of compliance.

NMTBA's long involvement with the voluntary standards movement in the United States has provided the Association with an excellent understanding of the relative advantages and disadvantages of employing performance oriented versus design restricted language in the drafting of the regulatory standards. Indeed, NMTBA had representation on one of the early standards committees operating under the American Engineering Standards Committee (AESC), which was later to be known as the American National Standards Institute (ANSI). From this beginning, as one member of a committee of seventeen different organizations charged with the development of a single safety standard -- Safety Requirements for the Construction, Care and Use of Mechanical Power Presses (currently listed as ANSI B11.1) -- NMTBA now holds the responsibility of functioning as the sole secretariat of the ANSI B11 Standards Committee, which in 1971 was greatly expanded to include all types of machine tools, and currently includes a membership of approximately forty six trade associations, labor organizations, government agencies and insurance and professional societies.

The point of this brief history is simply to emphasize that voluntary standards writing groups such as the ANSI

B11 Standards Committee have provided associations such as NMTBA with a vast amount of experience in the area of standards development. And, while we can speak only for ourselves, it is nevertheless accurate to say that based on this extensive background it is the opinion of most such groups that performance based language in standards is in most cases preferable to mandatory design criteria.

A performance standard or a performance provision of a standard establishes minimum requirements in terms of performance needs to be fulfilled without limiting the materials, systems, designs, or construction methods that may be used. By specifying performance criteria in functional terms, the social purpose of the standard is clear. Everyone has an opportunity to evaluate the wisdom of the choices made and the value judgments implicit in them. Scientists and engineers who are trying to meet the goal can search for innovative solutions, with restraints on technology limited to only those that are actually relevant to social ends. Additionally, performance standards are also less likely to serve as obstacles to a fair, competitive marketplace, since they are less likely to lock into place established technologies against potentially more improved new ones.

Admittedly, design standards may enjoy the benefit of relative ease of enforcement vis-a-vis performance criteria -- either you have the mandated equipment in place or you don't. Also, while compliance with design requirements can be verified by inspection, measurement of compliance with performance standards generally requires the use of more sophisticated tools by more qualified personnel. In the short run this may lead us to conclude that design standards are less costly to enforce. However, in the broader perspective it is more likely that these possible immediate savings in enforcement costs are far outweighed by the long term advantages, both social and economic, which would endure under performance standards.

Moreover, compliance with a design standard does not necessarily measure the achievement of the actual social goal that

is the genesis of the standard. Design standards necessarily require us to make the logical leap of equating compliance with specific criteria to achievement of the desired goal. And, not only must we make this leap in the initial development of the standard, but we must repeatedly make this identical leap in each less than identical enforcment situation.

For example, the Occupational Safety and Health Act of 1970 (P.L.91-596) covers some five million workplaces and sixty million employees, from manufacturing plants to farms. With this broad range of coverage, clearly, it is next to impossible to develop regulations that are completely equitable from one workplace to the next.

Although OSHA has attempted to recognize these differences through establishing different sets of standards for different occupational groups -- 1910 for general industry, 1926 for the construction industry, and 1915-1918 for the maritime industry, etc. -- even this limited breakdown probably is not sufficient to account for the numerous differences in workplaces within these industry subgroups.

By contrast, performance standards would allow more accurate measurement of the level of attainment of the actual goal itself. Moreover, they would provide for the flexibility and latitude to insure that state-of-the-art technology would be brought into the effort on a continuing basis.

For those who would be troubled by the fear of not knowing precisely what would constitute adequate compliance with a standard drafted in performance language, let us point out that such a standard would not preclude agencies from developing voluntary conformance guidelines. We recognize that such guidelines are in a sense "design standards" and are, therefore, subject to some of the same criticisms which we have just levelled against design standards generally. However, by not making them mandatory such guidelines would at once offer a selection of alternatives that would satisfy the minimum requirements of the standard, and still remain open to more innovative and efficient methods of compliance. Such flexibility is not possible with only straight design criteria.

Finally, we do not advocate a complete bar to design standards. Indeed, some areas, such as health regulations or industrial interchangability requirements for example, may necessitate more specific language requiring more restrictive criteria. However, while recognizing these special cases, we must remember that they are just that -- special cases which should be the exception and not the rule. Certainly, we are all too familiar with the concerns of manufacturers and other businessmen who are now at great and needless expense trying to cope with an avalanche of regulations promulgated by faceless Washington bureaucrats who suppose themselves to know more about a business than the owner or manager of that enterprise himself.

Our suggestion would simply require that agencies pay careful heed to the above considerations in their initial analysis of a proposed new standard, they do so in full knowledge of its relative advantages and disadvantages, with a justification for such a decision on the record.

We recognize and generally applaud sections 3(c)(2)(C), 3(c)(2)(C), and 3(e)(1)(B) of S. 1080 for requiring agencies to describe each of the alternatives to a proposed rule and to explain why each alternative was rejected, at the time of announcing a proposed rulemaking, as well as at the time of promulgation of a final rule.

However, we believe that more precise language specifically directing agencies to think about and evaluate these various alternatives in terms of performance vs. design approaches is required in the above two sections of the bill. As an example of such an approach we would recommend the provisions contained in the House Judiciary Committee's bill of the last Congress, H.R. 3263, as the clearest legislative formulation of this approach to date.

III. HYBRID RULEMAKING

We commend S. 1080 for providing what has come to be known as "hybrid rulemaking" for major rules. We believe that the opportunity for oral presentation and cross-examination in major

rule makings can strengthen the regulatory process by providing a closer scrutiny of matters of material fact.

Although some have expressed the concern that hybrid procedures would significantly delay the regulatory process, we believe that the experience in rule making in which hybrid procedures have already been used does not support this concern. Moreover, we firmly believe that the limitations on hybrid procedures already contained in S. 1080 will allow hybrid rulemaking to be an effective tool by resolving complex factual issues without turning informal rulemaking proceedings into full blown trials.

Finally, we fully concur with S. 1080's sponsors in recognizing that it is impossible to limit the scope of judicial reviewability of agencies' decisions to employ or disregard hybrid procedures.

IV. JUDICIAL REVIEWABILITY OF "MAJOR RULE DETERMINATIONS"

As in the case of hybrid rulemaking procedures, we would most strongly discourage the use of interlocutory judicial review of agency determination as to whether a proposed rule was or was not a "major rule".

V. CONCLUSION

In conclusion, Mr. Chairman, as we stated at the outset, we congratulate you for your leadership in the area of regulatory reform. Although reform of the administrative procedures used in the rulemaking process is not the complete answer to over-regulation of the U.S. economy, it is a major and necessary component of the total solution. Moreover, we believe that S. 1080's effective date of 1983 is an appropriate recognition of the need for additional experience under Executive Order 12291, in order that the provisions of S. 1080 might be more effectively implemented. Thank you.

STATEMENT OF THE NATIONAL RETAIL MERCHANTS ASSOCIATION
ON REGULATORY REFORM

The National Retail Merchants Association (NRMA) is a voluntary, non-profit trade association which represents 3,500 members who operate a total of 35,000 general merchandise and specialty stores throughout the United States that sell an infinite variety of products, from clothing, jewelry, cosmetics, sporting goods, and housewares to food, drugs, furniture, household appliances and automotive supplies. A majority of NRMA's members are small independent retailers with annual sales of $1 million or less.

In contrast to huge manufacturing entities, which may be compelled to spend hundreds of millions of dollars as a result of the adoption of a single environmental standard, no single agency, statute or regulation constitutes the primary control over retail activity. Instead, retailing is governed by perhaps the greatest range of regulators and regulations of any industry. Thus, retailers are subject to and are affected by regulations of the Federal Trade Commission (e.g., labeling, packaging, pricing, advertising, warranties); Consumer Product Safety Commission (consumer product safety, e.g., flammable fabrics, recalls of defective products, special packaging for hazardous substances); Federal Reserve Board (e.g., credit practices); Food and Drug Administration (e.g., food, OTC drugs, cosmetics, microwave ovens); Department of Labor (e.g., minimum wage and overtime requirements, employment discrimination, occupational safety); National Labor Relations Board (employee-management relations); Environmental Protection Agency (e.g., hazardous wastes, land use, parking); Department of Energy (e.g., building temperatures and energy consumption, utility rate reforms); Internal Revenue Service (taxes); Interstate Commerce Commission (e.g. transportation services); and others.

For this reason, the businesses that NRMA represents, and particularly the small businesses, though they need regulatory relief, by and large will not be significantly aided by regulatory reform proposals dealing with "major" rules (i.e., rules that will impose annual costs of $100,000,000 or more or that will otherwise cause significant adverse effects on productivity, competition, prices, innovation, etc.). For example, the regulatory impact analysis requirement of President Reagan's Executive Order No. 12291 and of several bills now pending in Congress would not apply to many of the rules to which NRMA members are subject. Thus, for retailers, who are being nibbled to death rather than swallowed in one big gulp, a different approach to regulatory reform is needed.

What kinds of regulatory reform will truly help retailers, especially the majority, which are small businesses?

-- Focus on the quality of regulators.

Individual administrators can and should play a significant role in determining how the laws entrusted to them will be implemented. Therefore, it is necessary to identify the characteristics that are required for particular positions and to establish personnel policies and appointment procedures that will facilitate the selection and appointment of highly qualified individuals.

-- Improve management and decision-making procedures.

A number of procedural reforms, particularly use of tools such as regulatory impact analyses, hold some promise for generally improving the quality of regulatory action. Care must be taken, however, to evaluate the cumulative effect of imposing many new procedural requirements simultaneously.

-- Most important, the organic statutes under which administrative agencies operate should be reformed.

Many of the agency actions that have prompted calls for regulatory reform are attributable not so much - or at

least not only - to arbitrary thinking or inadequate procedures as to the existence of statutes that either specifically call for a certain rule that no longer is considered desirable or that contain so broad a mandate as to give an agency virtually unfettered discretion. Only Congress can address these problems, and Congress should, -- in a systematic and comprehensive review of federal regulatory statutes and how they are being implemented.

The Need For High Quality Regulators.

The quality of federal regulation is significantly influenced by the people who run the federal agencies. Thus, it is essential to select for policy making positions people who possess the requisite background and skills. These include not only the requisite technical competence (such as chemistry, toxicology, economics, law, or nuclear engineering), but also the character traits that will make them able and wise administrators (e.g., intelligence, diligence, integrity, creativity, flexibility, vision, leadership, and, perhaps most important common sense). In addition, it is necessary to enlist the services of individuals who have appropriate personal experience, and hence, a sensitivity to the issues and an appreciation of the practical consequences of proposed regulatory actions that often is sorely lacking. Too little attention has been paid to the question of whether and to what extent government personnel policies and selection procedures are effective in making sure that the government can attract and retain people with the kinds of experience and skills that are needed, and some serious inquiry in this area would be beneficial.

N[illegible]gency Management And Analytical Systems Are Necessary -- But Not Sufficient.

Most of the regulatory reform proposals currently under discussion are designed to rationalize agency rule-making and decision-making processes through procedural, rather than

substantive, modifications. This is true of President Reagan's Executive Order No. 12291, which requires executive agencies to prepare regulatory impact analyses for major rules and requires agencies to submit proposed and final rules to OMB for review before their publication in the Federal Register. It is also true of most of the regulatory reform bills now pending in both houses of Congress which would require, inter alia cost-benefit and cost-effectiveness analyses, paperwork budgets, regulatory budgets, regulatory agendas, periodic agency review of rules, Congressional veto, more stringent judicial review, and executive oversight.

We commend such measures insofar as they serve to instill regularity and discipline into the rule-making process. These have too often been missing in the past. We particularly endorse the use of regulatory impact or similar analyses to ensure, so far as possible, that agencies engage in a rigorous analysis of the consequences of and alternatives to specific regulatory proposals, that agencies consider the costs and benefits of proposed rules, and that agencies clearly articulate the factual and legal basis for regulatory actions. Further, insofar as these principles generally represent good management and decision-making practices, they should not be limited to use in conjunction only with major rule proceedings; rather, they should become standard operating procedure for all substantive agency actions.

At the same time, we recognize that to a certain extent, added steps (e.g., analyses, calendars, agendas, paperwork budgets, regulatory budgets, legislative veto, etc.) particularly when considered as a group, may add costs, in terms of increased delay of agency action or increased participation costs for regulated industry and other interested parties. Clearly it is necessary to consider not only the merits of individual reform proposals, but also the cumulative

impact on agencies and the public of imposing a wide variety of additional budgetary, analytical and reporting requirements. Finally, despite their value as management and decision-making tools, regulatory analyses, budgets, agendas, and the like address only part of the regulatory overload problem, and thus, by themselves, comprise only part of the solution.

The Ultimate Regulatory Reform Consists Of Congressional Action To Clarify Vague Statutes, Update Old Statutes, And Coordinate Statutes Which Reflect Conflicting Policy Goals.

Many of the "regulatory excesses" that have fueled the debate over regulatory reform are attributable not only to arbitrary or sloppy administration, but also to the nature of the statutes being implemented. In some cases, agencies are operating under mandates that are so broad and vaguely defined, there is little basis for constraining their actions. In other cases, agencies are operating under mandates that clearly express a specific policy choice by Congress, but the choice is no longer considered wise. Finally, in other cases, agencies are operating under mandates that clearly express a desired policy choice, but the choice conflicts with other current policy goals.

In all three cases only Congressional scrutiny and revision of the agencies' authorizing legislation will afford any significant regulatory relief. Provisions for agency economic analysis, executive oversight, legislative veto, or heightened judicial review, for example, while perhaps useful for certain purposes, do not effectively address these types of problems, and thus can not substitute for a comprehensive and systematic review by Congress of the administrative schemes that have been established during the last century.

The problem of overly broad and vague statutory authorization is illustrated by the recent controversy over FTC actions to prevent "unfair or deceptive acts or practices" in commerce. Neither the FTC Act nor its legislative history

provide meaningful guidance for applying the term "unfair." Rather, by authorizing the FTC "to prescribe rules which define with specificity acts or practices which are unfair or deceptive," the statute arguably creates the potential for the FTC to make value judgments and policy determinations that are vested by the Constitution exclusively in Congress. For example, FTC's now abandoned "kid-vid" rulemaking proceeding, in which the FTC considered, inter alia, banning the advertising of sugared cereals on children's television as inherently unfair because of the susceptibility of the audience, clearly presents the question of whether such a determination represents an appropriate exercise of administrative expertise or whether it constitutes a political, economic or philosophical determination that properly should be made by Congress.

It has been suggested by a number of scholars and other observers of the Washington scene that such expansive grants of authority from Congress to administrative agencies are a primary cause of the regulatory bog from which we are trying to extricate ourselves. An excellent description of the problem is found in the concurring opinion of Justice Rehnquist in Industrial Union Department, AFL-CIO v. American Petroleum Institute, 48 U.S.L.W. 5022 (July 2, 1980), in which the Supreme Court invalidated an OSHA regulation reducing the employee exposure standard for airborne concentrations of benzene from 10 ppm to 1 ppm, because of OSHA's failure to make a threshold determination that workplace exposure to benzene concentrations of 10 ppm presented a significant health risk. The court considered such a determination a prerequisite to concluding that the 1 ppm standard was "reasonably necessary or appropriate," in the words of the statute. Justice Rehnquist went further, however, in noting that, Congress, rather than OSHA, was responsible for the decisive material omission in the case. According to him, the case

presented the question of how OSHA was supposed to know what to do when Congress did not tell it. In Justice Rehnquist's view, Congress used language that "read literally, . . . is completely precatory, admonishing the Secretary to adopt the most protective standard if he can, but excusing him from that duty if he can't. [It] . . . gives the Secretary absolutely no indication where on the continuum of relative safety he should draw his line." 48 U.S.L.W. 5040. According to Justice Rehnquist, by failing to resolve the issue for itself, Congress improperly delegated its policy-making function to OSHA, and derivatively, to the Supreme Court.

This is not the only case in which the language and legislative history of a statute has given the agency charged with its administration insufficient guidance about the considerations that were intended to govern its implementation. This deficiency is attributable sometimes to oversight, sometimes to inartful drafting, and sometimes to the inability of Congress to achieve a consensus on the issues. The result in all cases is the same, however -- the agency is obliged to go beyond merely filling in the blanks of a clearly drawn Congressional charter to legislating on its own under some vaguely defined notion of, e.g., fairness, feasibility, or the public interest. This process undercuts the separation of powers which is the cornerstone of our government under the Constitution. As Justice Rehnquist describes it,

> "If Congress wishes to legislate in an area which it has not previously sought to enter, it will in today's political world undoubtedly run into opposition no matter how the legislation is formulated. But that is the very essense of legislative authority under our system. It is the hard choices, and not the filling in of the blanks, which must be made by the elected representatives of the people. When fundamental policy decisions underlying important legislation about to be enacted are to be made, the buck stops with Congress and the President insofar as he exercises his constitutional role in the legislative process." 48 U.S.L.W. 5043.

The injury is compounded when, as is often the case, the courts are called upon to validate an agency's action or otherwise to enunciate the principles that should guide the agency in its implementation of a statute. As pointed out by Antonin Scalia, "[N]ow that judicial review of agency action is virtually routine, it is the courts, rather than the agencies, that can ultimately determine the content of standardless legislation."*/ Thus, rather than finding an unconstitutional delegation of power in vague and precatory language, the courts have struggled to give these statutes meaning. In breathing life into them, the courts are forced to articulate the policies and priorities that the Congress failed clearly to establish.

An obverse of the vague statute problem is the case of a statute that provides clear and explicit direction, but experience under the statute suggests that its stated policy may no longer be desirable, or it simply needs reexamination. This too presents a regulatory problem that only Congress properly can resolve. A good example of this is the FTC's rule on the pre-sale availability of written warranties.

The FTC Act was amended in 1975 by the Magnuson-Moss Warranty -- Federal Trade Commission Improvement Act, which, inter alia, specifically directs the FTC to "prescribe rules requiring that the terms of any written warranty on a consumer product be made available to the consumer (or prospective consumer) prior to the sale of the product to him" [15 U.S.C. 2302(b)(1)(A)]. Accordingly, the FTC issued a rule (16 C.F.R. Part 702) requiring store owners to make written warranties on consumer products costing over $15 available for inspection by consumers before purchase by displaying the warranty in any one of four ways. As a matter of convenience, most retailers have chosen to comply with the rule by maintaining warranty binders.

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*/ Scalia, "A Note on the Benzene Case", Regulation (July/August 1980).

The cost to retailers of updating these binders to follow changes in inventory, product design and warranty terms is considerable. Yet, experience with the rule over the last 4 years shows that consumers almost never ask to see the binders. A petition to modify the rule has been filed with, and is now being considered by, the FTC. But, even if the evidence were to prove that the rule serves no purpose, the FTC cannot do away with it entirely because Congress has directed it to have some sort of rule. Thus, significant relief in this instance would require a statutory amendment from Congress.

Finally, many of the classic examples of regulatory "terribles" stem from Congressional enactment of individual particular problems without provision for dealing with conflicts and duplication. Thus, there are the EPA and Department of Interior rules that restrict the mining and burning of coal based on environmental considerations and the DOE rules that encourage the use of coal in an effort to achieve energy independence. Similarly, the Department of Health and Human Services requires the use of plastic waste basket liners in hospitals for health reasons while OSHA prohibits them as a fire hazard. There are countless other examples.

In short, too many agencies are left free to wander under vague and far-reaching mandates. Too many agencies must continue to execute specific directives that no longer represent the desired course. And too many agencies have conflicting missions.

These phenomena have prompted the now familiar complaints about "activist" agencies and courts that have engaged inappropriately in legislating. And it is these phenomena that are, in large measure, responsible for such proposals as legislative veto and proposals to alter the current standards of and venue for judicial review. In our view, both legislative veto and heightened judicial review come too late in time to have the desired effect.

We prefer that Congress give clear directions to the executive branch in advance. Simply as a matter of good management, it makes more sense for Congress to work out a set of clear instructions initially than to attempt to control agency discretion by reviewing regulations after the expenditure of much time, energy, and money in developing them.

There are tough choices to be made, which should be made by Congress. There is guidance to be given, which should come from Congress -- not from OMB, and not from a single Congressional committee. In particular, it is essential to establish a procedure or mechanism for the systematic review by Congress of the organic statutes under which individual agencies operate with a view toward specifying and clarifying their authority, establishing priorities, and resolving conflicts.

As stated by Congressman Moakley (D. Mass.) at hearings in the House of Representatives on H.R. 746,

> Effective coordination involves reassessing legislative priorities, particularly where conflict and overlap are found to exist. This is and should be a legislative function. . . .
>
> While providing the Executive with better tools to manage the regulatory process may improve the situation, Congress should not shift the focus or the blame beyond itself. The roots of the regulatory problems are nurtured in the legislative turf. Insofar as regulatory reform means redefining legislative priorities, providing consistency in the regulatory scheme, shaping national policy and monitoring the execution of legislative mandates, the prime move of that reform should be Congress. The first step in the process should be for Congress to recognize its own deficiencies and to provide itself with the institutional mechanism for defining national goals and for identifying and balancing conflicts and duplications among regulatory policies, programs and rules.

STATEMENT OF THE NATIONAL RURAL ELECTRIC COOPERATIVE ASSOCIATION, PREPARED BY JOSEPH S. IVES, ENVIRONMENTAL COUNSEL

The National Rural Electric Cooperative Association (NRECA) is the national organization which represents over 1000 REA financed, nonprofit cooperative electric systems which deliver power to approximately 25 million people in 2600 out of 3100 counties in the United States. These consumer-owned electric systems serve nearly 75 percent of the total area of the U.S. which for the most part is sparsely populated containing only about 10 percent of the total population.

I appreciate the opportunity to express the views of NRECA on the Regulatory Reform Act of 1981, S. 1080.

NRECA strongly supports "The Regulatory Reform Act of 1981" as an important step in relieving the consumer of the inflationary burden loaded on him by the tremendous number of overly restrictive regulations. These regulations have so enraged our membership that they passed 21 resolutions (Enclosure 1) at the 1981 NRECA annual meeting, blaming one kind of regulation or another for the national problems which face our country today and demanding relief from this rising flood of strangling regulations.

We do recognize that a large complex society such as ours requires laws and regulations which govern the behavior of its members. However, members of regulatory agencies are also members of our society and they urgently require guidance in the development of their regulations which will be provided by this bill. This bill, we hope, will become a "Regulatory Bill of Rights" for our members and save them from ". . . the thousands of individual and often conflicting actions which in their totality have become counterproductive and burdensome to the American consumer" as states in one of our enclosed resolutions.

The damage which regulations are inflicting on our industry and the consumers we serve is grossly understated, in our judgment, as we can only evaluate their direct effects on our operations. Indirect effects which we attribute to "inflation" in many cases are the effects of regulations on other industries which serve us—steel and concrete for construction, aluminum and copper in equipment, construction and engineering labor. All of these factors have resulted in substantial power cost increase, but tremendous new cost increases are being forecast as new regulations continue to affect power production costs. NRECA's 25 million consumer/owners are outraged by these high electric power costs, and they are convinced that these costs are largely due to the regulations of Federal, state and local agencies. In one resolution our members state ". . . the time is long overdue for a legitimate accounting of the impact of Government overregulation, the large amount of resources devoted to these activities, the adverse effects that overregulation has on the cost of living, employment, productivity, capital formation and scientific progress". This is strong language, but in our view it is justified by the existing condition of our economy today—high interest rates, low productivity, high unemployment, low capital formation, and many near bankrupt industries.

NRECA conducted a study to determine the magnitude and cause of the rapidly escalating electric power costs experienced by our members. Although the cost of delivered power has substantially increased during the past few years, we were astounded by additional increases which are being forecast by our generating cooperatives during the 1980s. Increases of 95 percent to 170 percent are being forecast (Table 1) by six generating cooperatives which have had construction programs that spanned the period of intense regulatory activity which occurred during the late 1960s and 1970s. A summary of these construction programs (Table 2) shows that rises in capital costs of 340 percent to 625 percent are the major cause of these increases. In turn, capital cost increases are largely due to Federal, state and local regulations which mandate the use of a large amount of environmental equipment and require an ever increasing number of permits, licenses and reviews (Enclosure 2) which extended construction lead time by 23 to 71 months. Unfortunately, these costs are floors, not ceilings, as the plants shown in Table II commenced construction prior to promulgation of regulations for prevention of significant deterioration, solid waste disposal, 129 priority pollutants, and new environmental impact statements. Additional engineering and design costs are also incurred as a power plant design can no longer be based on previous engineering experience. Every regulatory standard must be considered, and the governing standards must be properly selected based on plant location and many other parameters. For air quality alone, there are seven regulatory programs, each mandating a different emission standard which could change the power plant design.

The NRECA study drew only general conclusions and did not identify specific costs. However, Colorado-Ute Electric Association, a member cooperative, did a complete and detailed study of their costs for the Colorado Public Utilities Commis-

sion (Enclosure 3). The study showed that the cost of compliance with existing Government regulations (Table III) as of June 30, 1978 amounted to 34.64 percent of their power production costs (Table IV). When their new units go into service, the cost of compliance will rise to 44.88 percent of their production costs (Table V). The study did not include the following costs:

1. Regulatory costs hidden in the price of materials used in generating plant construction such as steel and cement.
2. Reclamation and other regulatory costs included in the price of fuel purchased by Colorado-Ute, unless passed on directly to Colorado-Ute.
3. OSHA regulations requiring safety devices, imposing operating limitations and similar items.
4. Public Utilities Commission fees, hearing costs, reporting requirements, and added financing costs.
5. Federal Energy Regulatory Commission reporting requirements.
6. Local building permits and minor zoning restrictions.
7. Cost of continuous analysis of new regulations to determine applicability to Colorado-Ute's business.

Colorado-Ute's transmission costs have also increased over 100 percent due to Government regulations (Table VI) and are becoming a substantial part of the cost of delivered power to our customers. In addition to these high compliance costs, another dangerous effect is the loss in productivity of the power generating stations. In sworn testimony before the Colorado Public Utilities Commission (Table VIII), Colorado-Ute pointed out that 54 people must be added to the normal operating complement of 156 people at Hayden Generation Station to maintain and operate the equipment required by regulations. At the new Craig Station, 100 people must be added to the normal complement of 320 people. In both cases, 30 percent more operating personnel are required as a result of Government regulations so that productivity has been drastically reduced.

The compliance costs of Colorado-Ute do not necessarily reflect those of other generating cooperatives, but the average incremental cost increase of 26.47 mills per kwhr from six generating cooperatives in various regions of the country is reasonably close to Colorado-Ute's forecast of 27.35 miles per kwhr. If investor-owned and municipally-owned electric utilities experience similar incremental cost increases, a staggering $20.4 billion per year will be added to the consumers' electric power bills and $34.7 billion to the purchase price of services and goods in the marketplace. We recognize that the extrapolation of our experience to all utilities in arriving at an estimate of compliance cost is open to question. However, we do believe that our compliance cost estimate of $55 billion per year is justified, as all utilities are subject to nearly the same Federal regulations and state and local regulations are averaged over six regions. We believe our estimate is conservative as it does not reflect the cost of overhead and G&A, and the cost of the next body of regulations resulting from the Resource Conservation and Recovery Act of 1976, the Toxic Substances Control Act of 1976, the 1977 amendments to the Clean Air Act and the Clean Water Act and Executive Order granting the Council on Environmental Quality regulatory authority.

An estimated price increase of $55 billion for utilities, goods and services by itself in our view is highly inflationary. If we add the price increases due to the regulation of other industries, our estimate could soar. In any event, the consumers' response to these inflated prices is critical: will he maintain his rate of consumption (standard of living) and reduce personal savings (decreasing capital formation) or will he maintain his savings rate and decrease consumption? As consumers have shown little inclination to decrease their standard of living or quality of life, the response of consumers to these increased costs appears to be a reduction in their savings rate, which has been validated to some extent by the Bureau of Economic Analysis, Department of Commerce. Their data show personal savings have dropped from a high of 5.93 percent of GNP in 1975 to 3.64 percent in 1979. The average value of personal savings as a percent of GNP was about 5.04 percent during the past 10 years.

The yearly increase in capital stock can be evaluated by correcting the sum of personal savings and corporate retained earnings for inventory valuation and capital consumption adjustments. If we assume that financing the Federal budget deficit has top priority in the capital market, then the capital stock increase is about $118 billion for 1979. If consumers choose to maintain their living standards and reduce their savings, the capital stock increase could drop as much as 45 percent. Some citizens may not accept either a decrease in their standard of living or their savings rate and demand cost of living adjustments at the bargaining table. This solution results in additional inflation. The choice between savings and living standards is only available to the affluent. The low income consumers near or below the poverty

level have no savings, and the subsistence level of their living standard will be further reduced, probably at the expense of their health and welfare. Except for this low income consumer, no one really knows the choice which the more affluent consumer will make and, until these data are obtained, there will be uncertainty in any forecast.

The inflationary effect of regulations on the electric power industry may well be disastrous to low income consumers who will be forced to reduce their marginal standard of living and make choices between nutritious food, satisfactory housing, adequate medical attention and clothing. The Department of Health, Education and Welfare pointed out these potential effects of the "prevention of significant deterioration" (PSD) policy adopted by the Environmental Protection Agency in 1973 (Enclosure 4). HEW stated, "Should nondeterioration regulations increase unemployment and consumer prices, they might impair the ability of low income families to improve their diets, housing and medical care. Physical and mental health problems can be correlated with low income status although the causal links are not well understood". While these comments were a response to PSD policy, they are applicable to any regulation which does not benefit the public health but promotes inflation, depletes our capital stock, and decreases productivity.

The effect of inflationary costs has decreased low income consumers' buying power by $14 billion since 1978, according to the Department of Energy's Fuel Oil Marketing Advisory Committee in Report DOE/RG-0039 of July 1980. The study observed that 40 million people were forced to spend at least 21 percent of their income on home heating, home cooling and utility bills, and warned that ". . . the immediate effect of rising energy costs has been a loss of income to purchase the other necessities of life—shelter, food and health care . . .", and "In the long run continuing increases in energy prices . . . could jeopardize the health and safety of the poor and elderly of our nation".

Dr. James McCarroll, M.D., of the Electric Power Research Institute (EPRI), in discussing the health effects of environmental controls at a recent symposium, observed in his concluding statements, "Also, one thing that is too often neglected in looking at control technology and its value is the fact that we have not considered in the past the health cost associated with the technology to be introduced. If it is going to result in greatly increased energy costs, or in a decreased supply of energy, we can anticipate significant health costs far in excess of those that we could demonstrate to occur with pollution".

In a report from the U.S. Senate's Select Committee on Nutrition and Human Needs, June 1974, undernutrition was estimated to cost the economy up to $50 billion per year. The problem of undernutrition is largely experienced by the 40 million people at the poverty level. While this problem may have been reduced during the last few years, the rampant inflation during the 1979 to 1980 period has caused extreme hardship among the economically disadvantaged. In an advertisement from the Washington Post dated October 21, 1979, the Consumer Congress of Virginia charged that "Skyrocketing VEPCO (Virginia Electric Power Company) rates have forced people on fixed incomes to do without food and medicine".

Before the Subcommittee on Public Health and Environment, House Committee on Interstate and Foreign Commerce, September 12, 1973, Dr. Richard D. Stewart, M.D., M.P.H. Professor and Chairman of the Department of Environmental Medicine, the Medical College of Wisconsin, Allen Bradley Medical Science Laboratory, testified as follows: "Another mistake which has been made in the name of air pollution control is to speak of regulations and controls without considering cost. This is not to say that cost should be a major determinant in the setting of standards, but to promulgate primary and, especially, secondary air quality standards is irrational and irresponsible. Assessment of the economic impact of all actions of the EPA should be mandatory". Dr. Stewart's advice was ignored by the Congress in 1973, but the evidence is accumulating in support of his views. While he was concerned with the EPA, his observation is applicable to any regulatory agency whose regulations cause inflation and adversely affect health.

NRECA supports the "Regulatory Reform Act of 1981" but we respectfully suggest that the bill be expanded to include the following provisions:

1. Provide a Congressional Regulatory Veto: NRECA supports the regulatory veto as many regulations are based on the "intent" of Congress as interpreted by regulatory agencies and the courts. Only Congress can determine Congressional "intent" and should retain this power rather than delegate it to nonelected officials of regulatory agencies.

2. Prohibit Research by Regulatory Agencies: NRECA opposes the conduct of scientific research by regulatory agencies, as research can be selected which validates a regulatory agency's preconceived regulatory position and ignore other research. For example, an investigation report entitled "The Environmental Protec-

tion Agency's Research Program with Primary Emphasis on the Community Health and Environmental Surveillance System (CHESS)—An Investigative Report" prepared for the Committee on Science and Technology, U.S. House of Representatives, 94th Congress, November 1976, illustrates the abuses of a regulatory agency conducting research.

Regulatory reform is an utterly essential ingredient of the solution to the national problems of inflation, capital formation and productivity. Although the Federal deficit and energy prices play major roles, the effect of regulations on the economy has been, in our judgment, grossly understated in most cases. Our estimate of compliance costs would appear to reinforce other estimates such as that by Dr. Murray Weidenbaum, "Challenge", November–December 1979, who estimated compliance costs for all busienss at $102 billion for 1979. In any event, power industry regulations inflate prices, reduce productivity, retard capital formation, and adversely affect health. These inflationary forces form a positive feedback loop which trigger more inflation and, unless this feedback loop can be broken, inflation may soon become uncontrollable.

NRECA welcomes the opportunity to assist you in solving this critical problem.

TABLE I—COST OF DELIVERED POWER

Generating cooperative	1978 [1]	1985 [1]	Increase	Percent
East Kentucky Power Co-op	20.83	56.15	35.32	170
Colorado-Ute Electric Association, Inc	19.27	46.62	27.35	140
United Power Association	28.00	58.00	30.00	100
Big Rivers Electric Corp	16.95	41.20	24.25	140
Basin Electric Power Co-op, Inc	15.41	[2] 39.72	24.31	155
Associated Electric Co-op, Inc	18.89	36.49	17.60	95

[1] Mils per kilowatt hour.
[2] 1983 estimate.

Table II
Summary of Increased Capital Costs, Lead Time and Permitting of Cooperatively Owned Power Plants — 1961-1977

	Capacity (MW)	Capital Cost (S/kW)	Permits	Planning (Dates)	Phase (Months)	Construction (Dates)	Phase (Months)	Total (Months)
I BASIN ELECTRIC, N.D.								
1. Leland Olds #1	216	136	3	5/61-6/63	25	6/63-1/66	32	57
2. Leland Olds #2	440	245	6	11/68-7/71	34	7/71-12/75	53	87
3. Laramie River #1, 2, 3	1650	680 E	43	11/72-7/76	46	7/76-4/80 E	46 E	92 E
4. Antelope Valley #1, 2	880	992 E	63	12/74-6/78	43	6/78-4/82 E	46 E	89 E
II EAST KENTUCKY, KY.								
1. Cooper #1	116	163	2	1/60-1/62	24	1/62-2/65	37	61
2. Cooper #2	220	117	2	1/64-1/66	24	1/66-10/69	46	70
3. Spurlock #1	305	376	6	1/70-11/72	35	11/72-9/77	59	94
4. Spurlock #2	508	778 E	30	12/74-3/77	28	3/77-12/80 E	45	73 E
III UNITED POWER, MINN.								
1. Stanton	187	160	3	10/63-8/65	22	8/64-5/67	33	55
2. Coal Creek #1, 2	1100	700	25	11/72-4/75	30	4/75-10/80	66	96
IV ASSOCIATED ELECTRIC, MO.								
1. Thomas Hill #1	180	159	2	1/63-7/64	19	7/64-12/66	29	48
2. Thomas Hill #2	303	107	2	5/65-4/67	24	4/67-4/69	25	49
3. New Madrid #1	600	234	2	7/68-2/69	8	2/69-10/72	33	41
4. New Madrid #2	600	286	6	6/71-10/73	27	10/73-6/77	44	71
5. Thomas Hill #3	630	730 E	11	7/76-7/78	25	7/78-1/82 E	42 E	67 E
V COLORADO-UTE, CO.								
1. Hayden #1	184	162	1	7/61-4/63	21	4/63-7/65	28	49
2. Hayden #2	262	637	16	1/70-1/72	25	1/72-9/76	57	82
3. Craig #1, 2	800	972	58 (1)	1/70-9/74	52	9/74-5/80	68	120
VI BIG RIVERS, KY.								
1. Robt. Reed #1	80	138	2			1/63-1/66	36	36
2. Green #1, 2	480	795	20 (2)	6/74-11/76	28	11/76-12/80 E	48	76 E
3. Wilson #1	880	1000 E	12	6/77-6/80 E	36 E	6/80-1/86 E	67 E	103 E

E - estimated.
(1) - includes mining permits.
(2) - units constructed separately.

COLORADO-UTE ELECTRIC ASSOCIATION, INC.
COMPARISON OF COSTS OF COMPLIANCE WITH EXISTING GOVERNMENTAL
REGULATIONS TO TOTAL PRODUCTION COSTS FOR ALL
STEAM GENERATING STATIONS

Twelve Months Ended June 30, 1978
($1,000)

	Cost of Compliance With Governmental Regulations	Total Production Costs
Operation & Maintenance		
Labor	$ 652.9	$ 2,419.7
Fuel Costs	1,127.1	8,250.7
Materials, Supplies and Other Expenses	481.9	1,922.4
Additional Power	2,125.6	
Subtotal	4,387.5	12,592.8
Fixed Costs		
Depreciation	1,469.9	3,362.8
Taxes	266.9	1,004.2
Interest	1,035.9	3,555.0
Insurance	156.7	606.1
Subtotal	2,929.4	8,528.1
Administrative & General Expense	823.1	2,376.0
Total Production Costs	$8,140.0	$23,496.9

% Cost of Compliance to Production Costs
$8,140.0/$23,496.9 = 34.64%

1077

Table III

COLORADO-UTE ELECTRIC ASSOCIATION, INC.
COSTS OF COMPLIANCE WITH EXISTING GOVERNMENTAL
REGULATIONS FOR STEAM GENERATING STATIONS

Twelve Months Ended June 30, 1978
($1,000)

	Hayden Unit 1	Hayden Unit 2 (CUEA Portion)	Nucla Station	Bullock Station	Total
Operation and Maintenance					
Labor	$ 420.1	$ 117.1	$ 51.6	$ 64.1	$ 652.9
Fuel Costs	777.5	241.1	93.1	15.4	1,127.1
Materials, Supplies and Other Expenses	231.4	90.8	125.0	34.7	481.9
Additional Power and Energy	1,410.4	503.1	155.1	57.0	2,125.6
Subtotal	2,839.4	952.1	424.8	171.2	4,387.5
Fixed Costs					
Depreciation	615.7	419.9	233.8	200.5	1,469.9
Taxes	111.6	66.1	51.3	37.9	266.9
Interest	419.6	288.9	139.5	187.9	1,035.9
Insurance	87.6	26.4	11.8	30.9	156.7
Subtotal	1,234.5	801.3	436.4	457.2	2,929.4
Administrative and General Expense	458.4	197.2	96.7	70.8	823.1
Total	$4,532.3	$1,950.6	$957.9	$699.2	$8,140.0

1078

Table IV

COLORADO-UTE ELECTRIC ASSOCIATION, INC.
COSTS OF COMPLIANCE WITH EXISTING GOVERNMENTAL
REGULATIONS FOR CRAIG STATION 1 & 2

Projected Twelve Months Ended December 31, 1980
($1,000)

	Estimated Cost of Compliance With Governmental Regulations	Estimated Total Production Costs
Operation & Maintenance		
Labor	$ 738.2	$ 1,641.2
Fuel Costs	1,008.0	8,190.0
Materials, Supplies and Other Expenses	1,044.7	1,326.6
Additional Power and Energy Costs	4,482.1	-0-
Subtotal	7,273.0	11,157.8
Fixed Costs		
Depreciation	3,469.2	6,559.2
Taxes	702.0	2,764.4
Interest	4,196.9	16,100.5
Insurance	173.9	659.8
Subtotal	9,442.0	26,083.9
Administrative and General Expense	1,207.0	2,689.6
Total Production Costs	$17,922.0	$39,931.3

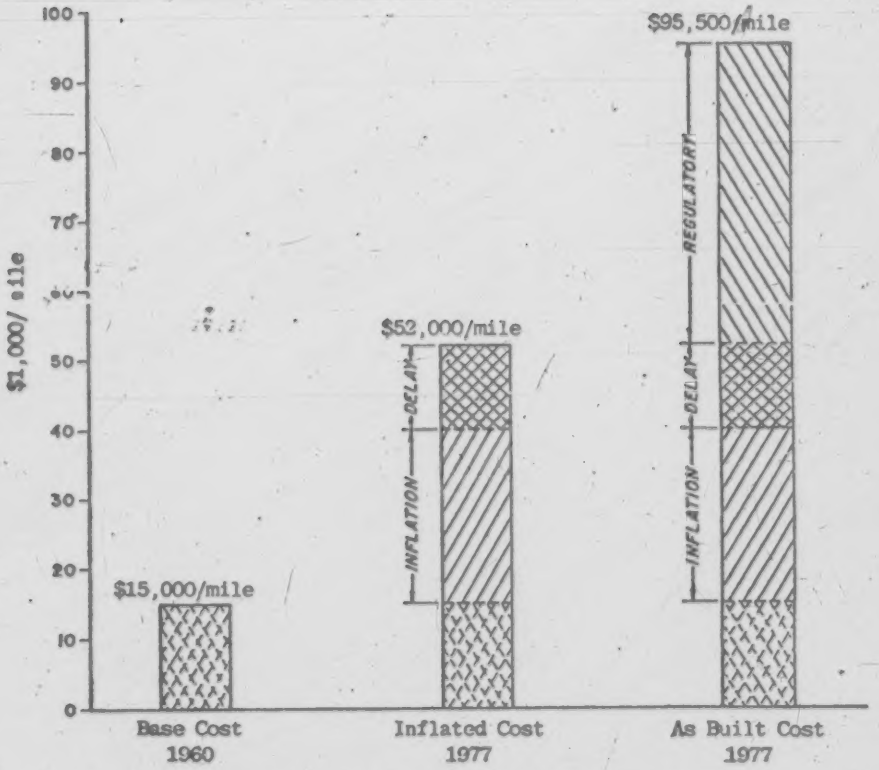
% Cost of Compliance to Production Costs
$17,922.0/$39,931.3 = 44.88%

1079

Table V

Table VI

TRANSMISSION LINE CONSTRUCTION COST



Cost is for a 115 kV wood pole line built in mountainous terrain. The 1977 as built cost is for the Bayfield-Pagosa 115 kV line completed in 1977.

INFLATION represents the increases in labor and materials from 1960 to 1974.

DELAY represents the increases in labor and materials from 1974 to 1977.

12. Question. What has been Colorado-Ute's experience as to the effect of pollution control equipment on manpower requirements at Hayden Station?

Answer. An additional 54 persons have been required at Hayden Station to operate, maintain and test the pollution control equipment than otherwise would have been required to operate Hayden Station Units 1 and 2 without such pollution control equipment. Our experience with the new pollution control equipment at Hayden indicates that even more personnel will be needed to perform the maintenance required to assure reliable operation of the generating unit. The additonal personnel that have been required are as follows:

a. Maintenance supervisors	3
b. Waste water supervisor	1
c. Chemistry assistants	4
d. Equipment operators	15
e. Welder Mechanics	2
f. General mechanics	14
g. Utilitymen	3
h. Electrical and instrument mechanics	2
i. Assistant storekeepers	2
j. Fuel and ash supervisor	1
k. Heavy equipment operators	7
Total	54

86-435 O - 82 - 69

Table VIII

[COMMITTEE PRINT]

THE ENVIRONMENTAL PROTECTION AGENCY'S RESEARCH PROGRAM

WITH PRIMARY EMPHASIS ON THE

COMMUNITY HEALTH AND ENVIRONMENTAL SURVEILLANCE SYSTEM (CHESS): AN INVESTIGATIVE REPORT

REPORT

PREPARED FOR THE

SUBCOMMITTEE ON SPECIAL STUDIES, INVESTIGATIONS AND OVERSIGHT

AND THE

SUBCOMMITTEE ON THE ENVIRONMENT AND THE ATMOSPHERE

OF THE

COMMITTEE ON SCIENCE AND TECHNOLOGY
U.S. HOUSE OF REPRESENTATIVES
NINETY-FOURTH CONGRESS
SECOND SESSION
Serial SS

NOVEMBER 1976

Printed for the use of the Committee on Science and Technology

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U.S. GOVERNMENT PRINTING OFFICE
WASHINGTON : 1976

ENCLOSURE 1

RESOLUTIONS PERTAINING TO REGULATIONS ADOPTED AT 39TH ANNUAL MEETING OF THE NATIONAL RURAL ELECTRIC COOPERATIVE ASSOCIATION, JANUARY 25–29, 1981, SAN FRANCISCO, CALIF.

OVER-REGULATION STRANGULATION

We recognize the time is long overdue for a legitimate accounting of the impact of government over-regulation, the large amount of resources devoted to these activities, the adverse effects that over-regulation has on the cost of living, employment productivity, capital formation, and scientific progress.

The growth of over-regulation is the summation of thousands of small, sometimes conflicting actions, which in their totality become more and more insidious, pervasive, and expensive to the American consumer.

None of the regulatory agencies were established for the purpose of raising the price on consumer goods, strangling businesses, forcing firms out of business, altering international trade relationships or creating unemployment in whole industries; however, all have occurred as a result of the over-regulation.

We call on the President of the United States and the leadership of Congress to implement immediate action to streamline regulatory procedures and to limit the authority of federal agencies to issue rules and regulations which strangle private initiative to expand and improve our production capabilities—including the consumer-owned rural electric systems of our nation.

EASEMENTS ON FEDERAL LANDS

Rural electric transmission and distribution lines must of necessity in many instances cross federal lands to serve loads which are in the public and nation's interest, but the permitting process established by federal agencies has proven to be burdensome, time consuming, costly and apparently has a low priority within the respective agency. This process has been utilized in a number of instances to delay projects and thus has become unresponsive and counterproductive and as such imposes an unwarranted hindrance upon the very public which the agency is purported to serve.

Immediate review and modification of the permitting procedures is urged so that the process may be expedited and the annual fees related thereto be abolished since said fees are in fact a form of double taxation which is borne by the ultimate consumer.

COUNCIL ON ENVIRONMENTAL QUALITY REGULATIONS

We remain deeply concerned about the substantial time delays and additional costs which are imposed on rural electric system consumers by the CEQ regulations which became effective on July 30, 1979, and their implementation under the revised REA Bulletin 20–21—which is now in effect. As a result of this concern and, considering the potential impact upon the ultimate consumer by the CEQ regulations, we urge the President to rescind the executive order which granted CEQ authority to promulgate regulations and to abolish those regulations established thereunder.

OVERREGULATION

The growth of government regulation in recent years has strangled and forced firms out of business, raised levels of unemployment, deteriorated international trade relationships, limited scientific progress and increased the cost of living for all Americans.

Regulation today is the summation of thousands of individual and often conflicting actions which in their totality have become counterproductive and burdensome to the American consumer.

The time is overdue for an extensive accounting of the impact of government regulation and for an intensive effort to reduce regulation.

President Reagan has pledged his administration to reduce the involvement of government in American business and to reduce regulation. We support the administration in this effort and urge NRECA to seek every avenue of relief in achieving this end.

BUILDING ENERGY PERFORMANCE STANDARDS

Rural electric cooperatives support the need for stringent standards for energy efficient buildings as mandated by Congress in the Energy Conservation Standards for New Buildings Act of 1976 (Title III, PL 94-385).

We feel, however, that the intent of the legislation would be severely distorted by incorporating in the proposed Building Energy Performance Standards such concepts as "weighting factors" and "life cycle costing" and considerations other than efficiencies in new buildings. Such concepts that have been proposed would permit building designers to design a *less* efficient building if the fuel to be used is natural gas or oil; and we feel that this is contrary to national energy policy and dilutes efforts to promote energy conservation.

A better approach would be for standards to be directed *only* at the building envelope (without concern for energy source or appliance efficiencies) to assure that it is designed to attain maximum practicable efficiency throughout its useful life. Such an approach would also permit use of passive solar techniques, something which was not specifically recognized through the BEPS as originally proposed.

We urge that the new standards be at least as stringent as those developed, and in use, by the Farmers Home Administration of the U.S. Department of Agriculture. We suggest that it would be a simple matter to determine the thermal performance of residential buildings constructed according to these standards, and we strongly recommend that the new BEPS simply require this thermal performance as a minimum in residences and mobile homes. This approach would provide performance standards so necessary for early implementation and success in achieving energy efficient buildings.

INTERCONNECTION OF SMALL POWER PRODUCERS AND COGENERATORS

Rural electric systems recognize the importance of, and support the optimum development of renewable, alternative, and supplementary energy resources. As evidence of this, they are actively conducting research on various approaches to such development and also on the technological issues involved in implementing section 210 of the Public Utility Regulatory Policy Act (regulations requiring interconnection between utilities and small power producers and cogenerators, and requiring cost based rates the utilities should pay for the energy these facilities produce).

Rural electric systems are also conducting studies prior to establishing guidelines for interconnection which will be designed to protect both the small power producer/cogenerator and the utility and its membership.

There is considerable misrepresentation or implication by sellers of equipment as to what small wind and other small power generating systems will produce (what their payback period will be and how much energy they will produce). In addition, improper equipment and installation practices can result in subutility grade power, actual damage to utility equipment, interference with local telephone, TV, and radio reception, and danger to linemen and the public.

We urge the Federal Energy Regulatory Commission (FERC), NARUC and State Public Service Commissions to review regulations that apply to potential power producers and require small power producers and cogenerators to consult with the utility on plans to purchase and install power generation equipment before purchase commitments and/or installations are made.

FCC APPLICATION REQUIREMENTS

The Federal Communications Commission, in a public notice dated December 11, 1980, has proposed to replace the existing radio license application Form 400 and 405A, with Forms 574, 574A and 574B, for the purpose of obtaining additional technical information.

Providing such information would place additional burdens on licensees, particularly those seeking renewal of licenses of existing systems, due to the nature of the required information, particularly the entry labeled "Effective Radiated Power."

Provision of the data required by all licensees in the land mobile services would permit the creation of an unneeded national data base that may be utilized by this federal agency, for the purpose of frequency coordination and which may subsequently lead to the elimination of block frequency assignments in the various land mobile services, elimination of the independent frequency coordination within each service, and the implementation of expanded inter-service sharing of the radio spectrum.

We oppose the implementation of this proposal and request that a copy of this resolution be forwarded to the Federal Communications Commission through appropriate channels.

Leveraged Lease Financing—The rising costs of financing electric power plants make it mandatory that all financing methods be used which will minimize the cost of electric service in rural America. Leveraged lease financing, when used with Rural Electrification Administration (REA) guaranteed loans, could save an estimated 2 percent in the overall interest rate on the plant investment and permit the available REA guaranteed program to be utilized by additional projects. Such financing is not prohibited by statute but is prohibited by policy established by the administration's Office of Management and Budget.

We request that the NRECA staff and members continue their efforts to change the administration's policy so that leveraged lease financing with REA guaranteed loans is available to the rural electric cooperative systems.

Control of Waters of the United States—On March 27, 1975, the District Court of Washington, D.C., as a result of a suit filed by the National Resources Defense Council and the National Wildlife Federation, directed the United States Army Corps of Engineers to expand their authority and jurisdiction over the disposal of dredge and fill material in the "waters of the United States." Such authority is contained in Section 404, P.L. 92-500 (Federal Water Pollution Control Act Amendments of 1972). At issue is the Corps of Engineers establishing new regulations which have the potential of applying "navigation" laws and regulations, specified in the Rivers and Harbors Act of 1899 (33 USC 403), to all waters of the United States.

The result of such action will impose increased federal regulation that weakens state authority and threatens to undermine state legislation and administrative programs. These regulations may require many electric utilities to procure additional federal approval for construction of many transmission facilities as well as possibly requiring federal permits to perform standard agricultural practices by individual farmers.

We are unalterably opposed to federal administrative procedures that could require such unrealistic requirements. We urge that Congress work for legislative definition of "navigable waters" that will limit the navigability of any water body to its present actual value for transporting commerce.

Joint use of Federal Lands—There presently exist in the United States large amounts of federally owned land which is held for the use and benefit of the general public. Some agencies of the federal government have taken the position that these lands cannot be used for any purpose other than recreation and wildlife habitat. We feel that these lands should be used for multiple purposes such as electric lines, gas and oil lines and other uses which bring substantial benefits to large segments of the general public.

The NRECA staff is directed to work with the Executive Branch and the Congress to eliminate existing bureaucratic delay and fragmented interpretation of the law by the respective agencies which cause delay in construction and additional costs being incurred by the consumer and to allow for the expeditious and coordinated development of these lands for the multiple purposes for which they are intended.

Separation of EPA Regulatory and Research Functions—The primary mission of the Environmental Protection Agency (EPA) is to protect and enhance the environment through exercising the regulatory function of setting standards, promulgating regulations and establishing enforcement procedures. As a secondary mission, the EPA must exercise a research function in order that environmental standards are based on adequate scientific information. A conflict can develop between the regulatory function, which must make day-to-day decisions and the secondary research function, which requires long-term support. The regulatory agency might be responsive to outside pressures or to the preconceived notions of ambitious regulatory staff which may require premature support by the research staff. To prevent these potential abuses in the case of the Atomic Energy Commission, the Congress wisely separated the regulatory and research functions of the AEC by creating the Nuclear Regulatory Commission and the Energy Research and Development Administration.

We urge the administration and the Congress to develop legislation which will separate the regulatory function of the EPA from its research function and distribute the EPA research activities to existing independent agencies such as the Institute of Environmental Health Sciences, DOE, and the Bureau of Economic Analysis.

Federal Regulation of Pole Line Attachments—Regardless of any legislation which may be passed vesting regulations of pole line attachments with the Federal Communications Commission, it is our position that such legislation, whether it includes rural electric co-ops or not, is bad legislation, and pole line attachment matters should be a matter of contractual arrangements between interested parties; and if any government regulation is deemed necessary, it should be at the state level only.

We urge the NRECA staff to take such measures as may be necessary to support this position.

Agricultural Chemicals—Modern agriculture cannot continue to provide sufficient quantities of high quality food and fiber to meet the nation's needs without the use of agricultural chemicals. Likewise, electric cooperatives cannot economically or effectively maintain their rights-of-way without the use of these substances. Any undue curtailment in the use of these products will result in lower quality and/or quantities of food and fiber, and in more expensive and less reliable electric power for consumers.

In any evaluation of chemicals, the possible detrimental effects must be considered in relation to the benefits derived.

We favor the careful and knowledgeable use of agricultural chemicals unless scientific evidence shows conclusively that the benefits associated with use are exceeded by the risk to man or the environment.

Inflation—The primary economic problem confronting the nation is the excessive and increasing rate of inflation. It reduces the standard of living of all persons and particularly those who rely on a relatively fixed income. It is especially onerous to farmers and other small businessmen caught in a damaging cost-price squeeze.

The proliferation of nonessential governmental functions and regulations has necessitated a substantial increase in taxes, expenditures, and deficits which cause even more inflation. In addition, a multitude of unnecessary, unworkable, and sometimes absurd environmental control regulations are contributing to the inflationary spiral.

We support substantial reductions in nonessential federal expenditures and the elimination of the federal deficit which would effectively and immediately reduce inflation. We further support the elimination of all unnecessary and unworkable environmental regulations which drastically increase prices of energy and other essential commodities without producing any benefit of equivalent economic value.

We further support measures designed to improve productivity which would be effective in reducing inflation.

Enlisting Consumer Support Against Overregulation—A grave threat to the continued growth of America has emerged in the form of onerous administrative and judicial interpretations of regulatory laws intended to protect the health, pocketbooks, and natural environment of its citizens, but which in practice have led to costly, interminable delays, permit and impact statement duplications, and even total shutdowns of construction required to meet consumers' demands for power. Granted a charter to provide their members with low-cost, high quality electric service, the nation's electric cooperatives have a parallel obligation to inform them of the forces and events that stand in the way of achievement of their aspirations.

We, therefore, believe it imperative that the rural electric movement, both through a coordination of existing resources, and an increased financial commitment where necessary, immediately embark upon a unified communications campaign to inform our employees, members, office holders, and the general public of the burdensome costs of wasteful over-regulation and the misuse by no-growth pressure groups of endangered species and environmental protection laws.

We further recognize the need for creating and maintaining informed groups of rural electric members who can be effective spokesmen on energy-related issues and ask that NRECA take the leadership in an effort to assist in the organization of these groups and, further, that it provide timely information which can be used by the local systems to inform these member support groups on current legislative and regulatory issues affecting our program.

Wood Preservatives for Pole Treatment—The Environmental Protection Agency is considering a ban or restriction on the use of wood preservatives, such as pentachlorophenol and creosote, which are extensively used by electrical utilities to increase the life of their powerline poles by over 25 years. Rural electric cooperatives have used wood preservatives for over 40 years with no proven damage to the environment. If wood preservatives are banned or restricted in their use, cooperatives must replace over 30-million treated poles with steel, aluminum, or untreated wood at a capital cost of over $12 billion. This increased capital cost will require rate increases of over 100 percent for cooperatives which have a low consumer density and an average rate increase of over 35 percent for all cooperatives. The replacement of treated wood poles will inflate the price of electricity, deplete our natural resources and create safety hazards due to rotted wood or electrical conducting poles.

We urge that the EPA desist from this ill-advised effort to ban or restrict the use of wood preservatives for electric utility poles. If EPA persists in its efforts, we urge that the Congress enact legislation which will prevent this waste of money and resources on a potentially hazardous program.

Federal Coal Leasing Policies and Surface Mining Act—The Congress of the United States has enacted a Surface Mining Act to provide a framework of law which the states will administer. We believe the rules and regulations developed by the U.S. Department of Interior should be fair and equitable so the job of providing energy for this nation can be accomplished.

The federal government owns tracts of immense coal reserves which are urgently needed, but not released, to alleviate this nation's energy shortages. It is, therefore, puzzling how the Administration can in good faith attempt to encourage consumers to initiate substantial efforts towards energy conservation while, at the same time, compounding the problems by requiring federal coal leasing policies which force coal-fired electrical generating plants away from mining immediate federally owned checkerboard tracts of coal reserves and results in the waste of millions of gallons of oil used out of necessity as a substitute.

We urge that necessary amendments be made to the Mineral Leasing Act of 1920, the Surface Mining and Reclamation Control Act and other federal laws which apply in order to expedite federal coal-leasing policies and eliminate this needless consumption of oil in the national interest.

Fish and Wildlife Mitigation Requirements for Transmission Lines—Currently, state wildlife lands purchased with federal funds or federally owned land or easement areas may not be used for new electric transmission line crossings unless the affected land is replaced by the utility operating the line and unless the Federal Fish and Wildlife Service approves of the replacement.

State and federal agencies apparently assume that the crossing of an electric transmission line over these wildlife lands significantly destroys or degrades the intended purposes for which the land was purchased. This assumption has been made without adequate justification to demonstrate that such damage or degradation exists and the extent of any damage or degradation.

We urge the executive branch to require the Fish and Wildlife Service to assume the burden of proof and establish criteria for the determination of the extent of damage done to these lands by the crossing of electric transmission and/or lines, as well as to establish criteria governing the replacement of these lands at a fair and equitable cost.

Congress should review provisions of the Federal Water Pollution Control Act and the Fish and Wildlife Coordination Act in an effort to determine if in fact the original intent and purpose of these acts have been perverted or distorted beyond their original intent and purpose.

Environmental Protection—The electric utility industry fully recognizes its responsibilities to locate, construct and operate its facilities in compliance with all applicable laws and standards which are designed to protect the health and welfare of the citizens of this country.

However, the consuming public should be made aware of the fact that many of the regulations promulgated by the various governmental agencies go far beyond Congress' original intent as stipulated in environmental legislation designed to protect the public health and welfare.

Related costs to the electric utility industry and its customers of complying with such overkill structured environmental regulations are horrendous.

We therefore urge Congress to require a review of the regulations resulting from existing laws and subsequently mandate appropriate changes in all instances that are found to go beyond original intent. Following adjustment of existing regulations we urge Congress to closely monitor regulations imposed as a result of new legislation or amendments of existing laws to better insure strict compliance and therefore avoid future costly over-regulation.

Implementation of the Federal Surface Mining Law—The Congress of the United States has enacted into law the Surface Mining Control and Reclamation Act to provide a model for states to follow. It was clearly the intention of Congress to provide a law that allows the continued production of coal in an environmentally sound manner and without severe economic penalty to the ultimate consumers of the electric energy that coal ultimately provides.

It has become clear that administration of the Surface Mining Control and Reclamation Act has resulted in unnecessary and costly delays in development of coal mines and in approval by the Office of Surface Mining of mining permits. The Agency's insistence on requiring that environmental impact statements be completed by agencies with primary jurisdiction (Bureau of Land Management and Rural Electrification Administration, for example) before it takes jurisdiction, then proposing to prepare its own EIS independently adds immeasurably and unnecessarily to the cost of mining coal and adds to the costly delays associated with getting mines into production. Further, too strict and ambiguous application of restrictions on the "protection of prime farm lands" and in defining and identifying "alluvial valley

floors" in areas where suitable coal deposits exist add other impediments and costs to the economical mining of coal needed by rural electric generating stations. All this increases the costs of power to rural electric system users.

We are particularly troubled by jurisdictional disputes between federal and state officials which add to the level of confusion and frustration on the part of those who are trying to develop coal.

Accordingly, we urge the Department of the Interior to revise its policies and those of OSM to provide for "one-stop service" on permits and EIS examination in reviewing mining plans and permit applications. Further, we urge the Department to accelerate its handling of these matters. NRECA continues to support adequate concern for environmental, economic and social needs but is convinced that there must be equal concern for the costs of delay and over-protection so that implementation of the Act will not make impossible the production of urgently needed coal.

Bureau of Land Management and Other Federal Agencies—It is imperative that transmission and distribution facilities be built in a timely fashion to meet the needs of the consumers.

Numerous delays are being encountered with relation to obtaining appropriate rights-of-way over federal lands. These result in excessive delays in construction of the facilities with the end result being higher costs to the ultimate consumer and the unavailability of transmission capacity to meet delivery requirements thus imposing energy curtailment which is not in the best interests of the Nation's health and welfare.

While we do not object to application filing fees for permits, we do believe strongly that costs for studies and monitoring compliance would be borne by the requiring agencies.

Prolonged and extensive delays have been experienced in obtaining approvals from the Bureau of Land Management, U.S. Forest Service, and other federal agencies on right-of-way applications.

We urge the Administration to take positive action to expedite right-of-way applications and the Congress to hold oversight hearings to make federal agencies aware of the results of their delays and to press for the expeditious handling of said applications at reasonable costs.

Enclosure 2

Permits and Licenses

3-1-79

CPA/UPA COAL CREEK STATION

PURPOSE	ISSUING AGENCY	STATUS
Federal		
Final Environmental Impact Statement	Rural Electrification Administration	Issued 8/6/74
Determination of no hazard to air navigation (chimneys)	Federal Aviation Administration	Issued 3/4/75
Determination of no hazard to air navigation (lignite storage silos)	Federal Aviation Administration	Issued 7/11/77
Determination of no hazard to air navigation (generation building)	Federal Aviation Administration	Issued 2/8/78
Water intake construction	U. S. Army Corps of Engineers	Issued 4/17/78
State		
Surface water appropriation	North Dakota State Water Commission	Issued 7/24/74
Ground water appropriation (temporary)	North Dakota State Water Commission	Issued 10/9/75
Increased ground water appropriation	North Dakota State Water Commission	Issued 2/21/78
Surface water impoundments	North Dakota State Water Commission	Issued 8/21/78
Construct sewage treatment plant	North Dakota Department of Health	Issued 1/14/75
Water well construction	North Dakota Department of Health	Issued 12/2/74
Conditional approval to construct (air)	North Dakota Department of Health	Issued 4/11/75
Solid waste disposal (construction)	North Dakota Department of Health	Issued 8/19/77
Site compatibility (water line)	North Dakota Public Service Commission	Issued 4/8/76
Route designation (water line)	North Dakota Public Service Commission	Issued 6/15/77
NPDES permit (water intake construction)	North Dakota Department of Health	Issued 3/28/78
Sanitary landfill	North Dakota Department of Health	Application 10/27/
Surface Water Impoundments (East Ponds)	North Dakota State Water Commission	Application 2/7/79

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CPA/UPA COAL CREEK STATION
(continued)

PURPOSE	ISSUING AGENCY	STATUS
Local		
Zoning map amendment	McLean County Board of Commissioners	Issued 3/6/75
Conditional use permit	McLean County Board of Commissioners	Issued 3/6/75
Conditional use permit (water line)	McLean County Board of Commissioners	Issued 10/8/75
Conditional use permit (air monitoring)	McLean County Board of Commissioners	Issued 6/27/77
Land use approval (air monitoring)	Washburn City Commission	Issued 6/21/77

Notes:

In preparation--Application being prepared by CPA/UPA and/or B&V or CAI.
Pending--Application submitted by CPA/UPA, but agency has not taken final action.

CPA/UPA TRANSMISSION FACILITIES

PURPOSE	ISSUING AGENCY	STATUS
Federal		
Final Environmental Impact Statement	Rural Electrification Administration	Issued 8/6/74
Construction near navigable streams (Minnesota)(TR-2)	U. S. Army Corps of Engineers	Pending
Construction near navigable streams (Missouri)	U. S. Army Corps of Engineers	Issued 4/17/78
Construction near navigable streams (Bois de Sioux)	U. S. Army Corps of Engineers	Issued 1/3/78
Construction near navigable streams (Mississippi)	U. S. Army Corps of Engineers	Issued 3/8/78
Wetland easement crossing (N. D.)	U. S. Fish and Wildlife Service	Issued 6/28/77
Wetland easement crossing (Minn.)	U. S. Fish and Wildlife Service	Issued 5/18/78
Wetland crossing (Minn.)	U. S. Fish and Wildlife Service	Issued 5/9/79
State		
Certificate of corridor compatibility (dc)	Minnesota Environmental Quality Board	Issued 10/9/75
Construction permit (dc)	Minnesota Environmental Quality Board	Issued 6/3/76
Certificate of corridor compatibility (ac)	Minnesota Environmental Quality Board	Issued 5/7/76
Construction permit (ac)	Minnesota Environmental Quality Board	Issued 4/11/77
Certificate of Need	Minnesota Energy Agency	Issued 4/2/76
Land crossing (Kandiyohi) dc	Minnesota Department of Natural Resources	Issued 9/29/77
Water crossing (Kandiyohi) dc	Minnesota Department of Natural Resources	Issued 7/13/77
Water crossing (Traverse) dc	Minnesota Department of Natural Resources	Issued 11/10/77
Water crossing (Stearns) dc	Minnesota Department of Natural Resources	Issued 7/13/77
Water crossing (Meeker) dc	Minnesota Department of Natural Resources	Issued 9/3/77
Water crossing (Wright) dc	Minnesota Department of Natural Resources	Issued 7/13/77
Water crossing (Pope) dc	Minnesota Department of Natural Resources	Issued 8/31/77
Water crossing (Stevens) dc	Minnesota Department of Natural Resources	Issued 11/10/77
Water crossing (Grant) dc	Minnesota Department of Natural Resources	Issued 9/21/77
Water crossing (Wright) ac	Minnesota Department of Natural Resources	Issued 1/18/78
Water crossing (Hennepin) ac	Minnesota Department of Natural Resources	Issued 1/18/78
Water crossing (Anoka) ac	Minnesota Department of Natural Resources	Issued 1/18/78
Water crossing (Wright) TR-2	Minnesota Department of Natural Resources	Issued 1/4/79
Water crossing (Carver) TR-2	Minnesota Department of Natural Resources	Issued 1/4/79
Water crossing (Sibley) TR-2	Minnesota Department of Natural Resources	Issued 1/4/79
Water crossing (LeSueur) TR-2	Minnesota Department of Natural Resources	Issued 1/4/79
Water crossing (Scott) TR-2	Minnesota Department of Natural Resources	Issued 1/4/79
Water crossing (Blue Earth) TR-2	Minnesota Department of Natural Resources	Issued 1/4/79
Land crossing (Carver) TR-2	Minnesota Department of Natural Resources	Issued 1/24/79
Land crossing (Carver-Trail) TR-2	Minnesota Department of Natural Resources	Application 2/15/79

CPA/UPA TRANSMISSION FACILITIES (continued)

PURPOSE	ISSUING AGENCY	STATUS
State (continued)		
Ground water appropriation (Dickinson Terminal)	Minnesota Department of Natural Resources	Issued 5/17/77
Site compatibility (dc)	North Dakota Public Service Commission	Issued 4/8/76
Route designation (dc)	North Dakota Public Service Commission	Issued 12/17/76
Site compatibility (ac)	North Dakota Public Service Commission	Issued 2/28/77
Route designation (ac)	North Dakota Public Service Commission	Issued 9/8/77
Highway crossings (dc)	North Dakota Highway Department	Issued 3/22/76
Highway crossings (dc)	Minnesota Department of Highways	Issued 11/3/77
Highway crossings (ac)	Minnesota Department of Highways	Issued 10/31/77
Highway crossings (TR-2)	Minnesota Department of Highways	In preparation
Water discharge (NPDES) (Dickinson)	Minnesota Pollution Control Agency	Issued 9/30/77
PCB exemption (Dickinson)	Minnesota Pollution Control Agency	Issued 9/26/78
State land crossings	North Dakota State Land Department	Issued 8/25/77
Local		
Conditional use permit (dc)	McLean County Board of Commissioners	Issued 9/26/77
Conditional use permit (ac)	McLean County Board of Commissioners	Issued 9/26/77
Conditional use permit (ac)	Mercer County Board of Commissioners	Issued 5/3/77
Highway crossings (dc)	Meeker County Highway Department	Issued 3/15/78
Highway crossings (dc)	Stearns County Highway Department	Issued 12/6/77
Highway crossings (dc)	Pope County Highway Department	Issued 1/27/78
Highway crossings (dc)	Stevens County Highway Department	Issued 11/30/77
Highway crossings (dc)	Grant County Highway Department	Issued 12/1/77
Highway crossings (dc)	Wright County Highway Department	Issued 6/6/78
Highway crossings (ac)	Wright County Highway Department	Issued 3/13/78
Highway crossings (ac)	Hennepin County Highway Department	Issued 10/19/77
Highway crossings (TR-2)	Wright County Highway Department	In preparation
Highway crossings (TR-2)	Carver County Highway Department	In preparation
Highway crossings (TR-2)	Sibley County Highway Department	In preparation
Highway crossings (TR-2)	Scott County Highway Department	In preparation
Highway crossings (TR-2)	LeSueur County Highway Department	In preparation
Highway crossings (TR-2)	Blue Earth County Highway Department	In preparation

Notes:
In preparation--Application being prepared by CPA/UPA and/or B&V or CAI.
Pending--Application submitted by CPA/UPA, but agency has not taken final action

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Permits and Licenses

MBPP Laramie River Station

PURPOSE	ISSUING AGENCY	STATUS
Federal		
National Environmental Policy Act Determination	USDA-REA	Issued 5/28/76
Aeronautical Permit for Chimney	Federal Aviation Administration	Issued 7/2/76
Spill Prevention Control and Counter Measure Plan.	U.S. Environmental Protection Agency and Wyoming Dept. of Environmental Quality	Prepared but not submitted
Aeronautical Permit for Coal Silos	Federal Aviation Administration	Issued 3/77
Permit for the Prevention of Significant Deterioration	U.S. Environmental Protection Agency	Issued 12/24/76
State		
Permit to Appropriate Groundwater (plant site)	Wyoming State Engineer	Issued 10/28/75
National Pollutant Discharge Elimination System (NPDES) Discharge Permit	Wyoming Dept. of Environmental Quality	Issued 12/24/75
Certificate of Public Convenience and Necessity	Wyoming Public Service Commission	Issued 6/24/76
Industrial Siting Permit	Wyoming Industrial Siting Council	Issued 4/26/76
Order to appear and demonstrate compliance with permit conditions	Wyoming Industrial Siting Council	Issued 5/19/77
Solid Waste Disposal Permit for Construction Waste Material	Wyoming Dept. of Environmental Quality	Issued to N.P.V. Construction Co.

Permits and Licenses

MBPP Laramie River Station
(continued)

PURPOSE	ISSUING AGENCY	STATUS
State (continued)		
Solid Waste Disposal Permit for Industrial Wastes	Wyoming Dept. of Environmental Quality	Pending
Construction Permit (Div of Air Quality)	Wyoming Dept. of Environmental Quality	Issued 5/14/76
Operating Permit (Div. of Air Quality)	Wyoming Dept. of Environmental Quality	In preparation
Permit to Construct Public Water Supply	Wyoming Dept. of Environmental Quality	Issued 7/7/76
Permit to Construct Ash Pond	Wyoming State Engineer	Issued 10/5/77
Approval of Bottom Ash Pond	Wyoming Dept. of Environmental Quality	Pending
Permit to Construct Reservoir for On-Site Raw Water Storage	Wyoming State Engineer	Issued 7/16/76
Permit to Construct Reservoir for Storm Water Runoff	Wyoming State Engineer	Issued 7/6/76
Construction Permit for Waste-Water Treatment System	Wyoming Dept. of Environmental Quality	Issued 7/7/76
Construction Water Supply	Wyoming State Engineer	Issued until 6/1
Local		
Local Zoning	Platte County Commissioners	Issued 3/5/75

Permits and Licenses

MBPP Grayrocks Dam and Reservoir

PURPOSE	ISSUING AGENCY	STATUS
Federal		
Dredge and Fill (404) Permit for Construction of Grayrocks Dam	U.S. Army Corps of Engineers	Pending
Right-of-Way Approval of Lands to be Inundated by Grayrocks Reservoir and Also Right-of-Way for Pipeline Crossing	U.S. Dept. of the Interior-BLM	Issued 8/24/77
Right-of-Way Platte County Road Relocation	U.S. Dept. of the Interior-BLM	Issued 8/2/77
Transfer of Federal Mineral Leases-Grayrocks Reservoir	U.S. Dept. of the Interior-BLM	Issued 8/17/76
Dredge and Fill (404) Permit for Platte County Bridge	U.S. Army Corps of Engineers	Issued 10/25/77
State		
Permit to Appropriate Surface Water (Grayrocks Reservoir)	Wyoming State Engineer	Issued 2/11/75
Permit to Appropriate Surface Water (Water Treatment Tests)	Wyoming State Engineer	Issued 8/28/75
Permit to Divert Water (Laramie River Pipeline)	Wyoming State Engineer	Issued 2/11/75
Approval of Final Construction Plans for Grayrocks Reservoir	Wyoming State Engineer	Issued 6/3/77

Permits and Licenses
MBPP Grayrocks Dam and Reservoir
(continued)

PURPOSE	ISSUING AGENCY	STATUS
State (continued)		
Change of Water Appropriation Permits for Boughton Ditch Water	Wyoming State Board of Control	Issued 5/76
Permit to Appropriate Groundwater (Johnson Wells) for Industrial Use	Wyoming State Engineer	Issued 8/26/77
Revision of Water Appropriation Permits for Inundated Area	Wyoming State Board of Control	Issued 10/6/77
Petition Application for Transfer of Existing Plant Site Water Rights	Wyoming State Board of Control	Pending
Mining Permit to Excavate Dam Construction Material	Wyoming Dept. of Environmental Quality	Issued 3/16/77
License to Explore	Wyoming Dept. of Environmental Quality	Issued 7/28/76

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Permits and Licenses

MBPP Transmission Facilities

PURPOSE	ISSUING AGENCY	STATUS
Federal		
Rights-of-Way and Easements of Federal Lands	U.S. Dept. of the Interior-LBM	Pending
State		
Certificate of Public Convenience & Necessity Transmission Line Approval	Wyoming Public Service Commission	Issued 5/26/77
Approval of Construction of Transmission Lines	Nebraska Power Review Board	Issued 5/77
Design Approved Transmission Line	Nebraska Public Service Commission	In preparation
Certificate of Public Convenience and Necessity (west side)	Colorado Public Service Commission	Issued 9/8/76
Transmission Center-Line Approval (Dave Johnston) (East Side) (West Side)	Wyoming Industrial Siting Council	 Issued 10/7/77 Pending In preparation
Local		
Transmission Line Permit	Morgan and Weld Counties, Colorado	Pending

Enclosure 3

COLORADO-UTE ELECTRIC ASSOCIATION, INC.—COMPARATIVE STUDY OF THE COSTS OF COMPLIANCE WITH GOVERNMENTAL REGULATION 12 MONTHS ENDED JUNE 30, 1978

I. INTRODUCTION

During 1978, Colorado-Ute Electric Association, Inc. developed a study of the costs of compliance with governmental regulations, primarily in the environmental area. This study was conducted for the purpose of use in sworn testimony and exhibits of Colorado-Ute witnesses before the Colorado Public Utilities Commission in its 1978 rate case. It has also been used to provide information to legislative committees and other regulatory bodies. This study was not intended for the purposes of passing judgment on governmental regulations as being "necessary" or "unnecessary", but rather for the purposes of identifying the cost of regulatory compliance to Colorado-Ute and ultimately to the consumers supplied by Colorado-Ute. Colorado-Ute had not originally intended to publish the study in a form other than as testimony and exhibits; however, due to the numerous requests for information from various individuals, legislators and governmental bodies, Colorado-Ute has provided this study in a more convenient form for public use.

II. GENERAL DESCRIPTION OF COLORADO-UTE

Colorado-Ute Electric Association, Inc. is a public utility operating in the state of Colorado and headquartered in Montrose, Colorado. Colorado-Ute operates as a non-profit, member-owned cooperative and is principally engaged in the business of providing wholesale electric service to its thirteen member distribution cooperative associations.

Colorado-Ute's thirteen members are locally-owned consumer cooperatives that are principally engaged in the business of providing retail electric service to their consumer members. In general, the membership of these cooperatives is composed of residential, recreational, commercial and industrial consumers within the cooperatives retail service area. The member cooperatives supply their member consumers load requirements through bulk purchases of power and energy from Colorado-Ute. The retail service areas of Colorado-Ute's member distribution cooperatives encompasses approximately one half of the land area within the state of Colorado, including all or a portion of 41 of the state of Colorado's 63 counties. Colorado-Ute and its thirteen members together compose the second largest electric utility in the state of Colorado in the terms of number of consumers served and annual energy sales to consumers.

III. OVERVIEW OF STUDY ELEMENTS

A. Summary of generation and transmission systems

In order to meet its members load requirements, Colorado-Ute supplies power and energy primarily from its own generating resources and from purchases from other power supply entities. Colorado-Ute presently owns and operates the following electric generating plants:

	Net Capacity available (megawatts)
1. Hayden Unit 1	184
2. Hayden Unit 2 (20 percent ownership of 262 megawatt total capacity)	52
3. Nucla Station	36
4. Bullock Station	12
5. Tacoma and Ames Hydro	11

Hayden Unit 1, Hayden Unit 2, Nucla Station and Bullock Station are coal-fired steam electric generation plants and Tacoma and Ames Stations are hydro-electric generation plants. In addition to generating plants now in service, Colorado-Ute is one of the four participants in the Yampa Project, which consists of Craig Station, a two unit 800 mw coal-fired steam electric generating plant now under construction at Craig, Colorado, and related transmission facilities. The two units are scheduled to be in commercial operation by 1979 and 1980. Colorado-Ute is both project

manager and operating agent and owns a 29% undivided interest in the Craig Station. Upon commercial operation, the net capacity available to Colorado-Ute from Craig Station Units 1 and 2 will be approximately 232 mw.

Colorado-Ute currently plans to construct a third coal-fire steam generation unit at the Craig Station. This unit is scheduled for completion and commercial operation in 1983 and will entitle Colorado-Ute to an available net capacity of 400 mw.

Colorado-Ute delivers power and energy to its thirteen members over its own transmission system, consisting of approximately 1,062 miles of high voltage transmission lines and 41 substations, and over the interconnected high voltage transmission systems of other power supply entities pursuant to the contractual terms of a variety of interconnection, wheeling and displacement arrangements.

B. Objectives and scope of study

Due to the fact that the study of the cost of compliance with governmental regulation was developed for use by Colorado-Ute witnesses in a rate case before the Colorado Public Utilities Commission, the period of the study, the twelve months ended June 30, 1978, coincides with the test year that Colorado-Ute used in developing its rate case. The main objectives of the study were as follows:

1. To examine and quantify the operating costs of compliance with governmental regulation where directly ascertainable.
2. To compare these costs with total operating costs.
3. To examine and quantify the capital costs of compliance with governmental regulation where directly ascertainable.
4. To compare these costs with total capital costs.

Colorado-Ute was able to ascertain the direct costs of compliance with governmental regulation with respect to the area of coal-fired steam generation production operating and capital costs as this is the area where governmental regulation has had a major identifiable impact upon the operating costs of Colorado-Ute. Colorado-Ute has so far not been impacted greatly in the areas of hydroelectric production operating costs and has not had any recent direct experience in the construction of hydroelectric generation facilities. For these reasons, no effort was made to ascertain the cost components affecting hydroelectric facilities that are directly related to governmental regulation.

In the area of transmission system operating costs, Colorado-Ute was not able to quantify the total costs of compliance with governmental regulations due to the time limitations of the study, the geographical diversity of the terrain which would affect costs and the sheer bulk of the data that would have to be analyzed. The analysis of regulatory costs in the transmission area was limited to examples of recent transmission line construction costs and the cost components relating to governmental regulations. The results of this analysis is included in this study.

It should be noted that the regulatory costs used in this study represent only directly identifiable major costs components. No attempt has been made to quantify those regulatory costs that are paid by Colorado-Ute indirectly, and therefore, cannot be definitely ascertained. For example, the study does not include, among others, the following major indirect cost items:

1. Regulatory costs hidden in the price of materials used in generating plant construction, such as steel and cement.
2. Reclamation and other regulatory costs included in the price of fuel purchased by Colorado-Ute, unless passsed on directly to Colorado-Ute.

The study also does not include those direct regulatory costs that consist of a multitude of small items, or where the costs are known to exist but the amounts are somewhat speculative. The following are examples of this category of regulatory costs excluded from the study:

1. OSHA regulations requiring safety devices, imposing operating limitations, and similar items.
2. Public Utilities Commission fees, hearing costs, reporting requirements, and added financing costs.
3. Federal Energy Regulatory Commission reporting requirements.
4. Local building permits and minor zoning restrictions.
5. Cost of continuous analysis of new regulations to determine applicability to Colorado-Ute's business.

The above lists of excluded regulatory costs are only representative of the many items that could properly be included if the data were available and could be reasonably analyzed.

It should be further noted that the costs contained in this study represent the cost that were associated with the existing regulatory compliance costs at the time the study was prepared; no estimates of the impact of any new or proposed changes in

environmental regulations were made. Some changes in environmental regulations have already occurred since this study was made.

C. Conclusions of the study

1. *Steam generation.*—The study concludes that the direct identificable annual cost of compliance with governmental regulations during the period of this study amounted to 35% of the total cost of production at steam generation plants. It further concludes that the direct identifiable annual cost of compliance with governmental regulations is estimated to be 45% of the annual costs of production for Craig Station, Units 1 and 2, when these units are placed in commercial operation (calendar year 1980 costs).

From these numbers, it is a reasonable inference that if all direct and indirect regulatory costs were included, the cost of compliance with governmental requirements would substantially exceed half of the total cost of generating electric power by Colorado-Ute.

Schedules 1 through 3 set forth the summary of costs involved. Supporting schedules 4 through 10 show a detailed distribution of the cost factors.

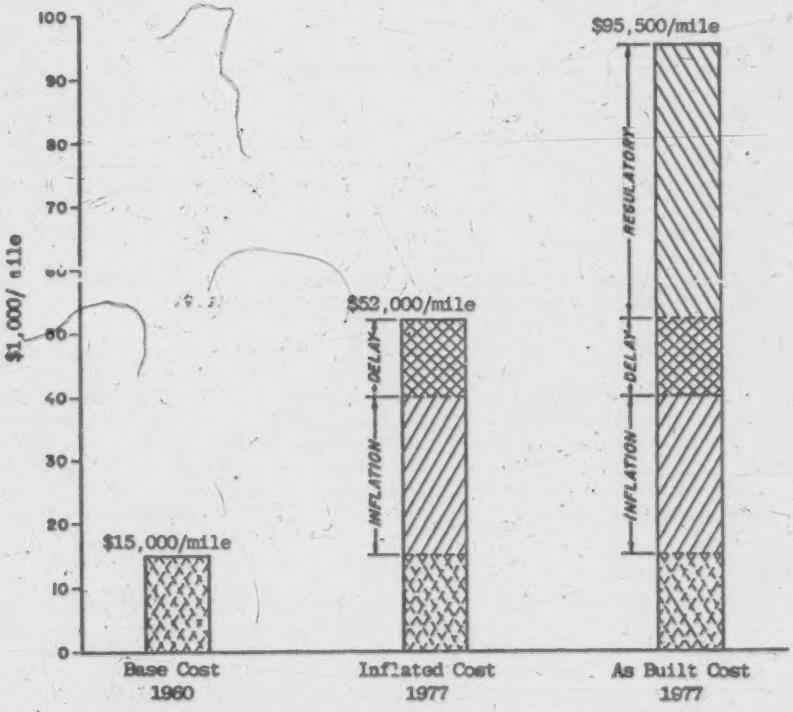
2. *Transmission.*—In the area of transmission facilities construction costs, Colorado-Ute analyzed the cost of construction of the Bayfield-Pagosa 115 kV line, which was completed and placed in service in 1978, approximately 3½ years behind its scheduled completion. The total cost of construction of this line amounted to $3.5 million, including estimated regulatory costs for federal permit requirements of $1.6 million. Inflation during the 3½ years of regulatory delay is estimated to represent another approximate $450,000 of the cost. The regulatory compliance cost of this 37-mile line is estimated to be 59% of the total cost. In addition, during the 3½ year delay, additional transmission line losses worth approximately $22,000 were experienced because an alternate, less efficient transmission system had to be used while the new Bayfield-Pagosa line was delayed by regulatory action.

Another example, the Basalt-Aspen 115 kV line, was delayed for approximately 3 years by federal and local government action, principally because of environmental concerns. This line was finally completed and placed in service at a construction cost of $2.2 million. On this line, the estimated regulatory cost component is estimated to be $700,000 and inflation during the 3 years of regulatory delay is estimated to be another $350,000 of the cost. The total regulatory compliance cost of this line is estimated to be 49% of the total cost. In addition, during the 3 year delay, additional transmission lines losses worth approxmately $104,300 were experienced because an alternate less efficient transmission system had to be used while the Basalt-Aspen line was delayed by regulatory action.

Figure 1 is a graphic illustration of the increases in transmission lines due to governmental regulations and is based upon the example of the Bayfield-Pagosa 115 kV line that was mentiond before. Schedules 11 and 12 set forth the components of the Bayfield-Pagosa and Basalt-Aspen 115 kV line actual construction costs and 1974 and 1977 normal construction costs excluding regulatory requirements costs.

Figure 1

TRANSMISSION LINE CONSTRUCTION COST



Cost is for a 115 kV wood pole line built in mountainous terrain. The 1977 as built cost is for the Bayfield-Pagosa 115 kV line completed in 1977.

INFLATION represents the increases in labor and materials from 1960 to 1974.

DELAY represents the increases in labor and materials from 1974 to 1977.

IV. METHODOLOGY OF STUDY

A. Cost components studied—steam generation

In the area of identifying the operating costs of compliance with environmental regulations with respect to steam generation plant, Colorado-Ute examined the following cost components: (1) Labor and associated payroll overheads; (2) fuel expense; (3) materials and supplies and other costs; (4) additional power costs; (5) fixed costs on pollution control equipment; (a) depreciation, (b) property taxes, (c) interest expense, (d) property insurance, and (6) administrative and general expense.

Labor and associated payroll overhead expenses represent the cost of plant operations and maintenance personnel that are specifically assignable to the operations, maintenance and testing requirements of pollution control equipment. Also included were estimates of the cost of supervision of these functions by plant supervisory personnel. For example, of the total manpower requirement of 169 personnel necessary to operate Hayden Station, Units 1 and 2, 54 of these 169 personnel are required for the operation, maintenance and testing requirements of pollution control equipment.

Fuel expenses represents the portion of Colorado-Ute's fuel expense that were directly attributable to environmental taxes or legislation at the time this study was prepared. These cost include: (1) Reclamation costs, if specifically passed on to Colorado-Ute; (2) Surface Mine Control and Reclamation Act taxes; (3) Colorado Severance taxes; and (4) Federal Black Lung taxes.

Materials and supplies and other costs represent the direct costs of materials, supplies and replacement parts issued on a routine basis and other expenses associated with the operation, maintenance and testing requirements of the pollution control equipment.

Additional power costs represents a pro rata estimate of the cost of capacity lost in the generation station by the addition of pollution control equipment plus the cost of energy needed to operate the equipment.

Depreciation, property tax, interest expense and property insurance represent the fixed costs that are associated with the pollution control equipment installed. The pollution control equipment represented major component systems that Colorado-Ute installed or retrofitted to existing plant in order to comply with government regulation. These facilities are briefly summarized in the section, "Summary of Pollution Control Removal Systems". Administrative and general costs represent the administrative costs associated with the operation and maintenance of pollution control equipment installed and compliance with directly indentifiable regulatory requirements.

B. Cost components studied—transmission lines

In the area of analysis of the impact of government regulation on construction of transmission facilities, the main result of these regulations has been to lengthen the time period required for construction which increase the cost of construction due to inflation and interest charges during construction. Some of the main governmental regulations that affected Colorado-Ute are federal regulations with regard to: (1) Line routing; (2) Right-of-way clearing; (3) Obtaining permits; (4) Preparation of additional studies; and (5) Requirements for additional hearings.

Colorado-Ute's transmission system is particularly affected by federal requirements because most of the land in Western Colorado is federally owned and subject to Bureau of Land Management or United States Forest Service control.

Changes in requirements for routing transmission line corridors away from existing highway corridors so as to hide transmission lines from public view requires the use of special construction equipment, particularly in mountainous terrain. In most cases, this requires special overland vehicles or the extensive use of helicopter construction because of Bureau of Land Management and Forest Service limitations on the amount of construction access roads that are permitted to be constructed. Where right-of-way clearing is required, clear cutting may not be permitted and new regulations require feathering techniques which may involve landscaping and special cutting for distances up to 800 feet on either side of the center line. Because of the lengthening of construction time due to obtaining permits, preparation of additional studies and requirements for additional hearings, the construction costs of transmission facilities increase greatly because of the substantial delay caused by these requirements.

C. Summary of pollution control removal systems

The following is a brief summary of the major components of pollution control systems that Colorado-Ute had installed for Hayden Station, Nucla Station and Bullock Station that was analyzed for the purposes of this study.

Hayden Station: (1) Hotside electrostatic precipitators; (2) Flyash and bottom ash removal systems; (3) Ash hauling equipment and disposal site (to the extent not required for operational purposes); (4) Waste water concentration system including holding ponds and evaporation ponds; (5) Coal yard drain ponds; (6) Ambient air monitoring systems; (7) Nitrous oxide reduction boiler design on Unit 2; and (8) Increased stack height on Unit 2 for better dispersal of emissions.

Nucla Station: (1) Fabric filter baghouse collection system; (2) Ash hauling equipment and disposal site (to the extent not required for operational purposes); (3) Cooling tower system; (4) Evaporation ponds and holding ponds; and (5) Water piping modifications for elimination of thermal and water discharge pollution.

Bullock Station: (1) Fabric filter baghouse collection system; (2) Ash hauling equipment and disposal site (to the extent not required for operational purposes); (3) Evaporation ponds; and (4) Modification of drain piping to eliminate waste discharge pollution.

In addition, Hayden Station at the time that this study was prepared was anticipated to be required to install retrofitted sulfur dioxide removal systems by 1985. A recent relaxation of regulations may make this installation of retrofitted sulfur dioxide removal systems unnecessary.

At the Yampa Project, the following major components of pollution control systems are being constructed:

Craig Station—Units 1 and 2: (1) Hotside electrostatic precipitators; (2) Sulfur dioxide removal system; (3) Flyash and bottom ash removal systems (to the extent not required for operational purposes); (4) Ash and sludge hauling equipment and disposal site; (5) Increased stack height for better dispersal of emissions; (6) Nitrous oxide reduction boiler design; (7) Fugitive dust suppression systems at various plant site locations; (8) Waste water concentration system including holding ponds and evaporation ponds; (9) Coal yard drain pool; (10) Sewage and plant waste drain system; and (11) Ambient air monitoring system.

V. SUMMARY

One of Colorado-Ute's basic policies has been a full commitment to the protection of the environment. Colorado-Ute believes that economic growth and environmental protection can be compatible. However, it is Colorado-Ute's position that the effects of governmental regulation needs to be balanced reasonably against costs. Colorado-Ute has an obligation to the member consumers that it supplies to keep all costs, including the cost of environmental protection, as low as possible. Colorado-Ute is greatly concerned that the present costs of compliance with governmental regulations may be only the tip of the iceberg, particularly when new governmental regulations or modification of existing governmental regulations are being promulgated every year.

COLORADO-UTE ELECTRIC ASSOCIATION, INC.
COMPARISON OF COSTS OF COMPLIANCE WITH EXISTING GOVERNMENTAL
REGULATIONS TO TOTAL PRODUCTION COSTS FOR ALL
STEAM GENERATING STATIONS

Twelve Months Ended June 30, 1978
($1,000)

	Cost of Compliance With Governmental Regulations	Total Production Costs
Operation & Maintenance		
Labor	$ 652.9	$ 2,419.7
Fuel Costs	1,127.1	8,250.7
Materials, Supplies and Other Expenses	481.9	1,922.4
Additional Power	2,125.6	
Subtotal	4,387.5	12,592.8
Fixed Costs		
Depreciation	1,469.9	3,362.8
Taxes	266.9	1,004.2
Interest	1,035.9	3,555.0
Insurance	156.7	606.1
Subtotal	2,929.4	8,528.1
Administrative & General Expense	823.1	2,376.0
Total Production Costs	$8,140.0	$23,496.9

% Cost of Compliance to Production Costs
$8,140.0/$23,496.9 = 34.64%

1104

Schedule 1

COLORADO-UTE ELECTRIC ASSOCIATION, INC.
COSTS OF COMPLIANCE WITH EXISTING GOVERNMENTAL
REGULATIONS FOR STEAM GENERATING STATIONS

Twelve Months Ended June 30, 1978
($1,000)

	Hayden Unit 1	Hayden Unit 2 (CUEA Portion)	Nucla Station	Bullock Station	Total
Operation and Maintenance					
Labor	$ 420.1	$ 117.1	$ 51.6	$ 64.1	$ 652.9
Fuel Costs	777.5	241.1	93.1	15.4	1,127.1
Materials, Supplies and Other Expenses	231.4	90.8	125.0	34.7	481.9
Additional Power and Energy	1,410.4	303.1	155.1	57.0	2,125.6
Subtotal	2,839.4	752.1	424.8	171.2	4,387.5
Fixed Costs					
Depreciation	615.7	419.9	233.8	200.5	1,469.9
Taxes	111.6	66.1	51.3	37.9	266.9
Interest	419.6	288.9	139.5	187.9	1,035.9
Insurance	87.6	26.4	11.8	30.9	156.7
Subtotal	1,234.5	801.3	436.4	457.2	2,929.4
Administrative and General Expense	458.4	197.2	96.7	70.8	823.1
Total	$4,532.3	$1,950.6	$957.9	$699.2	$8,140.0

1105

Schedule 2

COLORADO-UTE ELECTRIC ASSOCIATION, INC.
COSTS OF COMPLIANCE WITH EXISTING GOVERNMENTAL
REGULATIONS FOR CRAIG STATION 1 & 2

Projected Twelve Months Ended December 31, 1980
($1,000)

	Estimated Cost of Compliance With Governmental Regulations	Estimated Total Production Costs
Operation & Maintenance		
Labor	$ 738.2	$ 1,641.2
Fuel Costs	1,008.0	8,190.0
Materials, Supplies and Other Expenses	1,044.7	1,326.6
Additional Power and Energy Costs	4,582.1	-0-
Subtotal	7,373.0	11,157.8
Fixed Costs		
Depreciation	3,469.2	6,559.2
Taxes	502.0	2,764.4
Interest	4,196.9	16,100.5
Insurance	273.9	659.8
Subtotal	9,442.0	26,083.9
Administrative and General Expense	1,507.0	2,689.6
Total Production Costs	$17,922.0	$39,931.3

% Cost of Compliance to Production Costs
$17,922.0/$39,931.3 = 44.88%

1106

Schedule 3

Schedule 4

COLORADO-UTE ELECTRIC ASSOCIATION, INC.
SUMMARY OF LABOR AND MATERIALS AND SUPPLIES COSTS
OF COMPLIANCE WITH GOVERNMENTAL REGULATIONS
Twelve Months Ended June 30, 1978
($1,000)

	Hayden Unit 1	Hayden Unit 2	Nucla Station	Bullock Station	Total
Labor:					
Plant Supervisory Personnel(1)	$101.0	$ 28.2	$ 12.8	$ 9.0	$151.0
Operation and Maintenance					
Ash Collection and Disposal Costs(2)	169.2	47.1	30.9	55.1	302.3
Water Treatment System(3)	102.5	28.6	5.5	xx	136.6
Air and Water Quality Control(4)	24.6	9.6	xx	xx	34.2
Air and Gas Handling System(5)	22.8	3.6	2.4	xx	28.8
Total	$420.1	$117.1	$ 51.6	$64.1	$692.9
Materials and Supplies and Other Costs:					
Ash Collection and Disposal Costs(2)	$165.9	$ 39.1	$ 99.0	$34.7	$338.7
Water Treatment System(3)	10.9	4.2	24.8	xx	39.9
Air and Water Quality Control(4)	39.3	19.1	0.1	xx	58.5
Air and Gas Handling System(5)	15.3	28.4	1.1	xx	44.8
Total	$231.4	$ 90.8	$125.0	$34.7	$481.9

(1) Represents the labor of plant supervisory personnel allocated to supervision of operation and maintenance of pollution control equipment
(2) Represents operations and maintenance costs of collection, handling and disposal of bottom ash and fly ash beyond normal operational requirements
(3) Represents operations and maintenance costs for treatment of water required by governmental regulations
(4) Represents the operations and maintenance expense associated with the ambient air and water quality and meterological monitoring programs required by governmental regulation
(5) Represents the operations and maintenance expenses associated with air and gas handling requirements due to governmental regulations

Note: xx denotes costs that are less than $100.00

Schedule 5

COLORADO-UTE ELECTRIC ASSOCIATION, INC.
SUMMARY OF FUEL COSTS OF COMPLIANCE
WITH GOVERNMENTAL REGULATIONS
Twelve Months Ended June 30, 1978
($1,000)

	Hayden Unit 1	Hayden Unit 2	Nucla Station	Bullock Station	Total
Reclamation Costs(1)	$ 51.9	$ 16.2	$ -0-	$ -0-	$ 68.1
Surface Mine Control and Reclamation Act Taxes	302.7	94.1	26.9	-0-(2)	423.7
Colorado Severance Taxes	333.3	103.1	46.9	10.3	493.6
Federal Black Lung Taxes	89.6	27.7	19.3	5.1	141.7
Total	$ 777.5	$ 241.1	$ 93.1	$ 15.4	$1,127.1
Tons of Coal Consumed	548,620	170,505	76,218	33,398	828,741

(1) Colorado-Ute purchases the majority of its coal under long term contractual arrangements under which a base price is established at the time the contract is entered into. The price of coal then fluctuates from the base price under the terms of the contract as the costs of producing the coal increases to the supplier. The costs associated with reclamation costs above represents only that portion of coal price component that is above and beyond the costs of reclamation included in the contractual base price of the coal. Hayden Unit 1, Hayden Unit 2 and Nucla Station coal is purchased under the terms of long term contracts. Bullock Station coal requirements are purchased on the spot market basis. The difference between Hayden Station and Nucla Station represents the time frame between the signing of these contracts. The Hayden Station fuel agreement was entered into in December, 1971, and the Nucla Station fuel agreement was entered into in December of 1974.

(2) Because of the price component structure of spot market purchases at Bullock Station, Colorado-Ute was not able to identify the amount pertaining to Reclamation costs or Surface Mine Control and Reclamation Act taxes.

Schedule 6

COLORADO-UTE ELECTRIC ASSOCIATION, INC.
SUMMARY OF ADDITIONAL POWER AND ENERGY
COSTS OF COMPLIANCE WITH GOVERNMENTAL REGULATIONS
Twelve Months Ended June 30, 1978
($1,000)

	Hayden Unit 1	Hayden Unit 2	Nucla Station	Bullock Station	Total
Additional Power and Energy:					
Pollution Control Equipment Energy Requirements-mwh	23,156.3	6,129.6	3,516.2	1,401.7	34,203.8
Pollution Control Equipment Energy Costs:(1)	$ 578.9	$ 153.2	$ 87.9	$ 28.7	$ 848.7
Pro Rata Generation Costs(2)	90.1	23.6	51.2	24.8	189.7
Maintenance Down Time Costs(3)	741.4	326.3	16.0	3.5	1,087.2
Total	$1,410.4	$ 503.1	$ 155.1	$ 57.0	$2,125.6

(1) Represents costs of replacement energy requirements for operation of pollution control equipment
(2) Represents a pro rata estimate of the operating costs capacity lost by installation of pollution control equipment
(3) Represents increased costs due to additional maintenance outage down time caused by pollution control equipment

COLORADO-UTE ELECTRIC ASSOCIATION, INC.

Summary of Pollution Control Equipment Hayden Unit 1

Twelve Months Ended June 30, 1978

($1,000)

Hayden Unit 1	Installed Costs	Annual Fixed Costs: Depreciation	Property Taxes	Interest Expense	Property Insurance	Total
Electrostatic Precipitator	$ 9,097.0	$394.7	$ 71.4	$317.3	$4.1	$ 787.5
Dust Control System	14.3	0.6	0.1	0.3	xx	1.0
Ash Handling Equipment	2,254.4	97.8	17.7	45.1	1.0	161.6
Ash Sludge Hauling Equipment	127.0	5.5	1.0	2.5	0.1	9.1
Ash & Sludge Disposal Land	22.2	N/A	0.2	0.4	N/A	0.6
Waste Water Concentrator	1,977.0	85.8	15.5	39.5	1.0	141.8
Holding Pond	327.6	14.2	2.6	6.6	0.1	23.5
Evaporation Pond	322.8	14.0	2.5	6.5	0.1	23.1
Coal Yard Drain Pond	36.6	1.6	0.3	0.7	xx	2.6
Ambient Air Monitoring Station	34.0	1.5	0.3	0.7	xx	2.5
Total	$14,213.1	$615.7	$111.6	$419.6	$6.4	$1,153.3

Note: xx denotes costs that are less than $100.

Schedule 7

1110

COLORADO-UTE ELECTRIC ASSOCIATION, INC.
Summary of Pollution Control Equipment Hayden Unit 2
Twelve Months Ended June 30, 1978
($1,000)

	Installed Costs	Annual Fixed Costs				
		Depreciation	Property Taxes	Interest Expense	Property Insurance	Total
Hayden Unit 2 (CUEA Portion Only)						
Electrostatic Precipitator	$2,487.6	$124.5	$19.6	$ 85.6	$1.1	$230.8
Gas Conditioning Equipment	41.5	2.1	0.3	1.4	xx	3.8
Increased Stack Height	100.0	5.0	0.8	3.4	0.1	9.3
Dust Control System	4.4	0.2	xx	0.2	xx	0.4
Ash Handling Equipment	681.2	34.1	5.3	23.4	0.3	63.1
Ash & Sludge Hauling Equipment	37.0	1.9	0.3	1.3	xx	3.5
Ash & Sludge Disposal Land	6.7	N/A	0.1	0.2	N/A	0.3
Waste Water Concentrator	597.4	29.9	4.7	20.5	0.3	55.4
Holding Pond	98.9	4.9	0.8	3.4	0.1	9.2
Evaporation Pond	97.6	4.9	0.8	3.3	xx	9.0
Coal Yard Drain Pond	11.1	0.6	0.1	0.4	xx	1.1
Sewage System	94.7	4.7	0.7	3.3	xx	8.7
Plant Waste Drain System	290.4	14.5	2.3	10.0	0.1	26.9
NOX Reduction System	130.0	6.5	1.0	4.5	0.1	12.1
Ambient Air Monitoring Station	10.6	0.5	0.1	0.4	xx	1.0
Capacity Required to Operate P.C. Equipment	3,708.3	185.6	29.2	127.6	1.7	344.1
Total	$8,397.4	$419.9	$66.1	$288.9	$3.8	$778.7

Note: xx denotes costs that are less than $100.

1111

Schedule 8

COLORADO-UTE ELECTRIC ASSOCIATION, INC.
Summary of Pollution Control Equipment Nucla & Bullock
Twelve Months Ended June 30, 1978
($1,000)

	Installed Costs	Annual Fixed Costs				
		Depreciation	Property Taxes	Interest Expense	Property Insurance	Total
Nucla Station						
Baghouses	$2,649.0	$152.1	$33.4	$ 94.8	$ 1.2	$281.5
Cooling Towers	1,098.2	63.1	13.8	38.2	0.5	115.6
Ash & Sludge Hauling Equipment	45.6	2.6	0.6	0.9	xx	4.1
Ash Handling Equipment	174.0	10.0	2.2	3.5	0.1	15.8
Holding Pond	2.0	0.1	xx	xx	xx	0.1
Evaporation Pond	40.0	2.3	0.5	0.8	xx	3.6
Waste Drain System	63.0	3.6	0.8	1.3	xx	5.7
Total	$4,071.8	$233.8	$51.3	$139.5	$ 1.8	$426.4
Bullock Station						
Baghouses	$2,152.7	$145.5	$27.1	$134.6	$13.5	$320.7
Ash Handling Equipment	640.0	43.2	8.1	40.0	4.0	95.3
Ash & Sludge Hauling Equipment	52.0	3.5	0.7	3.3	0.4	7.9
Ash Disposal Land	39.0	N/A	0.5	2.4	N/A	2.9
Evaporation Pond	86.9	5.9	1.1	5.4	0.5	12.9
Sewage System	34.2	2.3	0.4	2.1	0.2	5.0
Waste Drain System	1.0	0.1	xx	0.1	xx	0.2
Total	$3,005.8	$200.5	$37.9	$187.9	$18.6	$444.9

Note: xx denotes costs that are less than $100.

1112

Schedule 9

Schedule 10

COLORADO-UTE ELECTRIC ASSOCIATION, INC.
SUMMARY OF OTHER INSURANCE AND ADMINISTRATIVE COSTS OF
COMPLIANCE WITH GOVERNMENTAL REGULATION
Twelve Months Ended June 30, 1978
($1,000)

	Hayden Unit 1	Hayden Unit 2	Nucla Station	Bullock Station	Total
Other Insurance Costs:					
Pensions and Benefits Overheads (1)	$ 46.3	$ 12.9	$ 5.7	$ 7.0	$ 71.9
Injuries and Damages Overheads (1)	34.9	9.7	4.3	5.3	54.2
Total	$ 81.2	$ 22.6	$ 10.0	$ 12.3	$126.1
Administrative and General Costs (2)	$178.4	$137.2	$ 96.7	$ 70.8	$483.1

(1) Represents a pro rata allocation of personnel benefits for operation and maintenance and plant supervisory personnel direct labor assignable to operation and maintenance of pollution control equipment. Personnel benefits include Retirement Security Pensions and Benefits and Medical Insurance Benefits.

(2) Represents a pro rata allocation of total administrative and general expense to the expenses directly attributable to pollution control equipment.

Schedule II

COLORADO-UTE ELECTRIC ASSOCIATION, INC.
COMPARATIVE ANALYSIS OF CONSTRUCTION COSTS
Bayfield-Pagosa 115 kv Line
($1,000)

	1974 Normal Construction Cost (1)	1977 Normal Construction Cost (2)	1977 Actual Cost (3)
Contract Construction	$ 1,150.0	$ 1,500.0	$ 2,805.5
Owner's Labor, Engineering and Administrative Costs	40.0	52.5	74.8
Engineering Services	75.0	98.0	102.0
ROW Acquisition - Land	50.0	100.0	160.1
ROW Acquisition - Labor and Expense	18.0	23.5	75.5
Environmental Analysis	0	0	23.1
Interest During Construction	95.0	100.0	260.7
Other	3.0	3.8	3.8
Total	$ 1,431.0	$ 1,877.8	$ 3,505.5

Costs attributable to Regulation ($1,000)		
1977 Actual Cost	$ 3,505.5	
1977 Normal Construction Cost	1,877.8	
Increase	$ 1,627.7	
Costs attributable to Delay		
1977 Normal Construction Cost	$ 1,877.8	
1974 Normal Construction Cost	1,431.0	
Increase	$ 446.8	

(1) Normal construction cost does not include regulatory requirements for right-of-way landscaping, construction methods, or denial of access over federal lands.
(2) Differences between 1974 and 1977 normal costs is due to inflation costs as a result of lengthened construction time.
(3) 1977 actual cost includes all those regulatory compliance costs that are above and beyond normal construction costs.

Schedule 12

COLORADO-UTE ELECTRIC ASSOCIATION, INC.
COMPARATIVE ANALYSIS OF CONSTRUCTION COSTS
Basalt-Aspen 115 kv Line
($1,000)

	1974 Normal Construction Cost (1)	1977 Normal Construction Cost (2)	1977 Actual Cost (3)
Contract Construction	$ 765.0	$ 1,000.0	$ 1,626.2
Owner's Labor, Engineering and Administrative Costs	42.7	55.8	70.7
Engineering Services	50.0	65.0	67.3
ROW Acquisition - Land	75.0	150.0	181.8
ROW Acquisition - Labor and Expense	76.4	100.0	104.7
Environmental Analysis	0	0	19.6
Interest During Construction	112.0	115.0	131.3
Other	1.2	1.4	1.4
Total	$ 1,122.3	$ 1,487.2	$ 2,203.0

Costs attributable to Regulation		
1977 Actual Cost		$ 2,203.0
1977 Normal Construction Cost		1,487.2
Increase		$ 715.8
Costs attributable to Delay		
1977 Normal Construction Cost		$ 1,487.2
1974 Normal Construction Cost		1,122.3
Increase		$ 364.9

(1) Normal construction cost does not include regulatory requirements for right-of-way landscaping, construction methods, or denial of access over federal lands.

(2) Differences between 1974 and 1977 normal costs is due to inflation costs as a result of lengthened construction time.

(3) 1977 actual cost includes all those regulatory compliance costs that are above and beyond normal construction costs.

ENCLOSURE 4

THE SECRETARY OF HEALTH, EDUCATION, AND WELFARE,
Washington, D.C.

Hon. RUSSELL TRAIN,
Administrator, Environmental Protection Agency, 401 M Street, N.W., Room 1200, Washington, D.C.

DEAR MR. TRAIN: This is in response to the request for written comments contained in the Environmental Protection Agency's proposed rulemaking on Prevention of Significant Air Quality Deterioration (FEDERAL REGISTER, July 16, 1973). That rulemaking called for non-deterioration to be "discussed, debated, and decided as a public policy issue, with full consideration of its economic and social implications."

Through the enactment of the Clean Air Act and similar measures, this Administration and the Congress have documented their concern that we protect and improve our environment. The ambient air quality standards set by the Clean Air Act will, when achieved, cut the nation-wide air pollution average in half. In addition, these standards can be made even more stringent by EPA should this ever be necessary to "protect the public welfare from any known or anticipated adverse effects . . . of air pollution."

The proposed rulemaking would carry these clearly desirable legislative objectives further by requiring regions to maintain air quality levels in excess of the ambient standards. EPA's request for consideration of the economic and social implications caused this Department to attempt an assessment of those implications. We conclude that the non-deterioration regulations could well impose substantial social and economic costs which in turn would likely be borne disproportionately by the poor, the aged, and the disadvantaged.

These potential consequences are discussed in some detail in the enclosed staff paper. This paper is an exploratory effort only, and it does not reach final conclusions as to the exact nature and extent of the impacts. However, it is clear from the paper's findings that a substantial risk exists that any of the alternative regulations now under consideration might impose social costs far in excess of any benefits to be gained. It would be tragic if regulations were issued which had wholly unintended adverse consequences restraining the ability of the American people to control their social and economic future.

Despite the high priority which the nation must give to improving our environment, no regulations should be promulgated which produce few benefits but risk imposing severe damage. This suggests further research, development of additional non-deterioration strategies, and, if necessary, legislative clarification of the intent of the Clean Air Act.

This Department would be glad to assist you in any way possible in your further deliberations on this subject.

Sincerely,

_____,
Secretary.

Enclosure.

PREVENTION OF SIGNIFICANT AIR QUALITY DETERIORATION: SOCIAL WELFARE AND HEALTH IMPLICATIONS, OCTOBER 1973

(This is a staff paper prepared as background for official DHEW comments on the Environmental Protection Agency's Proposed Rulemaking on Prevention of Significant Air Quality Deterioration (Federal Register, Volume 38, Number 135, July 16, 1973, pp. 18986–19000).)

I. BACKGROUND

On July 16, 1973, the Environmental Protection Agency (EPA) promulgated draft regulations (Proposed Rulemaking, Federal Register) to implement a District Court ruling which interpreted the Clean Air Act of 1970 as requiring the prevention of "significant deterioration" of air quality in "any portion" of the United States.

The non-deterioration regulations would add a wholly new set of standards to already existing requirements for reducing air pollution. Under present requirements in the Clean Air Act, EPA sets air pollution standards to "protect the public welfare from any known or anticipated adverse effects associated with the presence of such air pollution." The existing standards incorporate all known health effects and allow a margin of safety. Their attainment will reduce overall national emissions in 1980 to about half of 1970 levels (Proposed Rulemaking, p. 18988). The greatest improvements will occur in the most polluted (usually the most populated)

areas. In the absence of non-deterioration regulations, these improvements would be partially offset by additional air pollution in areas which presently have pollution levels well below the national ambient standards. However, no local pollution levels would be allowed to exceed the existing standards. New non-deterioration standards would change this by prohibiting any "significant" increments in pollution levels in any place, even if those increments would not violate the national ambient standards.

In the proposed Rulemaking, EPA stated that the effects of a "no significant deterioration" policy were "potentially so far-reaching" that the question "must be discussed, debated, and decided as a public policy issue, with full consideration of its economic and social implications" (Proposed Rulemaking, p. 18986). Because of this Department's responsibilities for the health and social welfare of the American people, this paper seeks to identify some possible adverse impacts of non-deterioration regulations.

II. SUMMARY

While we lack detailed data from the EPA or other sources about the specific impacts of the proposed non-deterioration regulations, we believe that their costs might outweigh their benefits by a significant margin.

According to EPA, the only documentable benefits to be achieved by non-deterioration regulations would be "aesthetic, scenic, and recreational." (Proposed Rulemaking, p. 18987). However, these regulations might in fact produce no consequential benefits of this kind, and alternative regulatory approaches could probably attain equal (or greater) benefits without imposing substantial costs. Against these benefits must be weighed the risk of negative impacts on economic growth, urban development capabilities, energy resource development, consumer prices, the status of low-income persons, and the public health. Non-deterioration regulations would produce a national land-use policy giving singular attention to air quality criteria. Serious land-use distortions might result, particularly if only a few regions would be capable of absorbing population or economic growth.

While non-deterioration regulations risk imposing substantial net costs on the nation as a whole, a disproportionate share of those costs might be borne by persons of limited economic means and residential mobility. These persons would benefit relatively little from the preservation of air quality in rural areas, while they would disproportionately bear any impacts of curtailed economic growth, altered urban and rural development trends, constrained national capacity to absorb anticipated population increases, and higher consumer prices for energy and manufactured goods. These impacts could compound the difficulties faced by all levels of government in responding to the needs of the poor, the elderly, racial minorities, and persons otherwise disadvantaged.

The health impacts of non-deterioration regulations could also be adverse. Present national ambient standards account for all but inconsequential or unforeseeable health risks. If, after time passes, those standards are found to be sufficient to protect the public health, then superseding non-deterioration standards might well create adverse health effects should cities be delayed in their efforts to achieve the national ambient standards. Conversely, if the national ambient standards are unexpectedly found to permit dangerous levels of air pollution, then non-deterioration standards would have imposed more substantial health problems by having perpetuated a greater concentration of air pollution in densely populated urban areas than would otherwise have occurred. Other adverse health effects might arise from energy shortages and from the possible health-impairing consequences of economic hardships imposed on low-income families.

All adverse impacts risked by non-deterioration should be investigated, quantified if possible, and weighed against any aesthetic and recreational benefits before any specific regulations are promulgated. Particular attention should be accorded to possibly irreversible effects of any alteration of national or regional development trends.

It would be desirable if this effort could encompass a broader range of alternatives than just the four presented by EPA for specific comment. Among the additional alternatives which EPA might review are such definitional possibilities as measuring "deterioration" on a population exposure basis—or disallowing any "prevention" of deterioraton in one region which demonstrably precludes or postpones air quality improvements in another region.

If the legal situation makes this review impossible, the regulations selected for promulgation should minimize the risk of major adverse impacts by providing for a minimum of Federal impingment on local preferences. The Federal government, in this neutral role, should avoid altering economic or demographic trends in any

manner not now known to be beneficial. It should also avoid imposing substantial uncompensated costs on disadvantaged persons.

If the courts are likely to interpret *Sierra Club* v. *Ruckleshaus* and the Clean Air Act as mandating a more aggresive Federal regulatory role, it may be necessary to consider legislative amendment of the Clean Air Act to clarify where and how "significant deterioration" should be prevented.

III. SOCIAL WELFARE IMPLICATIONS OF NON-DETERIORATION STANDARDS

Non-deterioration policies would impose costs, some of which might be very substantial even if unquantifiable. In the discussion below, we describe our understanding of the potential benefits and costs of non-deterioration, particularly as they affect HEW concerns for economic and social welfare, impacts on the poor, and the public health.

A. Possible benefits of non-deterioration

We are unable to identify documentable benefits of non-deterioration regulations other than scenic or aesthetic effects resulting from a reduction of visually discernible emissions. However, non-deterioration regulations might produce little or no discernible improvements in air quality—and little or no significant benefits. Indeed, steps taken to comply with such regulations might result in an adverse net scenic impact. Plant site scattering and high smoke stacks could increase the area in which air pollution might be discernible.

Although the proposed regulations might produce considerable benefits in such unique places as National Parks, they are a less effective and more costly means of producing such benefits than appropriate land-use regulation. There are many severe forms of visual blight which are not related to air quality and which non-deterioration would not prevent.

Non-deterioration regulations might allocate aesthetic benefits less advantageously than would the unhindered attainment of the ambient air quality standard throughout the nation—an attainment rendered more doubtful by non-deterioration regulations. (See Section III-B-1-c).

Non-deterioration would tend to perpetuate the incidence of air pollution in urban areas. The clearer sky in a rural region might be saved only at the cost of what could eventually have been a clearer sky in or near an urban region, a sky viewed by many times more people. Such aesthetic benefits would be repressive in their incidence. Low-income people in dense urban regions would share the benefits of non-deterioration much less than higher income people who could afford to visit remote areas to enjoy the scenery. Although low-income persons living in rural areas would share in any aesthetic benefits of non-deterioration, the rural poor in such places as Appalachia may not mind looking at a less clear sky in return for improvements in their economic condition.

Finally, persons presently living in the regions which now have the cleanest air may enjoy the health benefits as a result of non-deterioration regulations, but only if there are, as some argue, possible health risks from air pollution levels meeting the national ambient standards. However, if such health risks exist, non-deterioration would probably impose an adverse net health effect insofar as it might increase the concentration of air pollution in populous areas (see Section IV).

B. Possible costs of non-deterioration

Non-deterioration regulations might impose significant social welfare costs through their impacts on development patterns, residential mobility, job access, consumer prices, and other social and economic variables. On the basis of information now available, it is impossible to predict the extent to which any specific regulatory alternative would produce these consequences. While the proposed regulations differ in detail, with some appearing less restrictive than others, any of them might produce significant adverse impacts. In the absence of contrary information, the consequences described below must be considered real and serious risks of any non-deterioration regulations.

1. Adverse impacts on development patterns

(a) *Restricted margin for population growth and economic development.*—Underlying most of the adverse potential impacts of nondeterioration regulations are their effects on growth. Existing air quality standards severely restrict emissions in presently polluted areas, but they allow for an increase in emissions in other areas. Non-deterioration standards would allow no such increase anywhere.

Because of this, the only kind of growth possible under nondeterioration standards might be "clean" growth, concentrated in low-emission industries. For the nation as a whole, entirely "clean" growth is unlikely, if not impossible. The

industries emitting the particulates and sulfur oxides to be restricted by the proposed regulations include petroleum refineries, steel mills, fossil-fuel electric plants, and other basic industries. So many other industries are dependent on their products that these industries are essential to most economic growth. Virtually no major human activity is likely to avoid creating direct or indirect effects on air quality.

If non-deterioration regulations do not allow for a sizeable margin of growth, the adverse impacts might be profound. Even with a declining birth rate, this country's population is expected to increase by some 60 million persons (30 percent) in the next thirty years. Without a 30 percent growth in economic production during the same period, we would suffer an absolute decline in per-capita income.

Moreover, non-deterioration regulations might severely distort whatever growth they do not prevent by severely limiting the number of places where growth could occur. Three major types of settings can be distinguished, only the last of which enjoys any significant margin for growth.

First, the most polluted areas (usually the largest SMSAs), which start well above the ambient standards, at best have little margin for further growth with or without non-deterioration regulation. These areas need to apply extreme control measures just to meet existing standards. Their further growth depends largely on their ability to shift new pollution generation to nearby places. Non-deterioration standards might reduce whatever small margin for growth which already exists by effectively prohibiting pollution shifting within a decade. For the remainder of this century, such cities might be faced with the choice between using any additional margin for *either* increased local production of goods and services to increase the economic well-being of existing residents or the absorption of additional population. Their Air Quality Control Regions with air pollution levels substantially exceeding the national ambient standards account for only 25 percent of the land area of the country but 50 percent of the population.[1]

Second, regions (usually encompassing small towns and rural areas) which are now well below the ambient standards would be like the largest cities in their inability to accommodate economic or population growth because of non-deterioration standards. With air pollution already at or near background levels, control measures would be unlikely to improve air quality very much, and air quality would almost surely be worsened by significant population or production increases. Therefore, their per capita margin for growth would be very small. Air Quality Regions which are well below ambient standards contain 60 percent of the land area but only 30 percent of the population.

Third, the impact of the non-deterioration standards on areas (typically medium-sized cities) now at or near the ambient standards might be the opposite. These cities have a much greater per-capita margin to be gained by control measures. Accordingly, they would be under great pressure to absorb much larger population and production increases. However, even their capacity for population absorption and per-capita growth would be reduced by their inability to shift pollution to rural areas. The Air Quality Control Regions of this type account for 15 percent of the land area and 20 percent of the population of the United States.

Therefore, non-deterioration regulations could have a restrictive and distortive impact on national growth trends. Air Quality Control Regions of the first and second kind (accounting for 85 percent of the land and 80 percent of the present population) might have little or no leeway for accommodating long-run growth of any kind. If the proposed non-deterioration standards were to allow only one or two major emission sources per Air Quality Control Region, they would permit only five or ten years of normal economic growth. Growth-constrained areas could choose between economic or population growth at first. Thereafter, they might have difficulty in maintaining normal per-capita income growth even without additional population growth. The remaining cities (those now at or near the ambient standards) might therefore be faced with the brunt of population growth in the next several decades—and they too might eventually run out of margin.

These developments might have significant adverse consequences for most people, but particularly for low-income persons and persons who, for reasons of age or race, are constrained in their ability to change residential locations.

(b) *Constraints on residential mobility and job access.*—Non-deterioration standards might substantially limit residential and job choices by severely constraining the availability of sites for jobs and housing. At present, some 17 percent of the

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[1] These numbers and those which follow correspond to EPA's priority classifications of AQCRs for SO_x in the continental United States. The three cases described here represent priority classifications I, III, and II, respectively. Since air quality is measured at points rather than for AQCRs as a whole, these calculations are technically incorrect and are approximations at best. If particulates are taken into account along with SO_x, such calculations would be conservative.

American population move every year, about 5 percent across state lines. Such mobility is possible only to the extent that housing vacancies and job opportunities exist. This tendency reflects how people "vote with their feet" for better job opportunities, housing, schools, local governments, physical environment, and other factors. Residential mobility produces economic benefits for specific groups of persons and for the nation as a whole. For example, a major factor contributing to growth in black incomes during the past fifteen years has been exposure to urban job opportunities in the North, and the lack of mobility both within and among cities has been found to be a major factor in Britain's poor economic performance in the 1960's.

When mobility is impeded, the biggest losers are racial minorities, the poor, and the aged. Racial minorities suffer from inter-city residential segregation and its attendant consequences of higher housing costs, lower housing quality, and loss of suburban job opportunities. Racial considerations aside, the biggest losers from mobility restrictions are the aged and the poor. Many older people are locked into housing which does not meet their needs because they have nowhere else to go or cannot undergo the physical strain of moving. Low-income families are often faced with scarce housing opportunities in areas adjacent to available jobs, since low-cost housing tends to be concentrated in specific neighborhoods rather than spread evenly throughout a metropolitan area.

This restricted low-cost housing market is exacerbated when general housing shortages exist. Restrictions limiting the amount of developable land tend to raise housing prices, inhibiting the movement of low-income persons to developing areas. Also, environmentally-inspired restrictions on housing construction (e.g., restrictions on sewage capacity) in such areas as Washington, D.C., have contributed to substantial increases in the price of housing, tending to deny low-income persons the housing they otherwise could afford.

(c) *Freeze and mismatch of development patterns.*—Any restrictions on jobs and mobility might have specific geographic dimensions aggravating their impacts. In particular, they might tend to freeze or exacerbate present development patterns. Rural regions with concentrations of low-income persons and little industry might never grow substantially in per capita production and income. Alternative growth patterns could hinge on the development of tourism, agriculture, and forestry (the last two of which have little employment generating effects). With the rural poor having little economic future, trends towards migration of the poor, unskilled, and dispossessed to big cities might continue and perhaps accelerate.

Industrial siting patterns might be unlikely to provide large cities with means for keeping pace with rising in-migration—or even for coping with the unemployment problems large cities already face. It is true that factories which otherwise would relocate in rural areas might instead move to suburban fringe settings still within their original SMSAs. Fringe siting might preserve (or possibly expand) total job opportunities in some SMSAs. Such increases in job opportunities could benefit the urban poor.

However, fringe jobs would not necessarily correspond to low-income housing and transportation access. Indeed, it is possible that the inability of industries to relocate in rural areas might reduce job opportunities for the urban poor. If industries which would have moved to rural areas move to suburban areas instead, they might be equivalently inaccessible to their original inner-city work force. However, they would still be polluting the air in the same Air Quality Control Region. Encircling the SMSA, these industries might worsen the local air quality to the extent that factories remaining in the city center might be forced to curtail operations just to meet the national ambient standards, to the disadvantage of the predominately low-income work force. If this were to occur, non-deterioration regulations would reduce the total number of jobs available to the inner-city poor.

Those cities and towns fortunate enough to be now at or near the national ambient standards would enjoy the flexibility to orchestrate housing and development choices. It is possible, but not necessarily likely, that these medium-sized cities would take advantage of this flexibility to expand job opportunities for in-migrating low-income persons. These cities presently account for a small percentage of the national low-income population, and their governments might resist future inmigration for the poor through housing curtailments, zoning laws, or other means. Some cities are already passing laws limiting future population growth.

These problems could impact some regions more severely than others. For example, the proposed regulations might prevent the state of North Carolina from adding enough electric power to meet the anticipated growth in population and per-capita energy demand by 1980. The state's current growth rates might be halted by the end of the decade. In Appalachia as a whole, reductions in current emissions from TVA coal-fired plants might allow only a limited margin for future industrial growth. This margin would be available primarily near existing plant sites, which

do not closely correspond to existing growth centers or concentrations of low-income persons.

In sum, whatever national growth might be possible under nondeterioration regulations might be distorted by industries' difficulties in tapping new labor supplies and by low-income persons' lack of access to new job opportunities. The greatest economic growth would be likely to occur in the wealthiest communities, and growth trends in the South and other developing areas might be halted. Existing geographic disparities in income could widen, with the losers on the margin predominantly the poor.

(d) *Major disruptive effects.*—Large cities' inability to shift major pollution sources to nearby non-deteriorable areas could have catastrophic impacts, requiring either complete shutdown of major sources or extremely harsh restrictions on smaller sources. Such crises could well have their worst impact on the poor and near-poor. For example, the recent coal strike in Britain caused power shortages, substantial layoffs in manufacturing industries, and vast secondary effects on unemployment through the economy—most severely impacting blue-collar and low-wage service workers. Similarly, it was the aged and the isolated poor whose health suffered when the power went off.

2. Increased prices for consumers

Non-deterioration regulations might have substantial effects on the prices and availability of consumer items, the brunt again to be borne by the poor.

Current and anticipated emission control requirements will alone cause substantial cost increases in consumer goods. However, the imposition of more stringent non-deterioration standards might provoke additional major cost increases in energy production and manufacturing. Consumers would then necessarily be faced with higher prices for energy, transportation, and manufactured goods in general. These increases would supplement the already very substantial consumer price increases created by existing law. For example, the 1976 auto emission standards alone are expected to cost consumers about $10 billion a year, and total incremental costs of presently-mandated pollution controls are expected to average about $400 per family per year by 1980.

Low-income persons would shoulder a disproportionate share of these price increases, as they spend a relatively high proportion of their income on transportation and manufactured goods. Existing utility rate structures also bear heavily on low-income families, and the incidence of energy price increases would depend on adjustments in these rate structures.

IV. HEALTH IMPACTS OF NON-DETERIORATION REGULATIONS

According to the terms of the Clean Air Act, the national primary ambient air quality standards are those "requisite to protect the public health" while "allowing an adequate margin of safety." The stricter secondary standards are not intended to enhance public health directly, but rather to "protect the public welfare from any known or anticipated adverse effects. . . ." Therefore, barring unknown or inconsequential health risks, emission standards more stringent than the secondary standards would produce no direct health benefits. They would, however, entail certain health risks.

First, by complicating the efforts of SMSAs to shift pollution to rural areas, non-degradation regulations might jeopardize their efforts to attain the national ambient air quality levels on schedule (or, perhaps, at all). Should this happen, the claimed adverse health effects of air pollution would impair the health of susceptible people living in densely-populated areas which would otherwise have cleaner air.

Second, to the extent that any currently unknown health risks might be imposed by air quality levels which satisfy the national ambient standards, non-deterioration would increase, not decrease, the number of persons exposed to those risks. Since non-deterioration regulations would preserve air quality in sparsely-populated areas while probably retarding air quality improvements which otherwise might occur in densely-populated areas, they would probably have the long-run effect of increasing the national per-capita exposure to air pollution. Adverse health effects from any given air quality level are directly proportional to the number of humans exposed.

Third, to the extent that non-deterioration regulations alter urban development trends, impede economic growth, or impose disproportionate cost burdens on low-income persons, they might create adverse second-order health effects. Should non-deterioration regulations increase unemployment and consumer prices, they might impair the ability of low-income families to improve their diets, housing, and medical care. Physical and mental health problems can be correlated with low-income status, although the causal links are not well understood.

Fourth, if the enforcement of non-deterioration regulations should provoke electricity blackouts, fuel shortages, or other crises, emergency health problems might arise. Elderly persons and low-income families with health problems or inferior housing would be particularly vulnerable to pneumonia, exposure, household accidents, and other potential effects of such crises.

In sum, the proposed regulations appear to involve risk of damage to human health, with no prospect of offsetting benefits. At a minimum, they increase total human exposure to air pollution.

V. ACTIONS NECESSARY BEFORE SELECTING AN APPROPRIATE NON-DETERIORATION STRATEGY

A. Research and analysis of impacts

The magnitude and incidence of the non-deterioration impacts described above are very uncertain. On the basis of the limited information available, it is possible to conclude only that non-deterioration regulations would create a substantial risk of adverse impacts far outweighing the benefits to be gained. The basis for an informed judgment cannot exist until the potential consequences of alternative non-deterioration strategies can be researched, quantified (where possible), and evaluated.

The costs and benefits of the full causal sequence of foreseeable outcomes should receive this review. Where uncertainties or subjective value considerations are important, this should be made clear. Particular attention should be given the possibly irreversible effects of any alternative on national or regional development trends.

B. Specification and application of appropriate criteria

A reasonable decision requires not only the appropriate information, but also criteria upon which to judge the information. Four criteria are paramount.

First, there should be a general presumption against Federal intervention which constrains and distorts local choices needlessly, particularly when the consequences might be very severe. Federal policy must be focused as precisely as possible to achieve its specific objectives, avoiding ancillary impacts which are not necessary complements to the achievement of the objectives sought. In effect, the proposed non-deterioration regulations would regulate local land-use decisions almost entirely on the basis of air quality considerations alone. Therefore, the regulations might arbitrarily and unnecessarily constrain local decisions affecting development patterns, the availability of local employment, the status of low-income groups, and other areas of local concern. To prevent serious distortions, respect should be accorded local preferences and a very neutral Federal role adopted.

Second, no public policy should impose costs greater than its benefits. The measurement of policy impacts, even if the magnitude of consequences is certain, is tremendously difficult. Many of the costs and benefits of non-deterioration standards are qualitative or intangible. Including them in the balancing process, although difficult, must at least be attempted.

Third, equity considerations warrant special concern. As much as possible, the persons who benefit from environmental improvements should be the ones to pay the costs. Disproportionate costs should not be imposed on economically disadvantaged persons unless equivalent compensation can be offered. Also, people in like circumstances should be treated similarly, without arbitrary discrimination based on geographical or economic circumstances irrelevant to the issue in question. Equity issues become particularly important in such issues as non-deterioration, where program benefits would not substantially and undebatably outweigh program costs.

Fourth, the risk of major adverse consequences warrants special care in devising standards to minimize risks. The risk argument has previously been used to justify greater environmental protection than existing knowledge would justify. The Clean Air Act itself calls for ambient standards to be set "to protect the public welfare from any known or anticipated adverse effects." But the argument cuts the other way where, as here, the foreseeable risks of environmental controls are of such magnitude and consequence. Reasonable regulations should protect the public from the potential adverse effects of non-deterioration itself.

VI. CONCLUSION

The evaluative information and criteria described above should be applied to a broad set of alternatives before specific regulations are selected for promulgation. Alternatives which appear virtually certain to impose adverse impacts far exceeding

their benefits (e.g., EPA's first and second proposed regulations) should not be pursued. EPA's third and fourth proposed regulations contain enough modifying provisions to warrant further analysis, but they are not, it is hoped, the only strategies that can be considered. For example, the application of various definitions for the "prevention of significant deterioration" could directly influence the impacts of nondeterioration enforcement. A local instance of deterioration might not be deemed "significant" if the imposed costs of its prevention do not outweigh its benefits. "Deterioration" might be measured in terms of population exposure to air pollution rather than in terms of geographic increases in contaminant levels. Finally, significant deterioration might only be "prevented" in situations where the preservation of one region's air quality does not come at the expense of the air quality in another region. These definitions might not conflict with the *Sierra Club* v. *Ruckleshaus* court's holding that significant deterioration is to be measured in "any portion" of the United States rather than in the nation as a whole.

If comprehensive policy review or the adoption of a strategy not already proposed is rendered impossible by any legally-imposed decision deadline, the regulations selected for promulgation should hedge against the risk of creating adverse impacts by providing for a neutral Federal role. If a policy error is to be made, it should be made on the side of caution.

If the courts are likely to interpret *Sierra Club* v. *Ruckleshaus* and the Clean Air Act to require the adoption of high-risk, stringent non-deterioration regulations, it might be desirable to consider legislative amendment of the Clean Air Act to clarify where and how "significant deterioration" should be prevented.

PREPARED STATEMENT OF THE NATIONAL ASSOCIATION OF WHOLESALER-DISTRIBUTORS

NAW offers its strong support for the Regulatory Reform Act of 1981, S. 1080, and applauds the efforts of Chairman Laxalt and the Subcommittee for their commitment to changing the direction of administrative rulemaking in this country today.

S. 1080 is wholly consistent with the President's four-part economic recovery program. NAW strongly supports all four components:

- o responsible budgetary policy to restrain federal spending and reduce deficits;
- o tax reductions, including accelerated depreciation for business and multiyear individual reductions to encourage savings and investment;
- o regulatory reform to redirect finite resources toward increased productivity and economic opportunity; and
- o stable monetary policy to reduce inflation, restore certainty, and curb interest rates.

The Benefits of S. 1080

The purpose of S. 1080 is to provide new direction to regulations by revamping the Administrative Procedure Act. NAW strongly favors this approach for two reasons. First, it addresses in a comprehensive and constructive manner the very criteria and guidelines by which regulators proceed with rulemaking. Second, it avoids the political controversy surrounding as yet unresolved issues such as legislative veto. Enactment of S. 1080 must not be hampered by complicated ancillary issues. NAW believes this bill offers the hope for substantial relief from overregulation.

1. Comprehensive Guidelines for Regulators:

   Sections 2 and 3 provide improved criteria for all phases of rulemaking and consideration. Cost-benefit analysis, consideration of alternative means for compliance, the "major rule" test and cross examination for factual clarification provide new direction and emphasis to the regulatory process.

2. Regulatory Review:

   This provision ensures the elimination of outmoded or unnecessary rules and encourages greater use of sunsetting.

3. Judicial Review:

   While this provision has certain merit, it also has risks associated with it. The Subcommittee and the Congress must proceed with caution in refining such a provision for inclusion in the final version of S. 1080. It could limit congressional and presidential authority over regulatory matters while inviting excessive and costly litigation.

4. Venue Provisions:

   The scramble by petitioners to a favorably disposed court can undermine the regulatory process. The random selection of a court during consecutive or numerous filings prevents this abuse and minimizes agency logistical problems.

5. Regulatory Calenders:

This is a highly useful provision and will be of particular benefit to smaller and medium sized companies lacking a Washington presence. It also establishes an important degree of openness which should characterize a fair regulatory process.

Flexibility Needed in Developing and Refining S. 1080

S. 1080 has made a vital contribution to the development of substantive, effective regulatory reform. However, careful consideration must be given to providing the Administration with the needed flexibility to accomplish its regulatory reform objectives. Issues such as judicial review and OMB waiver authority, as included in Executive Order 12291, must be resolved in close consultation with the Task Force on Regulatory Relief.

NAW urges the Subcommittee to move in this direction as quickly as possible to provide for the expeditious enactment of S. 1080.

The National Association of Wholesaler-Distributors (NAW) appreciates this occasion to comment on the Regulatory Reform Act of 1981, S. 1080. As evidenced by its broad bipartisan cosponsorship, this legislation represents an unprecedented opportunity to enact meaningful regulatory reform during the 97th Congress.

Consistent with President Reagan's program for economic recovery, S. 1080 brings the force of law to many of the reform concepts embodied in Executive Order 12291. It also has the added advantage of extending these important concepts to the independent agencies not subject to the provisions of the President's Executive Order on Federal Regulation.

NAW offers its strong support for S. 1080 and applauds the efforts of Chairman Laxalt and this Subcommittee for their commitment to changing the direction of regulation and administrative rulemaking in this country today. We urge your prompt action on this legislation.

NAW and the Wholesale Distribution Industry

The Association is a federation comprised of 119 national commodity-line trade associations (see Appendix I for complete listing), with an aggregate membership of 45,000 merchant wholesaler-distributors nationwide. NAW serves as the national voice of the wholesale distribution industry, a crucial sector of the American economy responsible for the dissemination of a primary share of the goods and commodities sold in U.S. markets today.

The Department of Commerce estimates sales in excess of $1 trillion for the industry in 1981. NAW members account for approximately 60 percent of that volume. Wholesaler-distributors provide stable employment to over 5¼ million Americans at some 300,000+ places of business throughout the country.

Despite impressive statistics, the industry is preponderantly comprised of small-to-medium sized businesses. The average NAW member has an annual sales volume of $5 million and employs ten or fewer employees.

The commodity lines represented in the NAW federation distribute every conceivable product from industrial chemicals to children's toys. Most are impacted - directly or indirectly - by regulations emanating from the independent and Executive branch agencies of the federal government.

The Need for Regulatory Reform

The costs to industry and society resulting from overregulation are well documented. Numerous studies have concluded that a fundamental rethinking of regulatory methods and objectives is a requisite to economic revitalization, and there appears to be a strong consensus on this within the Congress.

Historians would not be wrong in dubbing the 1970s the "Era of Regulation." During that decade, regulations swept over American industry like a tidal wave. From consumer issues to workplace safety, the era was clearly characterized by aggressive and, in many cases, inflexible regulation. While much of this regulation was well-intentioned, costs frequently outweighed benefits as regulators sought to implement the will of Congress in a multitude of complex areas.

Though it is difficult to put a price tag on this era, it has taken its economic toll in a variety of ways. Overregulation has doubtlessly contributed to inflation, unemployment, declining productivity, America's inability to compete, and a myriad of other serious economic problems confronting the nation.

President Reagan recognized the inseparability of overregulation from the country's economic quagmire when he set about developing the foundations of his comprehensive program for economic

recovery. NAW strongly supports all of these foundations and is working hard toward their enactment and implementation:

- o responsible budgetary policy to restrain federal spending and reduce deficits;
- o tax reductions, including accelerated depreciation for business and multiyear individual reductions to encourage savings and investment;
- o regulatory reform to redirect finite resources toward increased productivity and economic opportunity; and
- o stable monetary policy to reduce inflation, restore certainty, and curb interest rates.

General Observations

Impressive progress has already been made by the Administration in fulfilling its promise to reform and restrain the government's unwieldy regulatory apparatus. The 60-day regulatory freeze, the early establishment of the Task Force on Regulatory Relief and the promulgation of Executive Order 12291 are strong indications of the President's sincere commitment to regulatory reform.

The Office of Management and Budget (OMB) and the Task Force have already begun the arduous task of subjecting literally hundreds of pending regulations to the provisions of the President's Executive Order on Federal Regulation. Several rules, failing these tests, have already been indefinitely deferred or rescinded, while others are pending further review. NAW is coordinating comments on unnecessary and excessive regulations that have impacted the commodity lines represented by member associations for input to the Task Force.

Although it will take the Task Force considerable time to review the countless regulations pending from the previous Administration, Executive Order 12291 has already had a significant impact on the pace of prospective rulemaking. The measured reduction in regulatory activity can only be attributed to the comprehensive redirection in regulatory philosophy contained in the Executive Order. This redirection has been strongly reinforced through the President's appointment of key Cabinet members whose views on regulatory matters parallel his own. With a strong top level mandate for regulatory reform coming from the White House and

the Executive agencies, NAW believes the Administration is off to an excellent start in realizing this crucial component of economic recovery.

The Benefits of S. 1080

This legislation is not an omnibus regulatory reform bill, nor is it intended to be one. Its purpose is to provide new direction to regulators by revamping the Administrative Procedure Act. NAW strongly favors this approach to regulatory reform for two reasons. First, it addresses in a constructive and comprehensive manner the very criteria and guidelines by which regulators proceed with rulemaking. Second, it avoids the political controversy surrounding issues like legislative veto. Enactment of this important legislation will not be hampered or bogged down by complex and, as yet, unresolved issues. This is not to discount the utility of legislative veto; it may indeed have an important role in the congressional arsenal to fight excessive regulation. However, expeditious enactment of S. 1080 is within our reach and that opportunity should not be passed up or complicated by other difficult issues. The Regulatory Reform Act has far too many attributes to be sacrificed for "not being tough enough."

1. Comprehensive Guidelines for Regulators:
   Sections 2 and 3 of S. 1080 provide comprehensive, much improved criteria with which regulators must comply during all phases of the rulemaking process. Cost-benefit analysis, consideration of alternative means for compliance, the "major rule" test, and cross examination for factual clarification provide new direction and emphasis to the regulatory process.
2. Regulatory Review:
   Section 4 of the legislation requires agencies to publish a regulatory review schedule and to review agency rules within a ten-year period. Agencies then review

existing rules under the same principles set forth in Sections 2 and 3 for the development of new rules, providing ample opportunity for public comment. This provision will ensure the elimination of obsolete rules and a continuing assessment of an agency's regulatory effectiveness. This periodic review provision will encourage greater use of the sunsetting concept and enhance policy makers' understanding of the macroeconomic effects of regulation.

3. Judicial Review:

Section 5 of S. 1080 provides for judicial review of agency rules. While this principle does have certain merit, there are downside risks to its inclusion in this legislation. It could have the effect of limiting congressional and presidential power over regulatory matters while inviting excessive and costly litigation. Courts have consistently rejected the notion of " doing Congress' job," and this provision would encourage considerably more of that activity. In addition, judges are not necessarily the best arbiters of difficult and technical regulatory matters. Because of the untested nature of the judicial review concept, the Subcommittee and the Congress must proceed with extreme caution in developing and refining such a provision for inclusion in the final version of S. 1080.

4. Venue Provisions:

Section 6 of the bill offers a sensible solution to the "race to the courthouse" syndrome. The scramble by petitioners to a favorably disposed court has the effect of undermining the regulatory process. The random selection of a court during consecutive or numerous filings prevents this abuse and minimizes agency logistical problems.

5. Regulatory Agendas and Calendars:

Section 7 of S. 1080 requires agencies to publish semi-annual agendas of subsequent annual regulatory activities.

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This section is designed to forewarn affected parties of upcoming regulatory actions, providing them with all relevant information. This is a highly useful provision and will be of particular relevance to smaller and medium sized companies lacking a Washington presence. Section 7 also establishes an important new degree of openness which should characterize a fair regulatory process.

6. Effective Date of S. 1080:

The effective dates included in this legislation reflect the urgency and need for various of its provisions. Regulatory review, venue and regulatory agenda provisions are of immediate benefit and utility and should be implemented expeditiously. The comprehensive guidelines for regulators included in Sections 2 and 3 of the bill have already been applied through Executive Order 12291, but should be extended by S. 1080 to the independent agencies in as timely a fashion as possible. The provision for judicial review is better left deferred until January 1, 1983 in light of its potential pitfalls. This will assist the Administration in accomplishing much of the residual regulatory review without the potential for drawn out litigation. This provision should be developed in careful consultation with the Administration as it can have the effect of undermining current regulatory reform efforts.

Flexibility Needed in Developing and Refining S. 1080

S. 1080 has made a vital contribution to the development of substantive, effective regulatory reform. However, careful consideration must be given to providing the Administration with the needed flexibility to get the job done. Issues such as judicial review and OMB waiver authority, as included in Executive Order 12291, must be refined in close consultation with the Task Force on Regulatory Relief.

NAW remains confident that with the existing close relationship between this Subcommittee and the Task Force, these issues

can be resolved without sacrificing the flexibility required to develop a mature and effective program of regulatory reform. We urge the Subcommittee to move in this direction as quickly as possible to provide for the expeditious enactment of S. 1080. This bill represents the critical first step which Congress must take on this difficult issue and NAW offers its full support.

APPENDIX I

National Wholesaler-Distributor Organizations
Affiliated with the National Association of Wholesaler-Distributors

Air-conditioning & Refrigeration Wholesalers
American Dental Trade Association
American Jewelry Distributors Association
American Machine Tool Distributors' Association
American Supply Association
American Surgical Trade Association
American Traffic Services Association
American Veterinary Distributors Association
Appliance Parts Distributors Association, Inc.
Associated Equipment Distributors
Association of Footwear Distributors
Association of Steel Distributors
Automotive Service Industry Association
Aviation Distributors & Manufacturers Association

Bearing Specialists Association
Beauty & Barber Supply Institute, Inc.
Bicycle Wholesale Distributors Association, Inc.
Biscuit & Cracker Distributors Association

Ceramic Tile Distributors Association
Ceramics Distributors of America
Cooperative Food Distributors of America
Copper & Brass Servicenter Association
Council for Periodical Distributors Association
Council of Wholesale-Distributors
  American Institute of Kitchen Dealers

Distributors Council, Inc.
Door & Hardware Institute
Drug Wholesalers Association

Electrical-Electronics Materials Distributors Assn.
Explosive Distributors Association, Inc.

Farm Equipment Wholesalers Association
Flat Glass Marketing Association
Fluid Power Distributors Association, Inc.
Food Industries Suppliers Association
Foodservice Equipment Distributors Association
Foodservice Organization of Distributors

General Merchandise Distributors Council

Hobby Industry Association

International Ceramic Association
The Irrigation Association
Institutional & Service Textile Distributors Association, Inc.

Laundry & Cleaners Allied Trades Association

Machinery Dealers National Association
Mass Merchandising Distributors Association
Material Handling Equipment Distribution Association
Monument Builders of North America-Wholesale Div.
Motorcycle Industry Council
Music Distributors Association

National-American Wholesale Grocers' Association
National Appliance Parts Suppliers Association
National Association of Aluminum Distributors
National Association of Brick Distributors
National Association of Chemical Distributors
National Association of Container Distributors
National Association of Decorative Fabric Distributors
National Association of Electrical Distributors
National Association of Fire Equipment Distributors
National Association of Floor Covering Distributors
National Association of Manufacturing Opticians
National Association of Marine Services, Inc.
National Association of Meat Purveyors
National Association of Plastics Distributors
National Association of Recording Merchandisers, Inc.
National Association of Service Merchandising
National Association of Sporting Goods Wholesalers
National Association of Textile & Apparel Distributors
National Association of Tobacco Distributors
National Association of Writing Instrument Distributors
National Beer Wholesalers Association
National Building Material Distributors Association
National Business Forms Association
National Candy Wholesalers Association
National Commercial Refrigeration Sales Association
National Electronic Distributors Association
National Fastener Distributors Association
National Food Distributors Association
National Frozen Food Association
National Independent Bank Equipment Suppliers Assn.
National Industrial Belting Association
National Industrial Glove Distributors Association
National Lawn & Garden Distributors Association
National Locksmiths' Suppliers Association
National Marine Distributors Association
National Paint Distributors, Inc.
National Paper Trade Association, Inc.
National Plastercraft Association
National Sash & Door Jobbers Association
National School Supply & Equipment Association
National & Southern Industrial Distributors Associations
National Spa and Pool Institute
National Truck Equipment Association
National Welding Supply Association
National Wheel & Rim Association
National Wholesale Druggists' Association
National Wholesale Furniture Association
National Wholesale Hardware Association
Northamerican Heating & Airconditioning Wholesalers
North American Wholesale Lumber Association, Inc.

Optical Laboratories Association

Pet Industry Distributors Association
Petroleum Equipment Institute
Power Transmission Distributors Association, Inc.

Safety Equipment Distributors Association, Inc.
Scaffold Industry Association
Shoe Service Institute of America
Specialty Tools & Fasteners Distributors Association
Steel Service Center Institute

Toy Wholesalers' Association of America

United Pesticide Formulators & Distributors Association

Wallcovering Distributors Association
Warehouse Distributors Association for
  Leisure & Mobile Products
Watch Materials & Jewelry Distributors Association
Water and Sewer Distributors Association
Wholesale Florists & Florist Suppliers of America
Wholesale Stationers' Association
Wine & Spirits Wholesalers of America, Inc.
Wood Heating Alliance
Woodworking Machinery Distributors Association

STATEMENT OF MARK D. COWAN
SPECIAL ASSISTANT FOR REGULATORY AFFAIRS
AND DIRECTOR OF POLICY
OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION
U.S. DEPARTMENT OF LABOR
TO THE SUBCOMMITTEE ON
REGULATORY REFORM
OF THE SENATE COMMITTEE ON THE JUDICIARY

May 13, 1981

Mr. Chairman and Members of the Subcommittee:

I appreciate this opportunity to discuss our mutual concern that government regulation be less omnipresent, less oppressive, and at the same time, more efficient and cost-effective. In this context, I would like to describe recent steps taken by the Occupational Safety and Health Administration (OSHA) in the area of regulatory reform and to comment briefly on S. 1080, the regulatory reform bill introduced by Chairman Laxalt.

In response to President Reagan's Executive Order 12291 on Federal Regulation, OSHA began in February to examine carefully various regulations, particular those promulgated in January, 1981. The Order directs all federal agencies to review existing and future regulations in order to choose, to the extent permitted by law, the regulatory alternatives having the greatest net benefit to society. As one basis for such choices, agencies are required to scrutinize their regulations in the light of benefit-cost analysis.

In the past three months, OSHA has initiated review of six agency regulations -- standards for cotton dust, lead, hearing conservation, electrical safety, a proposed standard for labeling and a rule for walkaround pay. Of these regulations, five were the object of federal rulemaking action on January 16th to 19th, and the seventh -- the cotton dust standard -- was the subject of oral arguments presented by the government before the Supreme Court on January 21, 1981. Thus, we have begun our efforts at regulatory relief with the rules most recently promulgated. Of the OSHA standards under review, only two -- the standards for cotton dust and lead -- were in effect prior to January 20, 1981, and they remain in effect during their reassessment, except as previously stayed by court order or administrative action.

Our primary purpose in reviewing the standards for worker exposure to cotton dust and lead is to evaluate the feasibility and utility of relying on cost-benefit analysis in setting occupational health standards. In all cases, however, OSHA will also take into account the requirements of the June, 1980, Supreme Court benzene-standard ruling that the agency must demonstrate (a) that the hazard being addressed poses a substantial risk to workers and (b) that the standard under review will reduce that risk.

These two standards have been chosen as a testing ground, not to determine whether cost-benefit analysis is a useful tool in itself -- we know that it is -- but to determine the extent and manner in which it can be usefully applied to rulemaking where health is concerned. As you are aware, Mr. Chairman, the application of cost-benefit analysis to workplace health has drawn considerable criticism. We are confident, however, that OSHA's experience with these two standards will do much to dispel the antipathy to, and misunderstanding of, this approach and make it possible for business, labor and government to address workplace safety and health problems in the objective, non-adversary spirit necessary for their effective resolution.

In addition to the benefit-cost issue, it is worth noting that there are significant problems in defending and enforcing both standards chosen for the test. I do not say that we will succeed in issuing health standards that are problem-free, but by subjecting these particular standards to further rulemaking that will include benefit-cost analysis, we hope to resolve some of the more flagrant problems. Certainly it is essential that we try.

We believe the Committee can profit from OSHA's experience in applying benefit-cost techniques to regulations affecting human health. What is learned in the process might well be helpful in shaping the provisions for benefit-cost analysis in regulatory reform legislation before this Committee.

It is important to point out that, in any case, flexibility is critical to the success of new institutional

approaches to problems. In this regard, it is our belief that the stipulations for benefit-cost analysis in S. 1080 might slow down present deregulatory efforts; they certainly would prove costly. The proposed legislation lacks the built-in flexibility of Executive Order 12291 which grants the Office of Management and Budget the discretion to waive requirements for regulatory analysis in the interests of regulatory relief.

It is enlightening to note that ninety percent of OSHA's regulations were adopted without rulemaking in the first six months of the effective date of the agency's enabling statute; many of these regulations need to be simplified, or in some cases eliminated altogether. For example, some of the rules for walking-working surfaces (29 CFR, Part 1910, Subpart D), which apply across the gamut of industry for all walking-working surfaces, ladders, stairways, elevated working platforms and such, may be out of date and excessively specific. If the agency had to demonstrate over the wide range of industries affected an absolute net benefit for every contemplated change in these rules, the deregulatory process would, in and of itself, be so lengthy and expensive as to prove cost-ineffective. The expense associated solely with data-gathering could reach well beyond a quarter of a million dollars for this particular deregulatory effort.

The estimated cost of benefit-cost analysis ranges typically from $50,000 to $250,000. We believe that such studies when applied to the health field will be considerably greater. For example, without beginning to satisfy the rigorous requirements of S. 1080, $750,000 has been spent to date on studies of the costs and health effects of OSHA's alternative noise standards.

That is not to say that these expenditures are unwarranted. As a matter of public information, we believe that we must be as explicit as possible about the costs and benefits associated with regulations, including those in the health and safety field. But in some instances, where the objective is to simplify and eliminate existing regulations, a rigid statutory requirement for detailed cost-benefit analyses could prove counter-productive.

The remaining provisions of S. 1080, with two exceptions, have our endorsement. The provisions for so-called hybrid rulemaking, sunset review, and venue of cases seem to us, in general, to effect genuine and needed improvements in government regulation. We are concerned, however, about the changes proposed in judicial review and the provision restricting the use of outside contractors in the preparation of cost-benefit analyses.

In our judgment, section 5 of the bill, by altering the present presumption by the courts of the validity of an agency's interpretation of its enabling statute, would impose additional and unnecessary burdens on the courts in reviewing administrative actions. In commenting on the vast increase in the burden on the judiciary over the past two decades, Chief Justice Burger noted that "there are valid questions as to whether justices can give proposed rules the kind of close study needed.... But," the Chief Justice added, "one thing is as sure as next year's tax bill: Congress must stop adding burdens or it must create an additional appellate court."

It seems to us that section 5 of S. 1080 would be particularly troublesome in regard to issues raised before the courts concerning procedural regularity of administrative proceedings, interpretations of technical or scientific provisions of the agency's own rules, as well as the interpretation of the agency's enabling legislation, as for example in challenges under sections 6(b)(5) and (7) of the Occupational Safety and Health Act of 1970. It seems reasonable in such instances to give some weight to the agency's practical experience in administering the statute.

Finally, OSHA is concerned about section 3(e)(3) of S. 1080, which would restrict outside contractors solely to gathering data when preparing benefit-cost regulatory analyses. The agency has no objection to the requirement in subparagraph (3) that all such outside assistance be specifically identified and that contract terms be fully disclosed. We agree as well that contractors should not bear final responsibility for an agency's regulatory policies, and we would have no difficulty in complying with a requirement

that final decisions, such as selections among alternative actions or determinations of the range of alternative actions, should be the sole responsibility of officers and full-time employees of the agency.

We are troubled, however, by the distinction the bill makes between the gathering and analysis of data. It would be virtually impossible, in our judgment, to discriminate between data-gathering and data-analysis as such. After all, some analysis is required merely to determine what information would be useful and how best to collect and present it.

At present, OSHA routinely uses analyses of data prepared by outside experts as part of the public-comment process inherent in rulemaking; in the past, the agency has also sought outside expert technical assistance in developing standards, particularly in preparing regulatory impact analyses. It should be pointed out that section 3(e)(3) of S. 1080 would allow an agency to continue to use such outside expert analyses as may be volunteered as public comment, but would prohibit the agency from seeking the same type of information to meet a specific need.

In conclusion, let me say that in addition to reviewing regulations in the light of benefit-cost analysis, OSHA's present efforts at regulatory reform include the following:

- vigorous pursuit of a balance among assistance and enforcement programs available under the Occupational Safety and Health Act,

- more efficient allocation of limited agency resources, particularly in targeting inspections to the individual workplaces with the poorest safety records and the greatest potential health hazards,

- a concerted move to dispel the adversary spirit that has prevailed in the OSHA program in the past, and

- an application of results-oriented management techniques to assure that agency policy objectives are implemented efficiently.

We hope this brief account of OSHA's current regulatory review will help the Subcommittee and its distinguished Chairman in their efforts to address the problem of runaway government regulation -- efforts we wholeheartedly endorse. OSHA has perhaps been a symbol of all that is felt to be burdensome in government regulation -- a dubious distinction which we will be happy to relinquish at the earliest opportunity. The agency therefore takes very seriously the task of regulatory relief, which, together with tax cuts, budget reductions and monetary restraint, form the cornerstones of President Reagan's overall economic program.

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August 10, 1981

Honorable Paul Laxalt
Chairman
Subcommittee on Regulatory Reform
Senate Judiciary Committee
United States Senate
Washington, D. C. 20510

Dear Mr. Chairman:

At your and Senator Bumpers' request, I have reviewed with great interest S. 1080. You have also asked that I give you my views on its provisions. I am happy to do so.

I would like to voice my strong support for the amendments to the judicial review provisions of the Administrative Procedure Act contained in S. 1080, particularly the amendments to § 706. These amendments, which were first proposed by Senator Bumpers, for the most part codify what, in my opinion, has always been the proper approach to effective judicial review of agency rulemaking. For years, a rule of strict construction was followed by the courts. While there has been a trend in the opposite direction in recent years, it is time we returned to Jeffersonian principles. Thus, the requirement that reviewing courts hold agencies to the confines of their statutory authority is nothing new. There is likewise nothing radical in the amendment's requiring "substantial support" for agency factual determinations in informal rulemaking. This simply recognizes the prevailing judicial view that without such underpinnings the agency decision would be arbitrary and capricious.

The one clear change made by the Bumpers' Amendment relates to the weight to be given agency positions on questions of law other than jurisdiction. There has recently been a trend in the courts, including the Supreme Court, to defer rather

blindly to agency legal interpretations so long as they are not "clearly unreasonable". That deference, or presumption of validity as it is often called, is unfair to our citizens and demeaning to our courts. Certainly the courts should not substitute their judgment for that of an agency where policy determinations or questions of fact are involved, particularly those within the agency's expertise. But I see no reason why the courts should defer to agency legal interpretations. For them to do so not only results in abdication of their traditional constitutional role as "final arbiters of law", it also tips the scales of justice in favor of the government. It is unconscionable to argue that the government with its vast resources needs a special handicap to protect it from challenges to the legality of its regulations in its courts by its citizens. We should not give the people the right of judicial review with one hand, and then take most of it away with the other through the heavy burden imposed on them by this presumption of validity. For these reasons, I think the Bumper's Amendment effect of generally placing the agencies and those challenging their statutory interpretations on even footing before the court is necessary and overdue.

Finally, I would also like to voice my support for your amended § 702(c). This permits our citizens to challenge agency regulations in the circuit in which they reside or in which their principal place of business is located. I see no reason to compel our citizens to go to Washington for justice as some dozen or so statutes now provide. The judges on all of our circuit courts are competent and so the only valid reason offered for conferring exclusive jurisdiction on the Court of Appeals for District of Columbia is the convenience of the government. I do not believe that is a sufficient reason. It not only overburdens that particular court but, more important, it overburdens our people.

Sincerely yours,

Griffin B. Bell

GBB:fc

Congressional Research Service
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SURVEY OF UNITED STATES CODE PROVISIONS CONTAINING REQUIREMENTS FOR COST-BENEFIT, ECONOMIC IMPACT, OR COST EFFECTIVENESS ANALYSIS

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and

Thomas P. Carr
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American Law Division
April 27, 1981

INTRODUCTION

Purpose

The notion of cost-benefit analysis is becoming increasingly attractive to proponents of regulatory reform. In the most general terms, cost-benefit analysis calls for a monetary quantification and comparison of all the costs and benefits which will ensue from a given rule or regulation.

In many respects, cost-benefit analysis is an economic term of art. To an economist, it may suggest sophisticated and complicated methodologies to assess the future or past efficacy of the action to which it is applied. But the term, as it has been used legislatively, is not precise, nor does it have a generic meaning or purpose.

Nonetheless, Congress has frequently required Federal agencies and officials to anticipate, before the fact, or measure, after the fact, the impact of an individual decision or regulatory scheme. In this survey, we examine over two hundred instances where Congress, in legislation, has incorporated requirements for some form of cost-benefit analysis, economic analysis, or cost effectiveness study.

We have organized this survey to help the reader better assess

- the types of legislation into which these requirements have been inserted;
- in various legislative contexts, the precise nature of the requirement imposed: cost-benefit, cost effectiveness or economic impact analysis;
- the various reasons these requirements were imposed: to clarify the intent of Congress, to modify rule-making procedures, to guarantee their inclusion in some study or report, or to mandate that decisions made in pursuit of some specific legislative purpose be based, at least in part, on the outcome of such analyses.

Methodology

In essence, the goal of this survey is to identify, with the greatest accuracy possible, those instances where Congress has mandated that costs or economic consequences be considered in conjunction with another action.

The term "cost-benefit analysis" implies that the benefits of the action are compared directly to the costs, while "economic impact analysis" suggests that the economic consequences of an act be deliberately considered, without necessarily weighing the merits, which may be predetermined or implicit. "Cost effectiveness" requires determining which of any given alternatives can most efficiently, economically or effectively be employed to achieve a previously determined goal.

To some extent, all of these terms simply signify the process of exercising judgment in determining how best to allocate limited resources. Indeed, Congress rarely grants mandates to government officials to act without any regard for economic consequences. Thus, for the purposes of this survey, it has been necessary to limit the scope of the provisions examined.

With the assistance of the JURIS computer system's text searching capability, we have scanned the entire United States Code (through Pub. L. 96-372) to identify every sentence in which the words "cost" and "benefit"; "economic" or "economy" and "impact"; and "cost effective" appear. Provisions which contained these terms were the primary focus of our survey.

Some provisions identified by JURIS were clearly not relevant to our present task. Hence, we have omitted them from the survey. In addition, we have not examined provisions containing legislative terms that are conceptually but only indirectly related to the notion of cost benefit analysis — such as "economically reasonable" or "economically justified."

As the survey material demonstrates, while the actual terms are used frequently in law making, the manner in which they are employed, and the ends to which they are directed defy facile categorization. Because of the unique nature of so many of the entries, we feel that the most useful way to present the material, after indexing them into proximate topical categories, is to paraphrase or quote the actual statutory language and provide either a public law or United States Code citation — so that the reader may examine any entry in greater detail, if desired.

How to Use this Survey

Each entry is comprised of three parts: a title, which is self-explanatory; a summary, which briefly notes the context of the statutory provision, and the obligation, which describes in specific language the analytical requirement imposed.

All of the entries have been sorted according to rough areas of substantive law, and divided into sections based thereon. Each entry is also listed in an index which appears at the beginning of the survey. In the index, we have identified each entry, given it a code to summarize the requirement imposed, and the process to which the obligation applies.

Analysis Required:

... "CB" stands for cost-benefit

... "EI" stands for economic impact

... "CEF" stands for cost effectiveness

Obligation:

... "R" indicates that the analysis is a component of of rulemaking;

... "A" indicates that the analysis is a component of a more limited administrative decision or action;

... "S" indicates that the analysis must be included in study, a report to Congress, a report to a Federal entity or to the States;

... "P" indicates that the term appears in a Congressional declaration of purpose or statement of policy.

Interpreting this Survey

The survey involved a review of all the statutes which appear in the U.S. Code, including those which may no longer have legal significance. It does not, however,

include the provisions of Executive Orders, many of which have addressed economic impact analysis, and more recently cost-benefit analysis.

Given these constraints, one must be cautious in determining how to use this survey. The index and summary charts are designed to give the reader a quick idea of the extent and manner in which these analytic requirements have been imposed -- as it appears in the Code. But in many instances, the decision whether to include or omit a provision, or how to classify it, was difficult and ultimately subjective. In some instances, statutes that contain references to cost benefit, economic impact and/or cost effectiveness have been noted more than once; in other cases, duplicative provisions have been excised. Finally, some, but by no means all, appropriations measures are noted.

Hence, while the scope of this survey is truly exhaustive, no numerical representations herein should be construed as absolute.

SECTION I

NATURAL RESOURCES, LAND USE AND CONSERVATION

Number	Item	Requirement	Obligation
I.1	Sets regulations for the national shellfish safety program	CB/EI	R
I.2	Requires study of Sacramento River water projects	CB	R
I.3	Acquisition of lands in Redwood National Park	CB	A
I.4	Establishes admission fees for units of the National Park System	CB	A
I.5	Management plan for the Upper Delaware River	CB	A
I.6	Encourages development of non-industrial private forest lands	CB	A
I.7	Establishes guidelines for preparation of a Renewable Resource Program	CB	A
I.8	Sets guidelines for development of a land and resource management plan for the National Forest System	CB	A
I.9	Elimination of backlogs for forest restoration	CB	A
I.10	Authorizes the Secretary of Agriculture to make payments to assure access to wetlands by the general public	CB	A
I.11	Sets conditions for non-Federal activities relating to recreation and fish and wildlife enhancement at public water projects	CB	A

NATURAL RESOURCES, LAND USE AND CONSERVATION

Number	Item	Requirement	Obligation
I.12	Establishes guidelines for establishing wetlands areas	CB	A
I.13	Provides for contributions by the Secretary of the Interior to Pennsylvania, for sealing abandoned coal mines, and control of drainage	CB	A
I.14	Authorizes the Secretary of Agriculture to furnish financial assistance to promote conservation and development of soil and water resources of unreclaimed mined lands	CB	A
I.15	Sets interim standards for issuance of licenses and permits for exploration and recovery of hard mineral resources in the deep seabed	CB	A
I.16	Enhancement of anadromous and Great Lakes fisheries	CB	A
I.17	Sets policies for the management of oil and natural gas in the Outer Continental Shelf with respect to drilling platforms	CB	A
I.18	Authorizes fincancial assistance to agricultural producers for carrying out conservation and environmental enhancement measures	CB	A
I.19	Mandates development of a national soil and water conservation program	CB	A
I.20	Revises standards for specifying areas as critical habitats for endangered species	CB/EI	A
I.21	Permits the Secretary of the Interior to specify whether areas within Federal lands are unsuitable for mining of minerals or materials other than coal	CB/EI	A
I.22	Specifies procedures for withdrawal of public lands	EI	A
I.23	Establishes a procedure for designating areas unsuitable for surface coal mining	EI	A
I.24	Establishes Redwood National Park	EI	A
I.25	Outlines a program of multiple usage and sustained yield of renewable natural resources in the King Range National Conservation Area	EI	A
I.26	Authorizes the Secretary of Agriculture to collect information on status of soil, water and related resources	CB	S
I.27	Requires evaluation of the soil and water resource conservation programs	CB	S
I.28	Revises bidding and lease administration provisions of the Outer Continental Lands Act	CB	S
I.29	Establishes the Santa Monica Mountains National Recreation Area	CB	S

NATURAL RESOURCES, LAND USE AND CONSERVATION

Number	Item	Requirement	Obligation
I.30	Outlines duties of the President with respect to formation of long-range goals relating to marine science activies	CB	S
I.31	Discusses wildlife conservation measures relating to the impoundment, diversion or control of waters	CB	S
I.32	Requires annual evaluation reports of Forest Service activities	CB	S
I.33	Sets procedures for formulation of regional or river basin plans, and Federal water and related land resources projects	CB	S
I.34	Requires study of the depletion of natural resources in the High Plains Region	CB	S
I.35	Requires annual report on the administration of the coastal zone management program	EI	S
I.36	Outlines plans to encourage the conservation development and utilization of water and related land resources	CB	P
I.37	Expresses the intent of Congress with respect to the management of Forest and Rangeland Renewable Resource Planning	EI	P

SECTION II

THE ENVIRONMENT

Number	Item	Requirement	Obligation
II.1	Sets procedures for establishing effluent limitations	CB	R
II.2	Sets administrative procedures by which EPA may cancel or change the registration of a registered pesticide	EI	R
II.3	Requires the Administrator of EPA to publish guidelines specifying information required to support pesticide registration, and establishes standards for data requirements	EI	R
II.4	Sets requirements, under the Clean Air Act for the issuance of permits for construction of major emitting facilities in non-attainment areas	CB	A
II.5	Permits regulation of fuels and fuel additives by the Administrator of EPA	CB	A
II.6	Permits Federal cost-sharing with rural land owners and operators for installing and maintaining non-point source pollution controls	CB	A
II.7	Requires publishing of regulations that provide guidelines for effluent limitations, including determination of best conventional pollution control technology	CB	A

THE ENVIRONMENT

Number	Item	Requirement	Obligation
II.8	Permits the EPA Administrator to enter into contracts with public agencies for full-scale solid waste demonstration projects	CEF	A
II.9	Requires maintanence of performance and cost-effectiveness records for various methods of solid waste disposal	CEF	S
II.10	Establishes a national program for prevention, reduction and elimination of water pollution	CB	S
II.11	Requires submission of State reports on costs and benefits of achieving water pollution prevention and control objectives	CB	S
II.12	Requires the EPA Administrator to study sulfur-bearing engine emissions	CB	S
II.13	Directs the EPA Administrator to furnish information to the States on air pollution control technologies	CB	S
II.14	Directs the EPA Administrator to study emissions-control technology	CB	S
II.15	Requires the Federal Energy Administrator to study production of energy through burning solid waste	CB	S
II.16	Requires the EPA Administrator to study the economic impact on government of the installation of water treatment facilities	EI	S
II.17	Requires the EPA Administrator to study the economic impact of air quality standards on industries, communities and other contributing sources of pollution	EI	S
II.18	States purpose of Acid Precipitation Act	EI	P
II.19	Sets guidelines for rulemaking by EPA when revising pollution standards	EI	R
II.20	Sets emission standards for new motor vehicles and motor vehicle engines	EI	R
II.21	Sets specificiations for the selection of disposal sites for dredged or fill materials	EI	A
II.22	Requires publishing of information by EPA on processes and methods to reduce or control air pollution	EI	S
II.23	Requires agencies of the Federal government to comply with Federal, state and local water pollution regulations	CEF	A
II.24	Sets guidelines for cost-effectiveness analyses of treatment works	CEF	A
II.25	Establishes criteria for grants to certain water treatment works	CEF	A
II.26	Requires study of possible fuel economy improvement standards	CB	S

THE ENVIRONMENT

Number	Item	Requirement	Obligation
II.27	Requires EPA to study noise "pollution"	EI	S
II.28	Outlines state implementation plans for national primary and secondary ambient air quality standards	EI	S
II.29	Requires study of effects of ban on halocarbon use in aerosol containers	EI	S
II.30	Designates area classifications for the purpose of applying increments and ceilings for various pollutants	EI	S
II.31	Requires study of the impact of requiring that all light duty vehicles comply with air quality standards, regardless of the altitude at which they are sold	EI	S
II.32	Calls for comprehensive cost studies of air pollution control activities	EI	S

SECTION III

ENERGY

Number	Item	Requirement	Obligation
III.1	Establishes rulemaking procedures for the Department of Energy	EI	R
III.2	Establishes rulemaking procedures for the Federal Energy Administration	EI	R
III.3	Directs the Administrator of the Federal Energy Administration to undertake economic analyses of proposed regulatory actions	EI	R
III.4	Authorizes the Secretary of Housing and Urban Development to make grants to finance energy-conserving improvements for specified types of housing	CB	A
III.5	Directs the Secretary of Energy to engage in support activities necessary to develop energy performance standards for new buildings	CB	A
III.6	Requires State regulatory authorities to consider "time-of-day" rates in utility rate-making	CB/CEP	A
III.7	Provides a means for selecting systems for transport of Alaskan crude oil	CB	A
III.8	Establishes criteria for determining when to proceed from solar energy development programs to demonstration projects	CB	A
III.9	Sets national and state emergency energy conservation targets	EI	A

III.10	Provides for a standby motor fuel rationing plan	EI	A
III.11	Gives the President emergency authority to allocate coal during energy shortages	EI	A
III.12	Mandates a national survey to identify possible nuclear energy sites	EI	A
III.13	Calls for submission of President's energy conservation and rationing contingency plans	EI	A
III.14	Requires that Strategic Petroleum Reserve Plan include a program schedule	CEP	A
III.15	Calls for development of proposals to improve electric utility rate design	CEP	A
III.16	Authorizes the Administrator of the Federal Energy Administration to establish procedures and guidelines for State energy conservation programs, and to provide technical assistance	CEP	A
III.17	Requires cost benefit analysis of increased pipeline safety regulation	CB	S
III.18	Requires the Nuclear Regulatory Commission to clearly state goals regarding commercial nuclear power	CB	S
III.19	Creates the National Alcohol Fuels Commission	CB	S
III.20	Provides for demonstration projects to encourage the use of carpools	CB	S
III.21	Creates within the Department of Housing and Urban Development the Solar Energy and Energy Conservation Bank	CEP	S
III.22	Requires the Administrator of the Federal Energy Administration to study regenerative brating systems	CEP	S
III.23	Authorizes Federal officials to submit written comments respecting recommendations for alternative methods of transporting Alaskan natural gas	EI	S
III.24	Requires study of the practicability of establishing fuel economy improvement standards	EI	S
III.25	Provides for assessment of water resource requirements for non-nuclear energy projects	EI	S
III.26	Calls for the Secretary of HUD to prepare a residential energy efficiency standards study	EI	S
III.27	Sets standards and procedures for oil pricing policy	EI	S
III.28	Mandates collection of information, by Administrator of the Federal Energy Administration, concerning energy resources on Federal lands	EI	S
III.29	Requires the Federal Energy Administrator to study petrochemical supplies	EI	S
III.30	Provides for research, development and demonstration programs in the area of ocean thermal energy conversion systems	EI	S

ENERGY

Number	Item	Requirement	Obligation
III.31	Establishes guidelines for carrying out regional energy related demonstration projects	CB	P
III.32	Authorizes appropriations for the Department of Energy	CB	P
III.33	Outlines policies and procedures for the Appalachian Regional Development Program with respect to opportunities for expanded energy production	CB	P
III.34	States purpose of Renewable Energy Resources Act with respect to solar energy systems	CEF	P
III.35	Mandates study of the reliability of consumer electric utility service	CEF	S
III.36	Authorizes funds for the acquisition of solar photovoltaic energy systems by Federal agencies	CEF	A

SECTION IV

TRANSPORTATION

Number	Item	Requirement	Obligation
IV.1	Authorizes the Secretary of Transportation to promulgate bumper standards	CB	R
IV.2	Directs the Secretary of Transportation to establish a motor vehicle diagnostic inspection demonstration project	CB	A
IV.3	Requires States to evaluate highway safety improvement projects	CB	A
IV.4	Sets conditions for Federal assistance for local rail service	CB	A
IV.5	Establishes processes by which Secretary of Transportation determines whether a railroad application for facilities rehabilitation financing are "in the public interest"	CB	A
IV.6	Requires the Secretary of Transportation to develop preliminary recommendations for a route system for Amtrak	CB	A
IV.7	Directs the Secretary of Transportion and the National Railroad Passenger Corporation to develop a method for evaluating rail corridors	CEF/CB	A
IV.8	Directs the Secretary of Transportation to make preliminary recommendations for a basic national rail passenger system	CB	S
IV.9	Outlines duties of the United States Railway Association	CB	A

TRANSPORTATION

Number	Item	Requirement	Obligation
IV.10	Sets standards of approval for Federal financing of railroad rehabilitation and improvement	CB	A
IV.11	Outlines provisions to be met to issue a guarantee of obligations for the purpose of improving rail properties	CB	A
IV.12	Specifies procedures for submitting proposals to add or discontinue rail routes and services	EI	A
IV.13	Requires study of techniques to alleviate the impact of increased unit train traffic	CB	S
IV.14	Provides funds for the removal of roadside hazards out of the Highway Trust Fund	CB	S
IV.15	Directs the Secretary of Transportation to study how operating characteristics of motor vehicles affect operating costs	CB	S
IV.16	Outlines the administration of the Railroad Rehabilitation and Improvement Fund	CB	S
IV.17	Outlines duties of the National Railroad Passenger Corporation	CB	S
IV.18	Provides for a study of highway beautification programs	EI	S
IV.19	Establishes the Office of Rail Service Planning in the ICC	EI	S
IV.20	Sets criteria for use of right-of-way on any Federal highway for accomodating any utility facility	EI	A
IV.21	Requires study of the desirability of shore station systems for monitoring vessels	CEP	S
IV.22	Requires study of reduced rate transportation for persons 21 years of age or younger	EI	S
IV.23	Declares the policy of Congress with respect to vessels carrying certain bulk cargoes	CB	P

SECTION V

PUBLIC WORKS

Number	Item	Requirement	Obligation
V.1	Authorizes the Secretary of Agriculture to provide assistance to local organizations in preparing water control projects	CB	A
V.2	Outlines requirements for surveys, reports and preliminary examinations of proposed river and harbor improvements	CB	A

PUBLIC WORKS

Number	Item	Requirement	Obligation
V.3	Authorizes construction of small rivers and harbors projects	CB	A
V.4	Sets guidelines for development of water supplies	CB	A
V.5	Requires the development of a Master Plan for the Upper Mississippi River System	CB	A
V.6	Authorizes water quality improvement programs in the Colorado River basin	CB	A
V.7	Authorizes construction of parts of the Colorado River Storage Project	CB	A
V.8	Establishes the Pennsylvania Avenue Development Corporation, and sets planning guidelines	EI	A
V.9	Mandates studies of navigation projects which serve regional needs	EI	S
V.10	Declares policy of Congress with respect to navigation and flood control projects	CB	P
V.11	Sets policy with respect to flood control projects on navigable waters	CB	P
V.12	Requires International Joint Commission to study a dam at the outlet of Lake Erie	CB	S

SECTION VI

HEALTH, WELFARE AND PUBLIC SAFETY

Number	Item	Requirement	Obligation
VI.1	Discusses the manner in which the Secretary of Agriculture may provide assistance to school lunch programs	CB	A
VI.2	Authorizes grants for special projects in comprehensive long-term care for older Americans	CB	A/S
VI.3	Outlines procedures and guidelines for Health Systems Agencies	CB	A
VI.4	Authorizes grants for the acquisition of facilities for health and nutrition demonstration projects	CEF	A
VI.5	Incorporates requirements for cost-effectiveness studies into various activities of Health Systems Agencies	CEF	A
VI.6	Authorizes grants for special projects and demonstrations for recreational and vocational services, and for services to individuals with spinal cord injuries	CEF	A
VI.7	Establishes pilot treatment and rehabilitation programs for veterans with alcohol and drug problems	CEF	A

HEALTH, WELFARE AND PUBLIC SAFETY

Number	Item	Requirement	Obligation
VI.8	Requires review of all rules of CPSC in effect on November 10, 1978	CB/EI	S
VI.9	Requires the Secretary of Commerce to submit a report on master plans in fire prevention and control	CB	S
VI.10	Authorizes studies of the operation and management of fire services	CEP	S
VI.11	Mandates study of education impact aid	CB	S
VI.12	Requires establishment of programs for locating absent parents, establishing paternity, and obtaining child support, under AFDC	CB	S
VI.13	Requires program evaluation of Health Maintenance Organizations	EI	S
VI.14	Establishes National Center for Health Statistics	EI	S
VI.15	Establishes a National Commission on Digestive Diseases	EI	S
VI.16	Requires recommendations of an advisory panel when promulgating new mining safety and health standards	EI	S
VI.17	Requires studies of patients with end-stage renal disease who are not eligible for benefits under the Federal End-Stage Renal Disease Program	EI	S
VI.18	Requires the Secretary of HEW to study health care technologies	CEP	A

SECTION VII

COMMERCE AND ECONOMIC POLICY

Number	Item	Requirement	Obligation
VII.1	Sets requirements for regulatory analyses by the Federal Trade Commission	CB	R
VII.2	Outlines the authority of the Federal Trade Commission with regard to unfair and deceptive acts or practices	EI	R
VII.3	Requires analysis of electronic funds transfer systems and other technologies as they might be applied by financial institutions	EI/CB	R
VII.4	Requires the ICC to prescribe a uniform cost and revenue accounting and reporting system for common carriers by railroad	CEP	A
VII.5	Mandates study, by the Joint Committee on Taxation, of different kinds of tax incentives	CEP	S

COMMERCE AND ECONOMIC POLICY

Number	Item	Requirement	Obligation
VII.6	Establishes reporting requirements for the Chrysler Corporation Loan Guarantee Board	EI	S
VII.7	Directs the Comptroller General to study the emergency support program, designed to prevent a recession	EI	S
VII.8	Provides for payments to enable local governments to coordinate economic recovery efforts with the Federal government	EI	S
VII.9	Declares that for tax purposes National Banks shall be treated as banks existing under the laws of the state within which its principal office is located	EI	S
VII.10	Establishes formal hearing requirements under the Economic Stabilization Act of 1970	EI	S
VII.11	Requires study on the applicability of the McFadden Act	EI	S

SECTION VIII

TRADE

Number	Item	Requirement	Obligation
VIII.1	Requires the Secretary of Commerce to study suitable ocean routes and their costs of operation	CB	S
VIII.2	Sets out rules for the interpretation of U.S. tariffs	EI	S
VIII.3	Outlines the authority of the President to adjust tariffs with the advice of the International Trade Commission	EI	S
VIII.4	Outlines the role of the International Trade Commission in advising the President on duty modifications	EI	S
VIII.5	Mandates Presidential action after investigation in the area of import relief	EI	S
VIII.6	Sets procedures for relief from unfair trade practices	EI	S
VIII.7	Directs the President to study the effects on the U.S. economy of trade restrictions by developed countries, and of the waiver of certain provisions of the Buy America Act	EI	S
VIII.8	Provides authority to regulate exports	EI	S
VIII.9	Requires study of regional impacts of meat imports	EI	S

TRADE

Number	Item	Requirement	Obligation
VIII.10	Directs the Secretary of Commerce to monitor exports and contracts for exports	EI	S
VIII.11	Sets out general reporting requirements under the Export Administration Act	EI	S
VIII.12	Declares U.S. policy toward export controls	EI	P

SECTION IX

GOVERNMENT ORGANIZATION AND OPERATIONS

Number	Item	Requirement	Obligation
IX.1	Requires, under Regulatory Flexibility Act, analysis of impact of proposed regulation on small entities	EI	R
IX.2	Sets procedures for disposal of surplus government property	EI	A
IX.3	Describes techniques by which Standing Committees of the House and Senate may review the administration of laws within their jurisdiction	CB	S
IX.4	Requires development and transmittal of a proposal for a uniform procurement system	CB	S
IX.5	Establishes duties of the Director of the Office of Science and Technology Policy	CB	S
IX.6	Sets out a series of measures designed to facilitate the efficient use of Federal assistance by state and local governments	CB	S
IX.7	Directs the Secretary of the Interior to report on which Federal programs are available to each Territory of the U.S.	CB	S
IX.8	Requires an independent management analysis of the operations of the Immigration and Naturalization Service	CEF	S
IX.9	Establishes a national program of incentives and support for state and interstate technical service programs	EI	S
IX.10	Establishes, and sets forth duties, of Offices of Inspector General	EI	S

SECTION X

DEFENSE

Number	Item	Requirement	Obligation
X.1	Establishes Defense Cost Accounting Standards Board	CB	R
X.2	Authorizes development of the MPS basing mode for the MX system	CEF	A
X.3	Requires consideration of solar energy systems in design of facilities for military base construction	CEF	A
X.4	Sets guidelines under which the Department of Defense may assign functions hitherto performed by DOD personnel to private contractors	EI/CEF	A
X.5	Establishes an educational assistance program for persons enlisting for active duty	CB	S
X.6	Outlines policies for naval shipbuilding and weapons systems deployment and construction programs	CEF	A
X.7	Provides for furnishing of headstones or grave markers to certain veterans	CEF	A
X.8	Prescribes military training student loads and provisions for reduction and realignment	CEF	A

SECTION XI

HOUSING

Number	Item	Requirement	Obligation
XI.1	Establishes guidelines for the reorganization of HUD's field offices	CB	A
XI.2	Establishes a "Special Risk Insurance Fund" to provide mortgage insurance for certain military personnel and Federal civilian or contractor employees in connection with installations of the Armed Forces	CB	A
XI.3	Defines "affordable rate" under the National Insurance Development Program	CB	A
XI.4	Establishes guidelines for comprehensive city demonstration programs	CB	A
XI.5	Calls for studies to determine need for mortgage counseling	CEF	S
XI.6	Requires the President to report on progress of housing rehabilitation and production programs	EI	S

SECTION XII

LABOR

Number	Item	Requirement	Obligation
XII.1	Establishes a program to increase part-time career employment in the civil service	CB	A
XII.2	Calls for a report on the labor surplus area procurement program	CB	S
XII.3	Sets out guidelines for evaluation of Job Corps programs	CB	S
XII.4	Requires study on justification of exemptions to minimum wage and maximum hour regulations	EI	S
XII.5	Sets forth duties of the National Commission on Unemployment Compensation	EI	S
XII.6	Requires continuing evaluation of all activities undertaking under the CETA program	CEF	A

SECTION XIII

FOREIGN AID AND AFFAIRS

Number	Item	Requirement	Obligation
XIII.1	Provides for grants for water or related land use projects under the Foreign Assistance Act	CB	A
XIII.2	Requires report to Congress on proposed acquisitions of defense articles from foreign sources	EI	S
XIII.3	Directs the President to make an annual report on U.S. actions affecting the development of less-developed countries	EI	S

SECTION XIV

MISCELLANEOUS

Number	Item	Requirement	Obligation
XIV.1	Sets criteria for the Secretary of Commerce to make public telecommunications construction and planning grants	CB	A
XIV.2	Directs Cabinet-level representatives of the President to consult with members of the House and Senate Committees on the Judiciary to review refugee or emergency refugee situations	EI	S
XIV.3	Requires study of increasing world-wide use of the metric system of measurement on the United States	CB	S
XIV.4	Requires the Secretary of Commerce to study state of the art in weather modification	EI	S
XIV.5	Establishes the United States Metric Board	EI	S
XIV.6	Establishes a national climate policy and program	CB	P
XIV.7	Establishes a Copyright Royalty Tribunal	EI	A

SUMMARY OF APPEARANCES IN THE CODE OF ANALYTIC REQUIREMENTS

	Analysis Required		
	Cost Benefit	Cost Effectiveness	Economic Impact
Area of Law			
Natural Resources, Land Use and Conservation	31	0	9
The Environment	12	5	15
Energy	12	9	16
Transportation	17	2	5
Public Works	10	0	2
Health Welfare and Public Safety	7	6	6
Commerce and Economic Policy	2	2	8
Trade	1	0	11
Government Organization and Operations	5	1	4
Defense	2	6	1
Housing	4	1	1
Labor	3	1	2
Foreign Aid and Affairs	1	0	2
Miscellaneous	3	0	4
TOTAL	110	33	86

I.1

Title : Shellfish Sanitation Regulations
Pub. L. 94-370, 90 Stat. 1032 (1976)
16 USC 1662 note

Summary : The Secretary of Health, Education, and Welfare is directed to promulgate final regulations concerning the national shellfish safety program.

Obligation : Before promulgating the regulations, the Secretary of HEW, in consultation with the Secretary of Commerce "shall publish an analysis (1) of the economic impact of such regulations on the domestic shellfish industry, and (2) the cost of such national shellfish safety program relative to the benefits that it is expected to achieve."

I.2

Title : An Act of Oct. 3, 1980, Pub. L. 96-375, 94 Stat. 1505.

Summary : An Act to authorize the Secretary of the Interior to engage in feasibility investigations of certain water resource developments, and for other purposes.

Obligation : The Act, in section 2 (b) expressly authorizes the Secretary of the Interior "to engage in feasibility studies for the purpose of determining the potential costs, benefits, environmental impacts, and feasibility of using the Sacramento River for conveying water from the enlarged Shasta Dam and Reservoir or the larger dam to points of use downstream from the dam."

I.3

Title : Redwood National Park
16 U.S.C. 79a et seq.

Summary : The Secretary of the Interior is authorized to acquire lands and interests in lands within the boundaries of the Redwood National Park under 16 U.S.C. 79c.

Obligation: Under certain circumstances, enumerated in 16 U.S.C. 79c(e), the Secretary is directed to obtain interests in land less than fee title:

"No acquisition other than by donation shall be effectuated and no contract or cooperative agreement shall be executed by the Secretary pursuant to the provisions of this subsection until sixty days after he has notified the President of the Senate and the Speaker of the House of Representatives of his intended action and of the costs and benefits to the United States involved therein."

I.4

Title : National Conservation Recreation Areas
16 U.S.C. 460K et seq.

Summary : Entrance or admission fees for designated units of the National Park System are discussed under 16 U.S.C. 460L-6a.

Obligation: 16 U.S.C. 460L-6a(d) provides, in part:

"All fees established pursuant to this section shall be fair and equitable, taking into consideration the direct and indirect cost to the Government, the benefits to the recipient, the public policy or interest served, the comparable recreation fees charged by non-Federal public agencies, the economic and administrative feasibility of fee collection and other pertinent factors."

I.5

Title : National Parks Recreation Act of 1978
Pub. L. 95-625, 92 Stat. 3467.

Summary : Amends 16 U.S.C. 1274, the Wild and Scenic Rivers Act.

Obligation : The Act requires the Secretary of the Interior, in cooperation with others, to develop, approve and submit to the governors of affected states a management plan for the Upper Delaware River which shall set forth, in relevant part, "an analysis of the economic and environmental costs and benefits of implementing the management plan including any impact of the plan upon revenues and costs of local government."

I.6

Title : Rural Environmental Conservation Program
16 U.S.C. 1501 et seq.

Summary : The Secretary of Agriculture is authorized to develop a forestry incentives program to encourage development, management, and protection of nonindustrial private forest lands under 16 U.S.C. 1509.

Obligation: The Secretary is directed in 16 U.S.C. 1509(c), to distribute funds available for cost sharing "only after assessing the public benefit incident thereto... No forest incentives contract shall be approved under this section on a tract greater than five hundred acres, unless the Secretary finds that significant public benefit will be incident to such approval."

I.7

Title : Forest and Rangeland Renewable Resources Planning
16 U.S.C. 1600 et seq.

Summary : 16 U.S.C. 1602 directs the Secretary of Agriculture to prepare and transmit to the President a recommended Renewable Resource Program.

Obligation: The Renewable Resource Program shall include, in relevant part:

(2) specific identification of Program outputs, results anticipated, and benefits associated with investments in such a manner that the anticipated costs can be directly compared with the total related benefits and direct and indirect returns to the Federal Government;

(3) a discussion of priorities for accomplishment of inventoried Program opportunities with specified costs, outputs, results, and benefits.

I.8

Title : Forest and Rangeland Renewable Resources Planning 16 U.S.C. 1600 et seq.

Summary : The Secretary of Agriculture is directed to develop a National Forest System land and resource management plan under 16 U.S.C. 1604.

Obligation: The Secretary is directed, under 16 U.S.C. 1604(L), to "formulate and implement, as soon as practicable, a process for estimating long-terms [sic] costs and benefits to support the program evaluation requirements of this chapter. This process shall include requirements to provide information on a representative sample basis of estimated expenditures associated with reforestation, timber stand improvement, and sale of timber from the National Forest System, and shall provide a comparison of these expenditures to the return to the Government resulting from the sale of timber."

I.9

Title : Forest and Rangeland Renewable Resources Planning 16 U.S.C. 1600 et seq.

Summary : The Secretary of Agriculture is directed to include requests for funds to eliminate backlogs for forest restoration in the annual budget under 16 U.S.C. 1607.

Obligation: When the Secretary finds "that (1) the backlog of areas that will benefit by such treatment has been eliminated, (2) the costs of treating the remainder of such area exceeds the economic and environmental benefits to be secured from their treatment... the budget requests for these elements of restoration may be adjusted accordingly."

I.10

Title : Water Bank Program For Wetlands Preservation 16 U.S.C. 1301 et seq.

Summary : The Secretary of Agriculture is authorized to enter into wetlands conservation agreements.

Obligation: Under the provisions of 16 U.S.C. § 1304, the Secretary is authorized to make annual payments to wetlands owners. The rates may be increased "by an amount determined by the Secretary to be appropriate, in relation to the benefit to the general public of the use of the wetland areas ... if the owner or operator agrees to permit, without other compensation, access to such acreage by the general public..."

I.11

Title : Water Resource Projects
16 U.S.C. 460L-12 et seq.

Summary : 16 U.S.C. 460L-13 sets forth conditions for non-Federal activities relating to recreation and fish and wildlife enhancement at public water projects.

Obligation: The statute sets forth the following formula for Federal agencies to consider to determine whether to accept non-Federal development proposals:

> (1) the benefits of the project to said purpose or purposes shall be taken into account in determining the economic benefits of the project;
>
> (2) costs shall be allocated to said purpose or purposes and to other purposes in a manner which will insure that all project purposes share equitably in the advantages of multiple-purpose construction: *Provided*, That the costs allocated to recreation or fish and wildlife enhancement shall not exceed the lesser of the benefits from those functions or the costs of providing recreation or fish and wildlife enhancement benefits or reasonably equivalent use and location by the least costly alternative means; and
>
> (3) not more than one-half the separable costs of the project allocated to recreation and exactly three-quarters of such costs allocated to fish and wildlife enhancement and all the joint costs of the project allocated to recreation and fish and wildlife enhancement shall be borne by the United States and be nonreimbursable.

I.12

Title : Water Resources Planning
42 U.S.C. 1962d-5e

Summary : Establishes guidelines to be followed by the Secretary of the Army and the Chief of Engineers in establishing wetlands areas.

Obligation : Establishment of a wetlands area may be undertaken only when in the judgment of the Chief Engineer the environmental, economic, and social benefits of the wetlands area justifies the increased cost thereof above the cost required for alternative methods of disposing of dredged material for such project. Benefits are deemed to be at least equal to the costs of establishing the area.

I.13

Title : Anthracite Mine Drainage and Flood Control
30 U.S.C. 572

Summary : Provides for contributions by the Secretary of the Interior to Pennsylvania for the purpose of sealing abandoned coal mines; and control of drainage of water.

Obligation: Secretary of the Interior must determine that projects are economically justified. Potential benefits must be estimated to exceed the estimated cost of the project.

I.14

Title : Surface Mining Control and Reclamation
30 U.S.C. 1201 et seq.

Subject : Under 30 U.S.C. 1236, the Secretary of Agriculture is authorized to furnish financial assistance to promote the conservation and development of soil and water resources of unreclaimed mined lands and lands affected by mining.

Obligation: The Secretary is authorized to make grants under 1236(d), and "may reduce the matching cost share where he determines that (1) the main benefits to be derived from the project are related to improving offsite water quality, offsite esthetic values, or other offsite benefits."

I.15

Title : Deep Seabed Hard Mineral Resources Act
Pub. L. 96-283, 94 Stat. 553

Summary : This law establishes interim procedures for the orderly development of hard mineral resources in the deep seabed.

Much of the Act is addressed to setting standards for the Administrator of the National Oceanic and Atmospheric Administration in the issuance of licenses for exploration and permits for commercial recovery activities.

Obligation: Under section 109 of the Act, codified at 30 U.S.C. 1419, the Administrator of NOAA is directed to require licensees and permittees to use the best available technology for the protection of safety, health, and the environment wherever such activities would have a significant effect on safety, health or the environment except where the Administrator "determines that the incremental benefits are clearly insufficient to justify the incremental costs of using such technologies."

I.16

Title : Preservation of Fishery Resources
16 U.S.C. 755 et seq.

Summary : Conservation, development, and enhancement of anadromous and Great Lakes fisheries is discussed in 16 U.S.C. 757a.

Obligation: The Secretary of the Interior is authorized to enter into cooperative agreements for the above stated purposes with the states, or with non-Federal interests. Such agreements shall describe, "(1) the actions to be taken by the Secretary and the cooperating parties, (2) the benefits that are expected to be derived by the States and other non-Federal interests, (3) the estimated costs of these actions...."

I.17

Title : Outer Continental Shelf Lands Act Amendment of 1978. Pub. L. 95-372, 92 Stat. 629.

Summary : Act Act to establish a policy for the management of oil and natural gas in the Outer Continental Shelf, and to amend the Outer Continental Shelf Lands Act.

Obligation : Section 208 of the Act adds several new sections to the Outer Continental Shelf Lands Act.

Section 21, 43 U.S.C. 1333 provides:

"(b) In exercising their respective responsibilities for the artificial islands, installations, and other devices referred to in section 4(a)(1) of this Act, the Secretary, and the Secretary of the Department in which the Coast Guard is operating, shall require, on all new drilling and production operations and, wherever practicable, on existing operations, the use of the best available and safest technologies which the Secretary determines to be economically feasible, wherever failure of equipment would have a significant effect on safety, health, or the environment, except where the Secretary determines that the incremental benefits are clearly insufficient to justify the incremental costs of utilizing such technologies.

I.18

Title : Soil Conservation
16 U.S.C. 590a et seq.

Summary : The Secretary of Agriculture is authorized, under 16 U.S.C. 590h, to provide financial assistance to agricultural producers for carrying out enduring conservation and environmental enhancement measures.

Obligation : Pursuant to 16 U.S.C. 590h (b), the amount of financial assistance to be provided shall be that portion of the cost of installing enhancement measures which the Secretary determines is necessary. In determining necessity, the Secretary must consider:

(A) the amount of expected conservation or environmental benefit accruing to society, (B) the total cost of carrying out the needed measures, (C) the degree to which appropriate conservation or pollution abatement practices will be applied in the absence of financial assistance, and (D) in order to avoid duplication of assistance, the degree to which the agricultural producer benefits from other public programs for conservation and environmental enhancement.

I. 19

Title : Soil and Water Resources Conservation
16 U.S.C. 2001 et. seq.

Summary : 16 U.S.C. 2005 directs the Secretary of Agriculture to develop in cooperation with and participation by by the public, a national soil and water conservation program.

Obligation : The program, 16 U.S.C. 2005(a)(7) and (8), shall include, but not be limited to:

"(7) analysis of cost and benefits of alternative soil and water conservation practices; and (8) investigation and analysis of alternative irrigation techniques regarding their costs, benefits, and impact on soil and water conservation, crop production, and environmental factors."

I. 20

Title : Endangered Species Act Amendments of 1978
Pub. L. 95-632, 92 Stat. 3751

Summary : An Act to amend the Endangered Species Act of 1973

Obligations: Section 11 of the Act amends 16 U.S.C. 1533 entitled "Determination of endangered species and threatened species" to add the requirement that the Secretary of Interior or Commerce consider "the economic impact, and any other relevant impacts, of specifying any particular area as critical habitat [of any endangered or threatened species], and [that] he may exclude any such area from the critical habitat if he determines that the benefits of such exclusion outweigh the benefits of specifying the area as part of the critcal habitat, unless he determines, based upon the best scientific and commercial data available, that the failure to designate such area as critical habitat will result in extinction of the species."

I. 21

Title : Designation of Lands Unsuitable for Noncoal Mining
30 U.S.C. 1281

Summary : With respect to Federal lands within any State, the Secretary of the Interior may review any area to assess whether it may be unsuitable for mining operations for minerals or materials other than coal.

Obligation : Prior to any designation, the Secretary "shall prepare a detailed statement on. . .(iii) the impact of such designation or the absence of such designation on the environment, economy and the supply of such mineral resources."

When the Secretary designates an area as unsuitable for all or certain types of mining operations, he may withdraw the area from mineral entry or leasing if he also determines "that the benefits resulting from such designation would be greater than the benefits to the regional or national economy which could result from mineral development of such area."

I. 22

Title : Federal Land Policy and Management
42 USC 1714

Summary : Specifies procedures to be followed for withdrawal of public lands.

Obligation : When submitting to Congress notice for approval of withdrawals aggregating five thousand acres or more the Secretary of the Interior shall furnish "an analysis of the manner in which existing and potential resource uses are incompatible with or in conflict with the proposed use, together with a statement of the provisions to be made for continuation or termination of existing uses, including an economic analysis of such continuation or termination.

I. 23

Title	:	Control of the Environmental Impacts of Surface Coal Mining 30 U.S.C. 1251 et seq.
Summary	:	30 U.S.C. 1272 establishes a procedure for designating areas unsuitable for surface coal mining.
Obligation	:	Prior to designating any land areas as unsuitable for surface coal mining operations, the state regulatory authority "shall prepare a detailed statement on (i) the potential coal resources of the area, (ii) the demand for coal resources, and (iii) the impact of such designation on the environment, the economy, and the supply of coal."

I. 24

Title	:	Redwood National Park, California 16 USC 79k
Summary	:	Established a Redwood National Park in the State of California
Obligation	:	The Secretary of the Interior in consultation with the Secretaries of Agriculture, Commerce and Labor shall conduct an analysis of appropriate Federal actions that may be necessary or desirable to mitigate any adverse economic impact to public and private segments of the local economy.

I. 25

Title	:	King Range National Conservation Area 16 U.S.C. 460y-z
Summary	:	Outlines a program of multiple usage and sustained yield of renewable natural resources in the King Range National Conservation Area.
Obligation	:	The Secretary of the Interior shall use public and private assistance for the purpose of preparing for the area a program of multiple usage and sustained yield of renewable natural resources, which program shall include a statement of the expected costs and an economic analysis of the program with particular reference to costs to the United States and expected economic effects on local communities and governments.

I. 26

Title : Soil and Water Resources Conservation
16 U.S.C. 2001 et. seq.

Summary : 16 U.S.C. §2004 authorizes the Secretary of Agriculture to collect and maintain information on the current status of soil, water, and related resources for the purpose of carrying out a continuing appraisal of those resources.

Obligation : The Secretary is directed to include in the appraisal:

"(5) data on the costs and benefits of alternative soil and water conservation practices, and
"(6) data on alternative irrigation techniques regarding their costs, benefits, and impact on soil and water conservation, crop production and environmental factors."

I. 27

Title : Soil and Water Resources Conservation
16 U.S.C. 2001 et seq.

Summary : 16 U.S.C. 2006 directs the President and the Secretary of Agriculture to prepare and transmit to Congress various appraisals and evaluations of the soil and water resource conservation programs.

Obligations : The Secretary of Agriculture, under 16 U.S.C. 2006(c), is required to prepare a report which "shall contain appropriate measurements of pertinent costs and benefits. The evaluation shall assess the balance between economic factors and environmental quality factors."

I. 28

Title : Outer Continental Shelf Lands Act Amendment of 1978
Pub. L. 95-373, 92 Stat. 629.

Summary : An Act to establish a policy for the management of oil and natural gas in the Outer Continental Shelf, and to amend the Outer continental Shelf Lands Act.

Obligation : Section 205 of the Act is entitled "revision of Bidding and Lease Administration." Subsection 205 (a) (9) requires that at the end of each fiscal year, the Secretary of Energy, in consultation with the Secretary of Interior, report to Congress with respect to the use of various bidding options and include therein, "(E) the benefits and costs associated with conducting lease sales using the various bidding systems."

I. 29

Title : National Parks Recreation Act of 1978 Pub. L. 95-625, 92 Stat. 3467.

Summary : Establishes, among other things, the Santa Monica Mountains National Recreation Area, 92 Stat. 3501 16 U.S.C. 460kk.

Obligation : The Secretary of Interior is required by January 1, 1982, to submit a report to the House Committee on Interior and Insular Affairs and to the Senate Committee on Energy and Natural Resources which shall, among other things, "assess the benefits and costs of continued management [of the Santa Monica Mountains National Recreation Area] as a unit of the National Park System.

I. 30

Title : Marine Resources and Engineering Devlopment
33 U.S.C. 1103

Summary : Outlines duties of the President with respect to the formation of long range goals relating to Marine Science activities.

Obligation: Requires the President with the advice and assistance of the Council to establish long range studies of the potential benefits to the United States economy, security, health and welfare to be gained from marine resources, engineering and science and the costs involved in obtaining such benefits.

I. 31

Title : Protection and Conservation of Wildlife
16 U.S.C. 661 et seq.

Summary : Wildlife conservation measures relating to impoundment, diversion, or control of waters is discussed in 16 U.S.C. 662.

Obligation: Under 16 U.S.C. 662(f), reports to Congress supporting or recommending new water control projects shall include:

"an estimation of the wildlife benefits or losses to be derived therefrom including benefits to be derived from measures recommended specifically for the development and improvement of wildlife resources, the cost of providing wildlife benefits (including the cost of additional facilities to be installed or lands to be acquired specifically for that particular phase of wildlife conservation relating to the development and improvement of wildlife)..."

I. 32

Title : Forest and Rangeland Renewable Resources Planning
16 U.S.C. 1600 et seq.

Summary : Annual evaluation reports regarding Forest Service activities must be submitted to Congress under 16 U.S.C. 1606.

Obligation: 16 U.S.C. 1606(d) discusses required contents of annual evaluation reports:

> These annual evaluation reports shall set forth progress in implementing the Program required to be prepared by section 1602 of this title, together with accomplishments of the Program as they relate to the objectives of the Assessment. Objectives should be set forth in qualitative and quantitative terms and accomplishments should be reported accordingly. The report shall contain appropriate measurements of pertinent costs and benefits. The evaluation shall assess the balance between economic factors and environmental quality factors. Program benefits shall include, but not be limited to, environmental quality factors such as esthetics, public access, wildlife habitat, recreational and wilderness use, and economic factors such as the excess of cost savings over the value of foregoing benefits and the rate of return on renewable resources.

I. 33

Title : Water Resources Planning 42 U.S.C. 1962D-17.

Summary : Details procedures for formulation of regional or river basin plans and Federal water and related land resources projects.

Obligation: President shall make a full and complete investigation and Study of principles and standards for planning and evaluating water and related resources projects. Enumerate objectives to be included in the evaluation of costs and benefits attributable to such projects. Report to Congress results and recommendations of the study.

I. 34

Title : Water Resources Planning
42 U.S.C. 1962D-18

Summary : Calls for a study of depletion of natural resources in the High Plains Region

Obligation : The Secretary of Commerce is required to study the depletion of natural resources of those regions utilizing the declining water resources of the Ogallala acquifer and to develop plans to increase water supplies there, and report to Congress his recommendations. "The Secretary shall report on the costs of reasonable available options, the benefits of various options and the costs in inaction".

I. 35

Title : Coastal Zone Management
16 USC 1451 et seq.

Summary : The Secretary of Commerce is directed to submit to the President for transmittal to Congress an annual report on the administration of the coastal zone management program.

Obligation : The report shall include, under 16 USC 1462(a)(9), "a description of the economic, environmental, and social consequences of energy activity affecting the coastal zone and an evaluation of the effectiveness of financial assistance ... in dealing with such consequences."

I. 36

Title : Water Resources Planning 42 U.S.C. 1962-2.

Summary : Outlines plans to encourage the conservation, development and utilization of water and related land resources.

Obligation: It is the intent of Congress in the evalution of costs and benefits of federally funded water projects, to give due consideration the most feasible alternative method of accomplishing objectives.

I. 37

Title : Forest and Rangeland Renewable Resources Planning
16 USC 1600

Summary : Expresses the intent of Congress with respect to management of Forest and Rangeland Renewable Resources Planning

Obligation : Declares that to serve the national interest, the renewable resource program must be based on a comprehensive assessment of present and anticipated uses, demand for and supply of renewable resources through analysis of environmental and economic impacts.

II. 1

Title : Water Pollution Prevention and Control
33 U.S.C 1312

Summary : Section outlines procedures for establishing effluent limitations.

Obligation: Prior to establishing any effluent limitation the Administrator of EPA shall issue notice of intent to establish such limitation and hold public hearings to determine the social costs of achieving such limitations to the social and economic benefits to be obtained.

If a person affected by such limitation demonstrates there is no reasonable relationship between the economic and social costs and the benefits to be obtained, such limitation shall not become effective.

II. 2

Title : Insecticides and Environmental Pesticide Control
7 USC 136 et seq.

Summary : 7 USC 136d sets forth administrative procedures by which the Administrator of the Environmental Protection Agency may cancel or change the classification of a registered pesticide, or hold a hearing to determine whether action should be taken.

Obligation : Prior to taking any of the actions stated above, the Administrator must send a notice of intent to the registrant and make it public, pursuant to 7 USC 136d(b).

"In determining whether to issue any such notice, the Administrator shall include among those factors to be taken into account the impact of the action proposed in such notice on production and prices of agricultural commodities, retail food prices, and otherwise on the agricultural economy."

The Administrator must provide the Secretary of Agriculture with a copy of the agricultural economy impact analysis.

The procedure may be waived if the Administrator finds that pesticides prevention is necessary to prevent an imminent hazard to human health.

In taking final action, the Administrator shall consider the alternative of restricting the pesticide's use, and publish in the Federal Register an analysis of the "impact of such final action on production and prices of agricultural commodities, retail food prices, and otherwise on the agricultural economy."

II. 3

Title : Insecticides and Environmental Pesticide Control
7 USC 136 et seq

Summary : 7 USC 136a sets forth the procedures for registration of pesticides

Obligation : Administrator of the Environmental Protection Agency shall publish guidelines specifying the information required to support pesticide registration, and establish standards for data requirements.

"In the development of these standards, the Administrator shall consider the economic factors of potential national volume of use, extent of distribution, and the impact on the cost of meeting the requirements on the incentives for any potential registrant to undertake the development of the required data." 7 USC 136a (c)(2)(A).

II. 4

Title : The Clean Air Act
42 U.S.C. 7401 et seq.

Subject : Nonattainment plan provisions are set forth in
42 U.S.C. 7502

Obligation : In the case of implementation plans relating to quality standards which cannot meet the intial deadline, the plans must:

"(A) establish a program which requires, prior to issuance of any permit for construction or modification of a major emitting facility, an analysis of alternative sites, sizes, production processes, and environmental control techniques for such proposed source which demonstrates that benefits of the proposed source significantly outweigh the environmental and social costs imposed as a result of its location, construction, or modification."

II. 5

Title : The Clean Air Act
Vehicle Emission and Fuel Standards
42 U.S.C. 7521 et seq.

Summary : The Administrator of the EPA may, by regulation, require registration of fuel or fuel additives pursuant to 42 U.S.C. 7545.

Obligation: The Administrator may not control or prohibit fuel or fuel additives "(1) except after consideration of available scientific and economic data, including a cost benefit analysis comparing emission control devices or systems which are or will be in general use and require the proposed control or prohibition with emission control devices or systems which are or will be in general use and do not require the proposed control or prohibition." 42 U.S.C. 7545(c)(2)(B).

II. 6

Title : Water Pollution Prevention and Control Grants for Construction of Treatment Works
33 U.S.C. §1281 et seq.

Summary : Under section 1288 addressing areawide waste treatment management, the Secretary of Agriculture, with the concurrence of the EPA, is authorized to engage in cost sharing with rural land owners and operators for the purpose of installing and maintaining measures incorporating best management practices to control nonpoint source pollution.

Obligation : The Secretary is authorized to increase the matching cost share where he determines "(1) the main benefits to be derived from the measures are related to improving offsite water quality."

II. 7

Title : Water Pollution and Control Standards and Enforcement
33 U.S.C. 1311 et seq.

Subject : The Administration of the EPA, under 33 U.S.C. 1316, is required to publish regulations providing guidelines for effluent limitations and to revise them annually, if appropriate.

Obligation : Under 33 U.S.C. 1316(b)(4)(B), the regulations must specify factors to be taken into account in determining the best conventional pollution control technology measures and practices:

"Factors relating to the assessment of best conventional pollutant control technology (including measures and practices) shall include consideration of the reasonableness of the relationship between the costs of attaining a reduction in effluents and the effluent reduction benefits derived. . ."

II. 8

Title : Solid Waste Disposal
42 USC 6984

Summary : Permits the Administrator of EPA to enter into contracts with various public agencies and authorities for the construction of full scale demonstration facilities.

Obligation : Grants to full scale demonstration facilities shall only be made if the Administrator finds that each facility will demonstrate at a full scale the technological feasibility and cost effectiveness of an existing but unproven technology process or practice.

II. 9

Title : Solid Waste Disposal - Coordination, Collection and Dissemination of Information
42 USC 6983

Summary : Requires the Administrator of EPA to collect, evaluate, and coordinate information on Solid Waste Disposal.

Obligation : The Administrator of the Environmental Protection Agency shall maintain a central library which shall contain the actual performance and cost effectiveness records with respect to various methods, systems and aspects of solid waste disposal.

II. 10

Title : Water Pollution Prevention and Control
33 U.S.C. 1254

Summary : Outlines procedures in establishing a national program for the prevention, reduction and elimination of water pollution.

Obligation: EPA Administrator shall initiate research designed to develop the most effective tools and techniques for measuring the social and economic costs and benefits of activities subject to regulation and submit to Congress a report on the results by Jan. 1, 1974.

II. 11

Title : Water Pollution Prevention and Control
33 U.S.C. 1315

Summary : Outlines policies to achieve the objective of restoring and maintaining the chemical, physical and biological integrity of the Nation's waters.

Obligation: Each state is required to prepare and submit to the Administrator of EPA by January 1, 1975, and shall bring up to date each year thereafter a report ... which shall include an estimate of the environmental impact, the economic and social costs necessary to achieve objectives, and the economic and social benefits of such achievement.

II. 12

Title : Clean Air Act
Pub. L. 95-95, § 403(g)

Subject : The Administrator is required to undertake a study on emission of sulfur-bearing compounds from motor vehicles and motor vehicle and aircraft engines and report to Congress.

Obligation : Such study and report should include "a review of the effects of such emissions or public health and welfare and an analysis of the costs and benefits of alternatives to reduce or eliminate such emissions ..."

II. 13

Title : The Clean Air Act
42 U.S.C. 7401 et seq.

Subject : 42 U.S.C. § 7408 discusses, in relevant part, the issuance by the Administrator of the EPA of information on air pollution control techniques

Obligation : The Administrator, under 42 U.S.C. 7408(b)(1), is directed to issue to the states, and to appropriate air pollution control agencies, information on air pollution control techniques, which shall include data "relating to the cost of installation and operation, energy requirements, emission reduction benefits, and environmental impact of the emission control technology."

II. 14

Title : The Clean Air Act
Pub. L. 95-95, title IV, § 403(b), Aug. 9, 1977, 91 Stat. 792

Subject : Directs the Administrator of the EPA to conduct a study and report to Congress not later than January 1, 1979

Obligation : The study and report shall discuss, in relevant part, "the technology or other measures available for control of such emissions and the costs of such technology or measures, and the costs and benefits of alternative measures or strategies to abate such emissions."

II. 15

Title : Air Pollution Control 42 U.S.C. 1857c-10.

Summary : Outlines duties of the Federal Energy Administrator with respect to programs to reduce Air Pollution.

Obligation: Requires the Administrator to conduct a study and submit a report to Congress which contains a comparison of health benefits and detriments from burning solid waste and of economic costs.

II. 16

Title : Water Pollution Prevention and Control
33 USC 1375

Summary : Requires reports to Congress by the Administrator of EPA on measures taken toward implementating the objectives of Water Pollution Prevention and Control.

Obligation : The Administrator of EPA in cooperation with the states shall make a comprehensive study of the economic impact on affected units of government of the cost of installation of treatment facilities.

II. 17

Title : Air Pollution Control
42 USC 1857J-1

Summary : Mandates economic cost studies as a basis for evaluating Air Pollution Control programs.

Obligation : The Administrator of EPA in cooperation with State, interstate, and local air pollution control agencies shall make a detailed estimate of the cost of carrying out the provisions of this chapter; a comprehensive study of the cost of program implementation by affected units of government and a comprehensive study of the economic impact of air quality standards on the Nation's industries, communities and other contributing sources of pollution.

II. 18

Title : Acid Precipitation Act of 1980
42 USC 8901 et seq.

Summary : Congressional statement of purpose.

Obligation : "[T]o evaluate the environmental, social, and economic effects of acid precipitation."
42 U.S.C. 8901(b)(2).

II. 19

Title : Air Pollution Prevention and Control
42 U.S.C. 7617.

Summary : Establishes economic assessment requirements applicable to actions by the Administrator of EPA in promulgating or revising pollution standards.

Obligation: Before publication of notice of proposed rulemaking with respect to any standard or regulation to which this section applies, the Administrator of EPA shall prepare an economic impact assessment respecting such standard or regulation.

II. 20

Title : Air Pollution Prevention and Control
42 U.S.C. 7521(f).

Summary : Sets emission standards for new motor vehicle or new motor vehicle engines.

Obligation: Before promulgating any regulation applicable to high altitude vehicles the administrator of EPA shall consider and make a finding with respect to the economic impact upon consumers, individual high altitude dealers and the automobile industry.

II. 21

Title : Permits for Dredged or Fill Material
33 U.S.C. 1344.

Summary : Sets specifications for the selection of disposal sites for dredged or fill material.

Obligation: In specifying disposal sites the Secretary of the Army shall apply guidelines developed by the Administrator and in any case where such guidelines alone would prohibit the specification of a site, through the application additionally of the economic impact of the site on navigation and anchorage.

II. 22

Title : Air Pollution Prevention & Control
Air Quality Criteria and Control Techniques
42 U.S.C. 7408.

Summary : Requires certain information regarding air quality criteria to be published.

Obligation: The Administrator of the Environmental Protection Agency shall publish information regarding processes, procedures and methods to reduce or control pollutants. Such information shall include an assessment of the environmental, energy and economic impact of such processes procedures and methods.

II. 23

Title : Federal Facilities Pollution Control
33 U.S.C. 1323.

Summary : Requires agencies of the Federal government to comply with all Federal, State, and local requirements respecting the control and abatement of water pollution.

Obligation: Requires facilities initiated after September 30, 1979 to include certain alternative methods for wastewater treatment provided the life cycle cost of the alternative treatment does not exceed the life cycle cost of the most cost effective alternative by more than 15 per centum.

II. 24

Title : Grants for Construction of Treatment Works
33 U.S.C. 1297.

Summary : Sets guidelines for cost effectiveness analysis.

Obligation: Any guidelines for cost effectiveness analysis published by the administrator shall provide for the identification of and selection of cost effective alternatives.

II. 25

Title : Navigation & Navigable Waters Grants for Construction of Treatment Works
33 U.S.C. 1281.

Summary : Establishes criteria for grants for certain water treatment works.

Obligation: The Administrator of EPA is authorized to make a grant for certain treatment works if he determines that in the cost effectiveness study made, the life cycle cost of the treatment works for which the grant is made, does not exceed the life cycle cost of the most cost effective alternative by more than 15 per centum.

II. 26

Title : Fuel Economy Improvement for New Motor Vehicles
42 U.S.C. 7547.

Summary : Requires a study of possible fuel economy improvement standards.

Obligation: The Administrator of EPA and the Secretary of Transportation shall conduct a study concerning the practicality of establishing a fuel economy improvement standard of 20 per centum for new motor vehicles manufactured during and after model year 1980. Such study shall include the economic costs associated with such standards, including any benefical economic impact.

II. 27

Title : Quiet Communities Act of 1978
42 U.S.C. 4413.

Summary : Amends the Noise Control Act of 1972 to promote the development of effective State and local noise control programs.

Obligation: The Administrator of the Environmental Protection Agency shall conduct or finance research on the effects, measurment and control of noise including "investigation of the economic impact of noise on property and human activities."

II.28

Title : Air Pollution Prevention and Control
42 U.S.C. 7410.

Summary : Outlines State implementation plans for national primary and secondary ambient air quality standards.

Obligation: The Administrator of EPA shall conduct a study on the necessity of parking surcharge, management of parking supply and preferential bus/carpool line regulations as part of the applicable implementation plans required to achieve ambient air quality standards. The study shall include an assessment of the economic impact of such regulations.

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II. 29

Title : Air Pollution Prevention and Control
42 U.S.C. 7453.

Summary : Requires studies of the cumulative effect of all substances, practices, processes, and activities on the stratosphere.

Obligation: The Secretary of Labor shall transmit a report to Congress and the Administrator of the Environmental Protection Agency with respect to the losses and gains to industry and employment which could result from the elimination of the use of halocarbons in aerosol containers. Such report shall include recommended means of alleviating unemployment or other undesirable economic impact if any resulting therefrom.

II.30

Title : Air Pollution Prevention and Control
42 U.S.C. 7474.

Summary : Sets forth procedure for designating certain area classifications for the purpose of applying increments and ceilings for various pollutants.

Obligation: Prior to reclassifying an area, public hearings shall be held, prior to which an analysis of the health, environmental, economic, social and energy effects of the proposed redesignation shall be reviewed and examined by the redesignating authority.

II. 31

Title : Air Pollution Prevention and Control
42 U.S.C. 7525.

Summary : Requires a report evaluating certain high altitude vehicle regulations.

Obligation: By October 1, 1978, the Administrator of the Environmental Protection Agency shall report to Congress on the economic impact and technological feasibility of the requirements that all light duty vehicle comply with the standards promulgated regardless of the altitude at which they are sold.

II. 32

Title : Air Pollution Prevention and Control
42 U.S.C. 7612.

Summary : Calls for comprehensive cost and economic impact studies of air pollution control activities.

Obligation: The Administrator of EPA shall annually conduct and submit to Congress a comprehensive study of the economic impact of air quality standards on the nation's industries, communities and other contributing sources of pollution.

III. 1

Title : Department of Energy Organization Act
42 U.S.C. 7101 et seq.

Summary : 42 U.S.C. 7191 establishes rulemaking procedures to supplement those of the Administrative Procedure Act.

Obligation :

(e)(1) If the Secretary determines, on his own initiative or in response to any showing made pursuant to paragraph (2) (with respect to a proposed rule, regulation, or order described in subsection (a)) that no substantial issue of fact or law exists and that such rule, regulation, or order is unlikely to have a substantial impact on the Nation's economy or large numbers of individuals or businesses, such proposed rule, regulation, or order may be promulgated in accordance with section 553 of title 5, United States Code [5 USCS § 553]. If the Secretary determines that a substantial issue of fact or law exists or that such rule, regulation, or order is likely to have a substantial impact on the Nation's economy or large numbers of individuals or businesses, an opportunity for oral presentation of views, data, and arguments shall be provided.

III. 2

Title : Federal Energy Administration
15 U.S.C. 761 et seq.

Summary : Administrative rule making procedures for the FEA are set forth in 15 U.S.C. 766.

Obligation: Pursuant to 15 U.S.C. 766 (i) (C), if any rule, regulation, or order "is likely to have a substantial impact on the Nation's economy or large numbers of individuals or business, an opportunity for oral presentation of views, data, and arguments shall be afforded."

III. 3

Title : Federal Energy Administration
15 U.S.C. 761 et seq.

Summary : The Federal Energy Administrator is directed to undertake economic analyses of proposed regulatory actions under 15 U.S.C. 777.

Obligation: The Administrator shall, "to the greatest extent practicable, insure that the potential economic impacts of proposed regulatory and other actions are evaluated and considered, including but not limited to an analysis of the effect of such actions on -

III. 3 (Continued)

Obligation: (1) the fiscal integrity of State and local governments;
(2) vital industrial sectors of the economy;
(3) employment, by industrial and trade sectors, as well as on a national, regional, State, and local basis;
(4) the economic vitality of regional, State, and local areas;
(5) the availability and price of consumer goods and services;
(6) the gross national product;
(7) low and middle income families as defined by the Bureau of Labor Statistics;
(8) competition in all sectors of industry; and
(9) small business."

III. 4

Title : National Energy Conservation Policy Act, Pub. L. 95-619, 92 Stat. 3206.

Summary : An Act to reduce the growth in demand for energy and to conserve nonrenewable energy resources produced in the United States and elsewhere.

Obligation : Under section 251 of the Act, the Secretary of Housing and Urban Development is authorized to make grants to finance energy conserving improvements for specified types of housing.

The Secretary is directed to issue regulations requiring that any grant made for specified purposes be made only on the condition "that the recipient of such grant shall take steps (prescribed by the Secretary) to assure that the benefits derived from such grants in terms of lower energy costs shall accrue to tenants in the form of lower rentals or to the Federal Government in the form of a lower operating subsidy if such a subsidy is being paid to such recipient."

III. 5

Title : Energy Conservation Standards for New Buildings 42 U.S.C. 6831 et seq.

Subject : 42 U.S.C. 6839 directs the Secretary of Energy to engage in support activities necessary or appropriate to develop and implement performance standards for new buildings

Obligation : The statute provides that "[s]uch activities shall be designed to assure that such standards are adequately analyzed in terms of energy efficiency, stimulation of use of nondepletable sources of energy, institutional resources, habitability, economic cost and benefit, and impact upon affected groups."

III. 6

Title : Public Utilities Regulatory Policies Act of 1978, Pub. L. 95-617, 92 Stat. 3117. 16 U.S.C. 2601 et. seq.

Summary : An Act, which is designed, in part, to provide for increased conservation of electric energy, increased efficiency in the use of facilities and resources by electric utilities, and equitable retail rates for electric consumers.

Obligation : Under 16 U.S.C. 262 (d) (3), state regulatory authorities are required to consider "time-of-day" rates.

The provisions of 16 U.S.C. 2625 (b), state that time-of-day rates charged by electric utilities to each class of electric customers shall be determined to be cost-effective "if the long run benefits of such rate to the electric utility and its electric consumers in the class concerned are likely to exceed the metering costs and other costs associated with the use of such rates."

The law, 16 U.S.C. 2623, also requires state regulatory authorities to consider the appropriateness of prohibiting master metering in new buildings.

Separate metering will be considered in part, "if the long-run benefits to the electric consumers in such building exceed the costs of purchasing and installing separate meters in such building." 16 U.S.C. 2625.

III. 7

Title : Crude Oil Transportation Systems, Title V, Pub. L. 95-617, 92 Stat. 3157.

Summary : In relevant part, this law, provides a means for selecting delivery systems to transport Alaskan and other crude oil to northern tier and inland states.

Obligation : Under section 507, 43 U.S.C. 2007, the President must approve or disapprove of proposed crude oil transportation systems, and, after consultation with specified authorities, decide which system shall be approved.

The criteria for making a decision shall include findings of:

"(E) feasibility of financing for each of such systems;

"(F) capital and operating costs of each of such systems, including an analysis of the reliability of cost estimates and the risk of cost overruns;

"(G) net national economic costs and benefits of each such system."

III. 8

Title : Solar Energy Research, Development and Demonstration. 42 U.S.C. 5556

Summary : Establishes criteria for determining when to proceed from the development program to demonstration project under the Solar Energy Coordination and Management Project Program.

Obligation : The Chairman of the Solar Energy Coordination and Management Project in making a determination to proceed from development program to demonstration project shall consider, among other factors, the costs and benefits of the project as determined by an economic assessment.

III. 9

Title : Emergency Energy Conservation Act of 1979
Pub. L. 96-102, 93 Stat. 758
42 USC 8511 et seq.

Summary : 42 USC 8511 sets forth national and state emergency conservation targets.

Obligation : "For purposes of this subsection, the uniform national percentage shall be designed by the President to minimize the impact on the domestic economy of the projected shortage in the energy source for which a target is established..."
42 USC 8511(a)(3)(D).

III. 10

Title : Emergency Energy Conservation Act of 1979
Pub. L. 96-102, 93 Stat. 749

Summary : An Act to establish an emergency program for the conservation of energy and to provide for a standby rationing plan for motor fuel; contains several amendments to the Energy Policy and Conservation Act (42 U.S.C. 6260 et seq.).

Obligation: Section 103 of the Act amends EPCA, section 201(f), 42 U.S.C. 6261(f) to provide "Notwithstanding the preceding provisions of this subsection, such economic analysis and evaluation is not required to be performed, or transmitted to the Congress, under this subsection in the case of any rationing contingency plan."

III. 11

Title : Powerplant and Industrial Fuel Use Act
42 USC 8301 et seq.

Summary : 42 USC 8374 vests the President with emergency authority to allocate coal during energy shortages.

Obligation : To activate his emergency powers, the President must determine that a fuel supply shortage exists which "(ii) causes, or may cause, major adverse impact on public health, safety or welfare or on the economy."

III. 12

Title : Nuclear Regulatory Commission
42 USC 5847

Summary : Mandates a national survey to locate and identify possible nuclear energy sites.

Obligation : The Nuclear Regulatory Commission is authorized to conduct a survey to identify possible nuclear energy sites, which survey shall include "an assessment of the economic impact of each nuclear energy site."

III. 13

Title : Standby Energy Authorities
42 USC 6261

Summary : Calls for the submission of energy conservation and rationing contingency plans to be formulated by the President.

Obligation : The President's contingency plans transmitted to Congress pursuant to this section shall include a specific statement explaining the need for and the rationale and operation of such plan and shall be based upon a consideration of, and to the extent practicable, be accompanied by an evaluation of, the potential economic impacts of such plan.

III. 14

Title : Strategic Petroleum Reserve
42 UCS 6234(e)

Summary : Outlines provisions of the Strategic Petroleum Reserve Plan

Obligation : Requires that the plan include "a program schedule for overall development and completion of the Reserve (taking into account all relevant factors, including cost effectiveness...)."

III. 15

Title : Electric Utility Rate Design Initiatives
42 USC 6803

Summary : Calls for the development of proposals to improve electric utility rate design.

Obligation : The Administrator of the Federal Energy Administration shall develop proposals to improve electric utility rate design, which shall include proposals which provide for the development and implementation of load management techniques which are cost effective.

III. 16

Title : State Energy Conservation Plans 42 U.S.C. 6326.

Summary : Authorizes the Administrator of the Federal Energy Administration to establish procedures and guidelines for the development and implementation of specific State energy conservation programs and to provide Federal financial and technical assistance to States in support of such programs.

Obligation: Defines the term "energy conservation measure" as one likely to improve the efficiency of energy use and to reduce energy costs (as calculated on the basis of energy costs reasonably projected over time, as determined by the Administrator) in an amount sufficient to enable a person to recover the total cost of purchasing and installing such measure.

III. 17

Title : Pipeline Safety Act of 1979. Pub. L. 96-129, 93 Stat. 989.

Summary : Amends the Natural Gas Pipeline Safety Act of 1968.

Obligation :

COST-BENEFIT ANALYSIS OF INCREASED PIPELINE SAFETY REGULATION

SEC. 110. (a) Within 12 months after the date of the enactment of this section, the Secretary of Transportation, after affording an opportunity for consultation and comment by persons operating pipeline facilities, State and local regulatory authorities with jurisdiction over pipeline safety, and consumers shall conduct and complete a cost-benefit analysis to determine whether additional Federal legislation on pipeline safety is beneficial and submit a report of his findings to the Congress.

(b) As part of the cost-benefit analysis required by subsection (a), the Secretary of Transportation shall conduct a study of the adequacy and effectiveness of existing pipeline safety regulations. In addition to existing pipeline safety regulations, the study shall address the following issues:

(1) whether pipeline safety could be significantly enhanced in a cost-effective manner by regulations requiring pipeline facility operators to prepare and maintain a general description of their pipeline facilities, including—

(A) the location of the pipeline and the pipeline facilities;

(B) the type, age, manufacturer, and method of construction of such pipeline and facilities;

(C) the nature of the materials transported, the sequence in which they are transported, and the pressure at which they are transported; and

(D) the climatic, geologic, seismic, and conditions (including soil characteristics) associated with the areas in which the pipeline facilities are located, and the existing and projected population and demographic characteristics associated with such areas;

(2) the cost-effectiveness, feasibility, and potential benefits of establishing in the Department of Transportation a program for use in an electronic data-processing system, which would be used to process and maintain pipeline-safety information obtained under existing and future Federal laws and regulations;

III. 18

Title : Nuclear Regulatory Commission
42 U.S.C. 5877.

Summary : Outlines duties and functions of the Nuclear Regulatory Commission.

Obligation : The Administrator of the Nuclear Regulatory Commission is required to submit a report to the President for submission to Congress on the activities of the Commission for the preceding year. "Such a report shall include a clear statement of the short-range and long-range goals, priorities, and plans of the commission as they relate to the benefits, costs and risks of commercial nuclear power."

III. 19

Title : Surface Transportation Assistance Act of 1978, Pub. L. 95-599, 92 Stat. 2689.

Summary : Section 170 of the Act creates the National Alcohol Fuels Commission.

Obligation : Section 170 (a) (2), directs the Commission to "evaluate the costs and benefits of alternative feedstocks, and their possible end uses, and analyze the feasibility and desirability of converting these resources to alcohol fuels... Based on such study it shall recommend those policies, and their attendant costs and benefits, most likely to minimize our dependence on petroleum, insure adequate energy supplies, and contribute to the economic health of the Nation.

The Commission is directed to report its findings to Congress under section 170(b) and (c), and to make recommendations with respect to "(2) the relative costs and benefits of developing alcohol fuels from alternative feedstocks, taking into account technical, economic, legal, competitive, environmental, and social factors associated with their production, distribution, and use."

III. 20

Title : Emergency Highway Energy Conservation Act
23 U.S.C. 101

Summary : Provides for demonstration projects to encourage the use of carpools.

Obligation: Secretary of Transportation to identify the costs and benefits of measures used to encourage the use of carpools in urban areas - and report to Congress his findings, conclusions, and recommendations no later than Dec. 31, 1974.

III. 21

Title : Solar Energy and Energy Conservation Bank Act
12 USC 3601 et seq.

Summary : The Act creates the Bank within the Department of Housing and Urban Development, and creates a Board of Directors to govern it.

Obligation : The Board, under 12 U.S.C. 3617, is directed to submit a report to Congress and the President which discusses, in part:

"(3) the cost effectiveness of the program in terms of expenditure, specific residential and commercial energy conserving improvements, and energy savings, using statistically valid samples of the improvements assisted under this subtitle."

III. 22

Title : Electric and Hybrid Vehicle Research, Development and Demonstration.
15 USC 2512

Summary : Outlines programs authorized under the Electric and Hybrid Research Development and Demonstration Project.

Obligation : Administrator of the Federal Energy Administration is required to conduct a study to determine the overall effectiveness and feasibility of including regenerative braking systems on electric and other automobiles in order to recover energy. Such study shall "assess the net energy impacts and cost effectiveness of such devices."

III. 23

Title : Alaska Natural Gas Transportation
15 USC 719 et seq.

Summary : Under 15 USC 719d, Federal officials are authorized to submit written comments respecting the recommendations for alternative methods for transportation of Alaska natural gas.

Obligation : Written comments shall include information within competence of the Federal officials with respect to:

"(7) impact on the national economy including regional natural gas requirements."

III. 24

Title : Motor Vehicle Emission and Fuel Standards
42 USC 1857F-6F

Summary : Requires a study to determine the practicability of establishing a fuel economy improvement standard of 20 per centum for new motor vehicle manufactured during and after model year 1980.

Obligation : The Administrator of EPA and the Secretary of Transportation shall conduct a study and report to Congress on the practicability of establishing fuel economy improvement standard. Such study shall include "the economic costs associated with such standard including any beneficial economic impact."

III. 25

Title : Water Resource Assessment
42 USC 5912

Summary : Provides for assessment of water resource requirements for non-nuclear energy projects.

Obligation : At the request of the Administrator of the Environmental Protection Administration, the Water Resources Council shall undertake an assessment of water resource requirement for any nonnuclear energy technology which is the subject of Federal research and development efforts which could have significant impact on water resources. In preparation of its assessment the Council shall "assess the environmental, social and economic impact of any change in use of currently utilized water resource that may be required by the proposed facility, or process."

III. 26

Title : National Energy Conservation Policy Act
41 USC 8201 et seq.

Summary : 42 USC 9232 calls for the Secretary of HUD to prepare, in coordination with designated officials, a residential energy efficiency standards study.

Obligation : The study shall include "an analysis of the effect of such a requirement on the economy as a whole and on the Nation's security as compared to the impact on the credit and housing markets caused by such a requirement."

III. 27

Title : Emergency Petroleum Allocation
15 U.S.C. 751 et seq.

Summary : 15 U.S.C. 757 sets forth standards and procedures of the oil pricing policy.

Obligation: The President is directed to submit a report to Congress "containing an analysis of the impact of any amendment... on the economy and on the supply of crude oil, residual fuel oil, and refined petroleum products." 15 U.S.C. 757 (f) (1).

III. 28

Title : Federal Energy Administration
15 U.S.C. 772

Summary : Mandates certain information gathering duties for the Federal Energy Administration.

Obligation : The Administrator shall collect information concerning energy resources on Federal lands. Such information shall include, but not be limited to, quantities of reserves, current or proposed leasing agreements, environmental considerations and economic impact analyses.

III. 29

Title : Federal Energy Administration
15 USC 782

Summary : Requires the Federal Energy Administrator to submit a report to Congress on the subject of petrochemicals.

Obligation : Requires the Administrator to inform Congress of the "anticipated economic effects of current and expected 1975 levels of domestic supplies of petrochemicals upon domestic producers, converters and fabricators of petrochemical raw materials and products."

III. 30

Title : Ocean Thermal Energy Conversion Research, Development, and Demonstration Act
Pub. L. 96-210; 94 Stat. 941 (1980);
42 U.S.C. 9001 et seq.

Summary : An Act to provide for research, development, and demonstration programs to achieve early technology applications for ocean thermal energy conversion systems.

Obligation: Directs the Secretary of Energy to prepare a comprehensive program management plan for research, development, and demonstration activities; to transmit the program to the House Committee on Science and Technology and the Senate Committee on Energy and Natural Resources; and to include "an analysis of the environmental, economic and societal impacts of ocean thermal energy conversion facilities."

III. 31

Title : Regional Action Planning Commission
42 U.S.C. 3194.

Summary : Establishes guidelines for carrying out regional energy related demonstration projects.

Obligation: Statement of purpose that expanded energy production opportunities must maximize social and economic benefits while minimizing social and environmental costs.

III. 32

Title : Department of Energy Act of 1978
Pub. L. 95-238, 92 Stat. 47.

Summary : An Act to authorize appropriations for the Department of Energy and for energy-related research, development and demonstration. Many of the Act's provisions amend the Federal Nonnuclear Energy Research and Development Act of 1974, 42 U.S.C. 5901, et. seq.

Obligation : Title I of the Act amends the Federal Nonnuclear Energy Research and Development Act by adding 42 U.S.C. 5919, entitled "Loan Guarantees for alternative fuel demonstration facilities," 42 U.S.C. 5919(a)(3) declares it to be the purpose of the Act "to gather information about the technological, economic, environmental, and social costs, benefits, and impacts of such demonstration facilities."

Title IV of the Act amends the Federal Nonnuclear Energy Research and Development Act by adding 42 U.S.C. 5920, entitled "Financial support program for municipal waste reprocessing demonstration facilities." 42 U.S.C. 5920(a)(2) declares it to be the purpose of the section "to gather information about the technological economic, environmental, and social costs, benefits, and impacts of such demonstration facilities."

III. 33

Title : Appalachian Regional Development Act
Pub. L. 94-188, 89 Stat. 1079
40 U.S.C. App. §2

Summary : Outlines policies and procedures for the program of Appalachian Regional Development.

Obligation: Congressional statement of purpose. Opportunities for expanded energy production should be used so as to maximize social and economic benefits and minimize social and environmental costs.

III. 34

Title : Renewable Energy Resources Act
42 USC 7371

Summary : Declaration of Purpose

Obligation : "[T]o encourage the use of certain cost effective solar energy systems and conservation measures by the Federal Government."

III. 35

Title : Public Utility Regulatory Policies Act of 1978
16 U.S.C. 824a-2.

Summary : Mandates a study by the Secretary of Energy in consultation with the Federal Energy Regulatory Commission regarding the reliability of electric utility service to consumers.

Obligation: The Secretary of Energy shall conduct a study of the various methods which could be used in order to achieve a level of reliability appropriate to serve the needs of electric consumers and the cost effectiveness of such methods.

III. 36

Title : Department of Energy Act of 1978 — civilian applications
42 U.S.C. 5556a.

Summary : Authorizes funds for the acquisition of solar photovoltaic energy systems.

Obligation: Solar photovoltaic energy systems acquired shall be available for use for power generation by Federal agencies provided that no procurement takes place until their application on Federal sites is determined to be life cycle cost effective.

IV. 1

Title : Motor Vehicle Information and Cost Savings
15 USC 1901 et seq

Summary : 15 U.S.C. 1912 sets forth the authority of Secretary of Transportation in regard to the promulgation of bumper standards.

Obligation : Bumper standards, under 15 U.S.C. 1912 (b), "shall seek to obtain the maximum feasible reduction of costs to the public and to the consumer, taking into account:

> (A) the cost of implementing the standard and the benefits attainable as the result of implementation of the standards;
> (B) the effect of implementation of the standard on the cost of insurance and prospective legal fees and costs;
> (C) savings in terms of consumer time and inconvenience; and
> (D) considerations of health and safety, including emission standards.

IV. 2

Title : Diagnostic Inspection and Demonstration Projects
15 USC 1961 et seq.

Summary : 15 USC 1962 directs the Secretary of Transportation to establish a motor vehicle diagnostic inspection demonstration project.

Obligation : 15 USC 1962(b)(5) provides that "[e]ach project shall provide to the Secretary information and data ... relating to the costs and benefits of such projects, including ... the capability of the motor vehicle repair industry to correct diagnosed deficiencies or malfunctions and the costs of such repairs, the relative costs and benefits of the project, the efficiency of facility designs employed, recommendations as to feasible reject levels which may be employed, in any such project and such other information and data as the Secretary may require."

IV. 3

Title : Surface Transportation Assistance Act of 1978, Pub. L. 95-599, 92 Stat. 2689.

Summary : Title I establishes the Federal-Aid Highway Act of 1978. Amends 23 U.S.C. 152.

Obligation : 23 U.S.C. 152 (f) requires states to establish an evaluation process, approved by the Secretary of Transportation, to analyze and assess results achieved by highway safety improvement projects. The evaluation process "shall develop cost-benefit data for various types of corrections and treatments which shall be used in setting priorities for highway safety improvement projects."

23 U.S.C. 152(g) requires that states submit annual progress reports to the Secretary which include "an assessment of the cost, of and safety benefits derived from, the various means and methods used to mitigate or eliminate hazards and the previous and subsequent accident experience at these locations."

IV. 4

Title : Local Rail Service Assistance Act of 1978, Pub. L. 95-607, 92 Stat. 3059.

Summary : An Act to amend section 5 of the Department of Transportation Act, 49 U.S.C. 1654, addressing rail service responsibilities of the Secretary.

Obligation : 49 U.S.C. 1654 (j) (2) was amended to require that states, as a precondition for rail service assistance, develop a plan which includes "a methodology for determining the ratio of benefits to costs of projects which are proposed to be initiated after November 8, 1978, and which are eligible for assistance".

IV. 5

Title : Milwaukee Railroad Restructuring Act Pub. L. 96-101, 93 Stat. 736.

Summary : An Act to provide for the orderly restructuring of the Milwaukee Railroad, and for the protection of the employees of such railroad; amends the Railroad Revitalization and Reform Act.

Obligation : The Act amends a provision under the Railroad Revitalization and Reform Act, 45 U.S.C. 825 (b) (2), which requires the Secretary of Transportation to determine whether a railroad's application for facilities rehabilitation and improvement financing are "in the public interest." The Secretary, to ascertain the public interest, is required to consider, inter alia, "the public benefits, including any significant railroad restructuring, to be realized from the project to be financed in relation to the public costs of such financing and whether the proposed project will return public benefits sufficient to justify such public costs."

IV. 6

Title : Amtrak Improvement Act of 1978, Pub. L. 95-421, 92 Stat. 923.

Summary : An Act to amend the Rail Passenger Service Act to provide for public consideration and implementation of a rail passenger service study, and for other purposes.

Obligation : The Secretary of Transportation is directed, under Section 4 of the Act to develop preliminary recommendations for a route system for the National Railroad Passenger Corporation. In developing the recommendations, the Secretary shall consider —

"(3) the relationship of benefits of given intercity rail passenger services to the costs of providing such services, computing the benefits in passenger per train mile and revenues earned and computing the costs in loss or profit per passenger mile rather than total loss or profit per route."

IV. 7

Title : Rail Passenger Corridors
45 U.S.C. 651 et seq.

Summary : 45 U.S.C. sections 651 and 652 direct the Secretary of Transportation and the National Railroad Passenger Corporation to develop a method for evaluating rail passenger corridors.

Obligation: 45 U.S.C. 651(c) directs the Secretary, in consultation with the Corporation, to establish a priority ranking of rail corridors and to "determine which corridors have the greatest potential to attract riders, reduce energy consumption, and provide cost effective rail passenger service."

45 U.S.C. 652 directs the Corporation to develop design and engineering plans necessary to provide accurate information which the Corporation, in consultation with the Secretary, "determines necessary to complete an accurate assessment of the anticipated cost and benefits of instituting new service in such corridors."

IV. 8

Title : Rail Passenger Service
45 U.S.C. 521

Summary : Secretary of Transportation shall make recommendations for a basic national rail passenger system.

Obligations : Preliminary report to be submitted to Congress shall include consideration of the "relationship of public benefits of given service to the costs of providing such services."

IV. 9

Title : United States Railway Association
45 U.S.C. 712

Summary : Outlines duties of the United States Railway Association.

Obligation : The Association shall consider methods of achieving economies in the cost of rail system operations, together with the anticipated economic, social and environmental costs and benefits of each such method.

IV.10

Title : Railroad Rehabilitation and Improvement Financing
45 USC 825.

Summary : Sets standards of approval by the Secretary of Transportation for requests for funds under the chapter.

Obligation : The Secretary of Transportation may approve any application if he determines that providing the requested financial assistance is in the public interest. In making this determination he shall evaluate and consider the public benefits to be realized from the project costs of such financing and whether the proposed project will return public benefits sufficient to justify such public costs.

IV. 11

Title : Railroad Rehabilitation and Improvement Financing 45 USC 831.

Summary : Outlines provisions to be met to issue a guarantee of obligations by the Secretary of Transportation for the purpose of improving rail properties.

Obligation : Stipulate that obligations may be guaranteed by the Secretary if the proceeds of such obligations shall be or have been used to acquire or rehabilitate and improve facilities or equipment in a manner that returns the most public benefits for the costs involved.

IV. 12

Title : Rail Passenger Service 45 USC 564

Summary : Specifies procedures for submitting proposals to add or discontinue rail routes and services.

Obligation : The board of directors of the National Railroad Passenger Corporation shall submit to the Corporation, the Secretary of Transportation and to Congress an initial proposal setting forth criteria and procedures under which the Corporation would be authorized to add or discontinue routes and services. Such criteria shall include methods for evaluating the economic and environmental impact of any addition or discontinuance of intercity rail passenger service including an evaluation of the economic impact to the Corporation and to the nation of the addition of new service points along existing or new intercity routes within the Northeast Corridor.

IV. 13

Title : Surface Transportation Assistance Act of 1978. Pub. L. 95-599, 92 Stat. 2689.

Summary : Title I establishes the Federal-Aid Highway Act of 1978.

Obligation: Section 162, 23 U.S.C. 130 note, directs the Secretary of Transportation, in cooperation with designated entities, to study, investigate, and report to Congress on techniques for alleviating "the environmental, social, economic, and developmental impacts of increased unit train traffic to meet national energy requirements in communities located along rail corridors experiencing such increased traffic." The report shall include:

(1) identification of specific adverse impacts on affected communities;
(2) examination of specific techniques to alleviate such impacts, including but not limited to low cost systems management methods, grade crossing separation, and rail line relocation, together with an assessment of the cost and benefits of each such technique;
(3) delineation of criteria to determine whether grade crossing separation or rail line relocation is appropriate for a given location;
(4) determination of the proper share of the cost of implementation for each such technique to be borne by the railroad or railroads based on the net benefit derived; and
(5) determination of various costs for different types of separation construction based on such factors as number of rail lines and number of highway lanes intersecting at the crossing.

IV. 14

Title : Elimination of Roadside Obstacles
23 U.S.C. 153

Summary : Provides funds for the correction of roadside hazards out of the Highway Trust Fund.

Obligation: Each state shall report to the Secretary of Transportation no later than September 30th each year on the progress being made in implementing the program.

Each report shall contain an assessment of the costs and safety benefits of the various means and methods used to mitigate or eliminate roadside obstacles.

IV. 15

Title : Automobile Consumer Information Study
15 U.S.C. 1941 et seq.

Summary : Under 15 U.S.C. 1941, the Secretary of Transportation is directed to conduct a comprehensive study and investigation of the methods for determining the prescribed characteristics of passenger motor vehicles.

Obligation: After the study has been completed, the Secretary is directed to devise specific ways in which information on "vehicle operating costs dependent upon [the] characteristics ... can be communicated to consumers so as to be of benefit in their passenger motor vehicle purchasing decisions."

IV. 16

Title : Railroad Rehabilitation and Improvement Financing
45 USC 824.

Summary : Outlines the operation and administration of the Railroad Rehabilitation and Improvement Fund.

Obligation : In preparing recommendations to be submitted to Congress and the Secretary of the Treasury for use of funds under this chapter, the Secretary of Transportation shall "specifically consider and evaluate the public costs and benefits which would result from public ownership of railroad right of way."

IV. 17

Title : Northwest Corridor Project Implementation
45 USC 853.

Summary : Outlines duties and functions of the National Railroad Passenger Corporation.

Obligation : The Secretary of Transportation was required to submit a report to Congress which shall include a full and complete accounting of the need for improvements in intercity passenger transportation within the Northeast Corridor and a full accounting of the public costs and benefits of improving various modes of transportation to meet those needs.

IV. 18

Title : Comprehensive Study of Highway Beautification Programs
23 U.S.C. 131

Summary : Provided for a study by the Secretary of Transportation in cooperation with State Highway departments making a detailed estimate of the cost of carrying out the provisions of Pub. L. 89-885 and a comprehensive study of the economic impact of such programs on affected individuals and commercial and industrial enterprises.

Obligation: Report to Congress was due Jan. 10, 1967.

IV. 19

Title : Rail Service Planning Office
45 UCS 715

Summary : Establishes an Office of Rail Service Planning within the Interstate Commerce Commission

Obligation : Upon the request of a State the Office shall prepare and publish in the Federal Register an evaluation of the economic viability of any or all light density lines within such State which are not designated for inclusion in the final system plan.

IV. 20

Title : Surface Transportation Assistance Act
23 U.S.C. 109.

Summary : Sets forth criteria for using any right-of-way on any Federal-aid highway system for accomodating any utility facility.

Obligation: The Secretary of Transportation shall evaluate the direct and indirect environmental and economic effects of any loss of agricultural productivity that would result from the disapproval of the use of right-of-ways for the accomodation of utility facilities.

IV. 21

Title : Port and Tanker Safety Act of 1978
33 U.S.C. 1224.

Summary : Mandates a study and report on the desirability and feasibility of shore station systems for monitoring vessels.

Obligation: The Secretary of Commerce shall report to Congress his findings regarding the capabilities, limitations, and cost effectiveness of each monitoring system examined from the standpoint of both the Federal Covermsent and any vessel owners who would be affected by the imposition of each approach.

IV. 22

Title : Air Carrier Economic Regulation
42 U.S.C. 1373.

Summary : Requires a study on reduced rate transportation for persons 21 years of age or younger.

Obligation: The Civil Aeronautics Board shall study and report to Congress on the feasibility and economic impact of air carriers and foreign air carriers providing reduced rate transportation on a space available basis to persons twenty-one years of age or younger.

IV. 23

Title : Congressional Declaration of Policy
Port and Tanker Safety Act
46 U.S.C. 391a

Summray : Declares the Policy of Congress in regard to vessels carrying certain cargoes in bulk.

Obligation: Declare that standards developed through regulations shall incorporate the best available technology and shall be required unless clearly shown to create an undue economic impact which is not outweighed by the benefits to navigation and vessel safety or protection of the marine environment.

V. 1

Title : Watershed Protection and Flood Prevention
16 U.S.C. 1001 et seq.

Summary : The Secretary of Agriculture is authorized to provide assistance to local organizations in preparing and planning water control projects under 16 U.S.C. 1003.

Obligation: The Secretary is authorized:

"(2) to prepare plans and estimates required for adequate engineering evaluation;
"(3) to make allocations of costs to the various purposes to show the basis of such allocations an to determine whether benefits exceed costs;"

V. 2

Title : Rivers and Harbors Improvements
33 U.S.C. 545

Summary : Outlines general requirements for surveys, reports and preliminary examinations of proposed river and harbor improvements.

Obligation: Secretary of the Army is authorized, in his discretion, to conduct surveys and report the results to Congress containing assessment of the cost and advisability of proposed projects and the benefit to commerce likely to result from improvements.

V. 3

Title : Small Rivers and Harbor Improvement Projects
33 U.S.C. 577

Summary : Authorizes appropriations for the construction of small river and harbor projects not specifically authorized by Congress.

Obligation: Chief of Army Corps of Engineers required to determine if the benefits of projects outweigh the costs.

V. 4

Title : Reclamation and Irrigation of Lands by Federal Government
43 USC 390b

Summary : Sets guidelines for the development of water supplies for domestic, industrial and other purposes.

Obligation : Provides that "the cost of any construction or modification authorized under the provisions of this section shall be determined on the basis that all authorized purposes served by the project shall share equitably in the benefits of multiple purpose construction."

V. 5

Title : Act of October 21, 1978, Pub. L. 95-502, 92 Stat. 1693 Title I - Replacement of Locks and Dam 26; Upper Mississippi River System Comprehensive Master Management Plan.

Summary : Requires Study by Upper Mississippi River Basin Commission.

Obligation : Section 101 directs the Upper Mississippi River Basin Commission to conduct the studies necessary to prepare a comprehensive master plan for the management of the Upper Mississippi River System. The Commission is specifically directed to study, "transportation costs and benefits to the Nation to be derived from any expansion of navigational capacity on said River System."; and "a demonstration program to evaluate the benefits and costs of disposing of dredge spoil material in contained areas located out of the floodplain."

V. 6

Title : Colorado River Basin Salinity Control
43 USC 1571.

Summary : Authorizes the Secretary to engage in Water Quality Improvement programs.

Obligation : Provides that the costs associated with the improvements authorized herein and allocated to the water users on the basis of benefits received, as determined by the Secretary shall be reimbursed to the United States in amounts and on terms and conditions satisfactory to the Secretary.

V. 7

Title : Feasibility studies by Secretary of the Interior-water projects. Colorado River Storage Project 43 USC 620.

Summary : Authorizes the Secretary of the Interior to construct, operate and maintain certain initial units of the Colorado River Storage Project

Obligation : Prior to construction of specified projects the Secretary of the Interior shall complete and submit to Congress a feasibility report certifying that in his judgment the benefits of such projects will exceed the costs.

V. 8

Title : Capital and White House-Pennsylvania Ave. Development 40 USC 874

Summary : Establishes the Pennsylvania Avenue Development Corporation

Obligation : A development plan prepared with the cooperation of the Department of the Interior, the General Services Administration and the District of Columbia Government shall include a thorough study of the economic impact on the local tax base; the metropolitan area as a whole, and the existing business activities within the development areas.

V. 9

Title : Rivers and Harbors Improvements 33 USC 547A

Summary : Mandates studies of navigation projects which serve regional needs.

Obligation : The Secretaries of the Army acting through the Chief of Engineers may include in any economic analysis which is under preparation on Oct. 27, 1976 such regional economic benefits as he determines to be appropriate for the purposes of computing the economic justification of the project.

V. 10

Title : Flood Control 33 USC 701-1

Summary : Declaration of Policy

Obligation : Declares the Policy of Congress with respect to construction of works of improvement for navigation or flood control "to limit the authorization and construction of navigation works to those in which a substantial benefit to navigation will be realized therefore and which can be operated consistently with appropriate and economic use of the waters of such rivers by other users."

V. 11

Title : Flood Control
33 U.S.C. 701A. June 27, 1936,
ch. 688 § 1 49 Stat. 1570.

Summary : Declares the policy of the United States with respect to the activities of flood control on navigable waters.

Obligation : The Federal Government should improve or participate in the improvement of navigable waters for flood control purposes "if the benefits to whomsoever they may accrue are in excess of the estimated costs, and if the lives and social security of people are otherwise adversely affected."

V. 12

Title : International Joint Commission, U.S. Canada 22 U.S.C. 267(b).

Summary : Provides for an International Joint Commission to investigate and report upon the conditions and uses of the water adjacent to the boundary lines between the U.S. and Canada.

Obligation : Report upon the advisability of locating a dam at the outlet of Lake Erie with a view to determining whether such a dam will benefit navigation and they shall make an estimate of probable cost thereof.

VI. 1

Title : School Lunch Programs
42 U.S.C. 1751 et seq.

Subject : 42 U.S.C. 1762a, entitled "Commodity Distribution Program" discusses the manner in which the Secretary of Agriculture may provide assistance to school lunch programs

Obligation : The Secretary, in providing assistance, is directed to establish procedures which will:

> "(4) provide for systematic review of the costs and benefits of providing commodities of the kind and quantity that are suitable to the needs of local school districts and private nonprofit schools."

VI. 2

Title : Comprehensive Older Americans Act Amendments of 1978, Pub. L. 95-478, 92 Stat. 1513.

Summary : An Act to amend the Older Americans Act of 1965 to provide for improved programs for older persons.

Obligation : Under section 422, 42 U.S.C. 3035c, the Commissioner of the Administration on Aging is authorized to make grants for special projects in comprehensive long-term care:

> "(3) Agencies and organizations assisted under this section shall establish procedures for evaluating the program assisted under this section, with respect to the benefits accruing to persons receiving

VI.2 (Continued)

assistance, the feasibility of the administrative model used for comprehensive coordination of services including coordination with other local programs, and the comparative costs and quality of services provided, and shall submit such evaluation to the Commissioner on a periodic basis.

"(c) The Secretary shall involve appropriate Federal departments and agencies in carrying out the provisions of this section in order to assure coordination at the Federal level and to avoid duplication and shall report to the Congress annually on the impact of grants made, on the experiences of grantees in meeting the requirements of this section, and on the comparative benefits and costs of projects assisted under this section.

VI. 3

Title : Public Health Service - Health Systems Agencies
42 U.S.C. 300L-2(3)

Summary : The Act outlines procedures and guidelines to be observed by Health Systems Agencies.

Obligation: Agency is required to establish, annually review and amend as necessary an annual implementation plan (AIP) which describes objectives which will achieve the goals of the Health Systems Plan. In establishing the AIP the Agency shall give priority to those objectives which will maximally improve the health of the residents of the area, as determined on the basis of the relation of the costs of attaining such objectives to their benefits, and which are fitted to the special needs of the area.

VI. 4

Title : Public Works and Economic Development
42 U.S.C. 3181 et. seq.

Summary : Outlines progress of the Regional Action Planning Commission

Obligation : Authorizes the Secretary of Health Education and Welfare to make grants for the acquisition of facilities for health and nutrition demonstration projects "where the acquisition of such facilities is the most cost effective means for providing increased health services." 42 U.S.C. 3195(a).

VI. 5

Title : National Health Planning and Development
42 U.S.C. 300K et seq.

Summary : By virtue of the Health Planning and Resource Developments Amendments of 1979, Public Law 96-79, 93 Stat 592, cost effectiveness provisions were incorporated into the statutory provisions noted below.

Obligation: 42 U.S.C. 300K-2(b)(2) provides that Health Systems Agencies and State health planning and development agencies should allocate the supply of services "where appropriate to advance the purposes of quality assurance, cost effectiveness, and access."

42 U.S.C. 300L-1(b)(A) provides that Health Systems Agencies shall have expertise in "(v) financial and economic analysis.

42 U.S.C. 300L-2(g)(3) provides that each Health Systems Agency periodically review institutional and home

VI. 5 (Continued)

health services and "consider the need for the service, its accessibility and availability, financial viability, cost effectiveness, and quality of service provided."

42 U.S.C. 300m-2(a)(6) directs each State Agency to periodically review "the need for the service, its accessibility and availability, financial viability, cost effectiveness, and the quality of service provided."

VI. 6

Title : Rehabilitation Comprehensive Services, and Developmental Disabilities Amendments of 1978, Pub. L. 95-602, 92 Stat. 2955.

Summary : An Act of amend Title III of the Rehabilitation Act of 1973, 29 U.S.C. 770 et. seq. and for other purposes.

Obligation : The law, section 116, added 29 U.S.C. 777a, which provides that the Commissioner of the Rehabilitation Services Administration may make grants to public or nonprofit agencies and organizations for special projects and demonstrations for recreational and vocational rehabilitation services, etc.

29 U.S.C. 777a (b) provides that any project or demonstration assisted by a grant which provides services to individuals with spinal cord injuries must "(2) demonstrate and evaluate the benefits to individuals with spinal cord injuries served in, and the degree of cost effectiveness of, such a regional system."

VI. 7

Title : Veterans Health Care Amendments of 1979
Pub. L. 96-22, 93 Stat. 47

Summary : Establishes, among other things, a pilot program for treatment and rehabilitation of veterans with alcohol or drug dependence or abuse disabilities.

Obligation: Section 104 of the Act amends 38 U.S.C. 620A to establish a pilot program for the purposes stated above, to be planned, designed, and conducted by the Chief Medical Director, with the approval of the Administrator of Veterans' Affairs, so as to demonstrate any medical advantages and cost effectiveness that may result from furnishing services in contract facilities as authorized, rather than in facilities over which the Administrator has direct jurisdiction.

VI. 8

Title : Consumer Product Safety Act
Pub. L. 95-631, 93 Stat. 3742 (1978)
15 USC 2076

Summary : Pursuant to 15 USC 2076(m), the Consumer Product Safety Commission is directed to review all rules in effect on November 10, 1978 and submit a report to Congress thereon within 18 months.

Obligation : The report should include:

(i) an economic impact analysis which takes into account, for such rule, the cost impact on and benefits to consumers and affected businesses (with particular attention to small businesses);
(ii) a paperwork impact analysis containing—

VI. 8 (Continued)

(I) an estimate of the numbers of, and a description of the classes of, persons who are required to file reports, maintain records, and fulfill any of the information-gathering requirements under such rule;

(II) an estimate of the nature and amount of the information required to be filed in such reports, the frequency of such reports, the nature and number of records required to be kept by such persons, and the amount of time such persons would require, and the costs which would be incurred, to keep such records and make such reports; and

(III) a description of steps being taken by the Commission to ensure that there is no unnecessary duplication in recordkeeping and report filing resulting from such rule;

(iii) a judicial impact analysis showing the effect of such rule on the workload of the Federal courts; and

(iv) such other explanatory and supporting statements and materials as the Commission determines necessary and appropriate for congressional consideration of such report.

VI. 9

Title : Fire Prevention and Control
15 USC 2201 et seq.

Summary : 15 USC 2209 directs the Secretary of Commerce to submit a report to Congress on the establishment and effectiveness of master plans in the field of fire prevention and control.

Obligation : The report shall include, under 15 USC 2209(b)(4), "an assessment of the costs and benefits of master plans."

VI. 10

Title : Fire Prevention and Control
15 USC 2207

Summary : Outlines the programs of the National Fire Prevention and Control Administration

Obligation : The Administrator is authorized to conduct, directly or through contracts or grants, studies of the operations and management aspects of fire services, utilizing quantitative techniques, such as operations research, management economics, cost effectiveness studies, and such other techniques and methods as may be applicable and useful.

VI. 11

Title : Education Amendments of 1978
Pub. L. 95-561, 92 Stat. 2311
20 USC 136 note

Summary : Establishes a Commission on the Review of the Federal Impact Aid Program to review, evaluate, and report to Congress on the administration and operation of the impact aid program under Public Law 874, Eighty-first Congress.

Obligation : The Commission is directed to evaluate:

"(2) the relative benefit of the assistance for impact aid under Public Law 874 in view of the increasing costs of the program and the limitation on the availability of funds."

VI. 12

Title : Aid to Families with Dependent Children
42 U.S.C. 601 et seq.

Subject : The Secretary of the Department of Health Education and Welfare is directed, under 42 U.S.C. 652, to establish a separate organizational unit for such purposes as establishing programs for locating absent parents, establishing paternity, and obtaining child support.

Obligation : The Secretary is directed to report to Congress, such report to include:

"(G) data, by State, on the use of Federal courts on the use of the Internal Revenue services for collections, the number of court orders on which collections were made, the number of paternity determinations made and the number of parents located, in sufficient detail to show the cost and benefits to the States and to the Federal Government."
42 U.S.C. 652(a)(10)(G).

VI. 13

Title : Health Maintenance Organizations
42 USC 300E-13

Summary : Requires program evaluation of Health Maintenance Organization.

Obligation : The Comptroller General shall conduct a study of the economic effects on employers resulting from compliance with health benefit regulations, and shall report to Congress the results of this study.

VI. 14

Title : The Public Health Service
42 U.S.C. 201 et seq.

Summary : The National Center for Health Statistics is established under 42 U.S.C. 242K.

Obligation: The Secretary [of Health and Human Services], acting through the Center, is directed to collect statistics on:

"(B) the impact of illness and disability of the population on the economy of the United States and on other aspects of the well-being of its population (or of such groupings)."

VI. 15

Title : Public Health Service Activities for Research
Pub. L. 94-562, 90 Stat. 2650
42 U.S.C. 289a note

Summary : Establishes a National Commission on Digestive Diseases.

Obligation : Requires the Commission to conduct a comprehensive study of the present state of knowledge of the incidence, duration and morbidity of, and mortality rates resulting from digestive diseases and of the social and economic impact of such diseases.

VI. 16

Title : Mandatory Mining Safety and Health Standards
30 U.S.C. 811.

Summary : Provides for the development, promulgation and revision of mining safety and health standards.

Obligation: The Secretary of Health and Human Services shall be required to request the recommendations of an advisory committee if the rule to be promulgated is, in the discretion of the Secretary which shall be final, new in effect or application and has significant economic effect.

VI. 17

Title : End Stage Renal Disease Program
Pub. L. 95-292, 92 Stat. 307.

Summary : Makes improvements to the end stage renal disease program.

Obligation: The Secretary of HEW shall conduct a study of the number of patients with end stage renal disease who are not eligible for benefits with respect to such disease under this title and the economic impact of such non-eligibility of such individuals.

VI. 18

Title : Health Services Research, Health Statistics and Health Care Technology Act of 1978
42 U.S.C. 242b.

Summary : Directs the Secretary of H.E.W. to undertake certain action to improve the effectiveness, efficiency and quality of health services in the United States.

Obligation: The Secretary shall give appropriate emphasis to research, demonstrations, evaluations and statistical and epidemiological activities respecting the safety, efficiency, effectiveness, cost effectiveness and social, economic, and ethical impacts of health care technologies.

VII. 1

Title : Federal Trade Commission Improvements Act of 1980
Pub. L. 96-252, 94 Stat. 374

Summary : Amends the Federal Trade Commission Act, 15 USC 41 et seq., by requiring preliminary and final regulatory analyses to accompany proposed and final rulemaking.

Obligation : Requirements for the regulatory analyses are set forth at 15 USC 57b-3 The analyses should include, in part:

> "(C) for the proposed rule, and for each of the alternatives described in the analysis, a preliminary analysis of the projected benefits and any adverse economic effects and other effects, and of the effectiveness of the proposed rule and each alternative in meeting the stated objectives of the proposed rule." 15 USC 576-3(b)(1)(c).

VII. 2

Title : Federal Trade Commission
15 U.S.C. 57a

Summary : Sets forth rulemaking proceedings for the Federal Trade Commission regarding unfair or deceptive acts or practices.

Obligation : The Commission statement of basis and purpose to accompany a rule with respect to unfair or deceptive acts or practices shall include a statement as to the economic effect of the rule, taking into account the effect on small business and consumers.

VII. 3

Title : Financial Institutions Regulatory and Interest Rate Control Act of 1978 Pub. L. 95-630, 92 Stat. 3641.

Summary : Title IX of the Act establishes the "Electronic Fund Transfer Act", 15 U.S.C. 1693 et seq.

Obligation : In promulgating regulations, 15 U.S.C. 1693b, the Board of Governors of the Federal Reserve System is required to:

> "(2) prepare an analysis of economic impact which considers the costs and benefits to financial institutions, consumers, and other users of electronic fund transfers, including the extent to which additional documentation, reports, records, or other paper work would be required, and the effects upon competition in the provision of electronic banking services among large and small financial institutions and the availability of such services to different classes of consumers, particularly low income consumers,

The Board is also required, under 15 U.S.C. 1693p, to report to Congress anually in conjunction with the Attorney General. In each report, "the Board shall particularly address the effects of this title on the costs and benefits to financial institutions and consumers, on competition, on the introduction of new technology, on the operations of financial institutions, and on the adequacy of consumer protection."

VII. 4

Title : Interstate Commerce Act
49 UCS 20

Summary : Requires the Interstate Commerce Commission to issue regulations prescribing a uniform cost and revenue accounting and reporting system for all common carriers by railroad.

Obligation : The Interstate Commerce Commission shall to the extent possible devise the system of accounts to be cost effective.

VII. 5

Title : Tax Incentives Study
26 USC 8022

Summary : Mandates study by the Joint Committee on Taxation of different kinds of tax incentives.

Obligation : Report to be submitted to the Committees of Congress no later than Sept. 30, 1977 on the cost effectiveness of different kinds of tax incentives.

VII. 6

Title : Chrysler Corporation Loan Guarantee Act of 1979
Pub. L. 96-185, 93 Stat. 1324

Summary : This law, in relevant part, requires the Chrysler Corporation Loan Guarantee Board to submit a report to Congress semiannually describing the nature of its activities under the Act for 1980 and 1981, and annually thereafter so long as any loan guaranteed under the Act is outstanding.

Obligation: Under section 14(a) of the Act, 15 U.S.C. 1873, the Board is required to include in the final report for 1981, "an evaluation of the long-term economic implications of the Chrysler loan guarantee program, with findings, conclusions, and recommendations for legislative and administrative actions considered appropriate to future Federal loan guarantee programs."

Subsection 14(c) confers upon the Board "the power to require the Secretary of Transportation to complete, within six months of such request, an assessment of the economic impact on the automobile industry of Federal regulatory requirements and the necessity thereof."

VII. 7

Title : Public Works Employment
42 U.S.C. 6701 et seq.

Summary : The Comptroller General is directed to investigate and study the emergency support program designed to prevent a recession.

Obligation: Under 42 U.S.C. 6735, the Comptroller General shall "conduct an investigation of the impact which emergency support grants have on the operations of State and local governments and on the national economy... together with an evaluation of the macroeconomic effect of the program established under this subchapter and any recommendations for improving the effectiveness of similar programs.

VII. 8

Title : Public Works Employment-Antirecession Provisions
42 USC 6733

Summary : Provides for payments to local governments to coordinate budget related actions by such governments with Federal Government efforts to stimulate economic recovery.

Obligation : The Secretary of Commerce shall report to Congress as soon as practical after the end of each calendar year during which payments are made. Such reports shall include "an evaluation of the purposes to which amounts paid under this subchapter were put by State and units of local government and economic impact of such expenditure during the previous calendar year."

VII. 9

Title : Federal Reserve Board of Governors
Publ. L. 93-100, 87 Stat. 347 (1973)
12 U.S.C. 548 note

Summary : Declares that for tax purposes national banks shall be treated as banks existing under the laws of the state within which its principal office is located.

Obligation : Required a study to be made by the Board of Governors to determine the probable economic effects on the banking system caused by certain changes in existing law. Report to be made by Dec. 31, 1970

VII. 10

Title : Economic Stabilization Act of 1970
Public Law 91-379, as amended.

Summary : An Act to stabilize the economy, reduce inflation, minimize unemployment, etc.

Obligation : Under section 207(c) of the Act, the President is directed, to the maximum extent possible, to conduct formal hearings to acquire information "bearing on a change or a proposed changed in wages, salaries, prices, rents, interest rates, or corporate dividends or similar transfers, which have or may have a significantly large impact upon the national economy..."

VII. 11

Title : International Banking Act
12 U.S.C. 36 note.

Summary : Requires a report by the President concerning the applicability of the McFadden Act.

Obligation: The President shall submit to Congress a report containing his recommendations concerning the applicability of the McFadden Act including an analysis of the effects of any proposed amendment to such act on the structure of the banking industry and in the financial and economic environment in general.

VIII.1

Title : Merchant Marine Act of 1936
46 USC 1121.

Summary : Requires Secretary of Commerce to conduct certain investigations and studies relating to suitable ocean routes and the costs of operation.

Obligation : Secretary of Commerce is required to investigate, determine and keep records of ocean routes determined to be essential to foreign commerce. In making this determination the Secretary shall give due consideration to the cost of maintaining each such line, the probability that any such line cannot be maintained except at a heavy loss disproportionate to the benefit accruing to foreign trade... and any other facts and conditions that a prudent business man would consider when dealing with his own business, with the added consideration, however, of the intangible benefit the maintenance of any such line may afford to the foreign commerce of the United States, to the national defense, and to other national requirements.

VIII. 2

Title : Revised Tariff Schedules of the United States
19 USC 1202

Summary : Sets out rules of interpretation for U.S. Tariffs.

Obligation : The Tariff Commission after holding public hearings shall advise the President with respect to articles considered for modification or continuance of duties, of its judgement as to the probable economic effect of such modification.

VIII. 3

Title : Tariff Adjustment
19 USC 1981

Summary : Outlines the authority of the President to adjust tariffs with the advise of the U.S. International Trade Commission.

Obligation : The U. S. International Trade Commission shall advise the President of its judgement as to the probable economic effect on industry of the reduction or termination of the increase in, or imposition of, any duty or other import restriction. The Commission shall take into account all economic factors which it considers relevant.

VIII. 4

Title : Trade Act of 1974
19 USC 2151

Summary : Outlines role of International Trade Commission in advising President on duty modifications

Obligation : The U.S. International Trade Commission shall advise the President on lists of articles considered for modification or continuance of duties with respect to the probable economic effect of modifications of duties on industries producing like or directly competitive articles and on consumers. In addition the Commission shall make such investigations and reports as may be requested, including, where feasible, advice as to the probable economic effects of modifications of any barrier to international trade on domestic industries and purchases.

VIII. 5

Title : Trade Act of 1974
19 USC 2253(i)

Summary : Mandates Presidential action after investigation in the area of import relief.

Obligation : "Upon request of the President or upon its own motion, the Commission shall advise the President of its judgment as to the probable economic effect on the industry concerned of the extension, reduction, or termination of the import relief provided pursuant to this section."

VIII. 6

Title : Trade Act of 1974
19 U.S.C. 2101 et seq.

Summary : Procedures for relief from unfair trade practices are set forth under 19 U.S.C. 2411.

Obligation: Before taking any action with respect to unfair trade practices, the President may request the International Trade Commission for its views "as to the probable impact on the economy of the United States of the taking of action with respect to such product or service." 19 U.S.C. 2411 (e) (3).

VIII. 7

Title : Trade Agreements Act of 1979
Pub. L. 96-39, 93 Stat. 144

Summary : An Act to approve and implement the trade agreements negotiated under the Trade Act of 1974, and for other purposes.

Obligation: Under Title III of the Act the President is charged with various reporting requirements:

§ 302(c), 19 U.S.C. 2512, directs the President, on or before July 1, 1981, to report to designated Congressional Committees on the effects on the United States economy of certain trade restrictions by developed countries.

§ 306, 19 U.S.C. 2516, directs the President to prepare and transmit to Congress a report which assesses the economic impact of the waiver of provisions under Title III of the "Buy American Act" 41 U.S.C. 10a et seq.

VIII. 8

Title : Export Administration Act of 1979
Pub. L. 96-72, 93 Stat. 503

Summary : An Act to provide authority to regulate exports, to improve the efficiency of export regulation, and to minimize interference with the ability to engage in commerce.

Obligation: Under section 5(h)(6) of the law, entitled "National Security Controls," whenever the President determines that export controls must be maintained notwithstanding foreign availability, the Secretary of Commerce is directed to publish that determination together with a concise statement of its basis and the estimated economic impact of the decision.

Under section 14 of the Act, the President is directed to submit an annual report to Congress, and to include the estimated economic impact on various industries of specified controls.

VIII. 9

Title : Meat Import Act of 1979
Pub. L. 96-177, 93 Stat. 1291

Summary : Amends meat import and quota modification laws.

Obligation: Directs the Secretary of Agriculture to study the regional economic impact of imports of meat articles and report the results of the study to the House Committee on Ways and Means and the Senate Committee on Finance (not later than June 30, 1980).

VIII. 10

Title : Export Regulation

Summary : 50 USC App. 2403(c) directs the Secretary of Commerce to monitor exports and contracts for exports, and to compile weekly or monthly monitoring reports.

Obligation : The Secretary is directed to monitor exports when "the volume of such exports in relation to domestic supply contributes, or may contribute, to an increase in domestic prices or a domestic shortage, and such price increase or shortage has, or may have, a serious adverse impact on the economy or any sector thereof."

VIII. 11

Title : Export Regulation
50 U.S.C. App. 2401 et seq.

Summary : 50 U.S.C. App. 2409 requires reports to Congress by the head of any department or agency exercising functions under the Act.

Obligation: 50 U.S.C. App. 2409(b)(1) requires the Secretary of Commerce to submit an analysis "of the impact on the economy and world trade of shortages or increased prices for articles, materials, or supplies subject to monitoring under this Act."

VIII. 12

Title : Export Administration Act of 1979
50 USC App. 2402

Summary : Declares the policy of the United States toward export control.

Obligation : "It is the policy of the United States to use export controls only after full consideration of the impact on the economy of the United States...."

IX. 1

Title : Regulatory Flexibility Act
Pub. L. 96-354; 94 Stat. 1164
5 USC 601 et seq.

Summary : The Act provides that whenever an agency publishes a notice of rulemaking for any proposed rule, the agency must prepare an initial regulatory flexibility analysis which shall describe the impact of the proposed rule on small entities. Promulgation of a final rule shall be accompanied by a final regulatory flexibility analyses.

Obligation : Pursuant to 5 USC 603(c), each initial regulatory flexibility analysis shall contain "a description of any significant alternatives to the proposed rule which accomplish the stated objectives of applicable statutes and which minimize any significant economic impact of the proposed rule on small entities."

Final regulatory flexibility analyses under 5 USC 604 also require descriptions of alternatives which may minimize any significant economic impact of a rule on small entities.

IX. 2

Title : Management and Disposal of Government Property 40 U.S.C. 471 et seq.

Summary : 40 U.S.C. 484 sets forth procedures by which the Administrator of the General Services Administration may dispose of surplus Government property.

Obligation: The Administrator may avail himself of alternative disposal procedures, under 40 U.S.C. 484 (e) (3), when:

"(D) the personal property involved is of a nature and quantity which... would cause such an impact on an industry or industries as adversely to affect the national economy."

IX. 3

Title : Congressional and Committee Procedure; Investigations 2 U.S.C. 190 et seq.

Summary : In order to assist Congress, each standing committee of the Senate and House is directed to review and study, on a continuing basis, the application, administration, and execution of laws within its jurisdiction. 2 U.S.C. 190d.

Obligation: The committees may carry out the required analysis, appraisal and evaluation themselves, or by contract, or may require a Government agency to do so. "Such committees may rely on such techniques as pilot testing, analysis of costs in comparison with benefits, or provision for evaluation after a defined period of time."

IX. 4

Title : Office of the Federal Procurement Policy Act Amendments of 1979. Pub. L. 96-83, 93 Stat. 648.

Summary : Amends the Office of Federal Procurement Policy Act.

Obligation : The Act amended 41 U.S.C. 407, which requires the Administrator for Federal Procurement Policy to transmit a proposal for a uniform procurement system to Congress. The proposal "shall include a full description of the proposed system, projected costs and benefits of the system as proposed," etc.

IX. 5

Title : Office and Science and Technology Policy 42 U.S.C. 6614. 42 U.S.C. 6614

Summary : Enumerates the functions of the Director of the Office of Science and Technology Policy.

Obligation : The Director of the Office of Science and Technology Policy is required to initiate studies of alternatives available for the resolution of critical and emerging national and international problems amenable to the contributions of science and technology and, insofar as possible, determine and compare probable costs, benefits and impacts of such alternatives.

IX. 6

Title : Joint Funding Simplification Act 42 U.S.C. 4260.

Summary : Comprises a series of measures designed to facilitate the efficient use of Federal assistance by state and local government.

Obligation: Required the President to submit to Congress a comprehensive report on actions taken under this chapter and make recommendations for its continuation modification or termination. The report shall include "information regarding the benefits and costs of jointly funded projects accruing to participating State and local governments and private non-profit organizations and to the Federal Government."

IX. 7

Title : Report to Congress on Availability of Federal Programs to Territories of United States.
Pub. L. 95-134, title IV, §401, 91 Stat. 1163 (1977)

Summary : Directs the Secretary of the Interior to report to Congress before January 1, 1978 indicating what programs are available to each territory.

Obligation: The report should increase discussion of "what additional programs would be of benefit to such territory if made available, what changes a modifications to each program should be made to impove the operation and effectiveness of each program and the estimated costs of such program."

IX. 8

Title : Department of Justice Appropriations Authorization Act, Fiscal Year 1980
Pub. L. 96-132, 93 Stat. 1040

Summary : An Act to authorize appropriations to carry out the activities of the Department of Justice for fiscal year 1980.

Obligation: Under section 10, the Attorney General is directed to arrange an independent comprehensive management analysis of the operations of the Immigration and Naturalization Service "for the purpose of making such operations efficient and cost effective." The Attorney General must submit a report on the results to the appropriate committees of Congress.

IX. 9

Title : State Technical Services
15 U.S.C. 1351 et seq.

Summary : Establishes a national program of incentives and support for state and interstate technical service programs.

Obligation: The designated agencies are directed to prepare and submit to the Secretary of Commerce a five-year plan which will identify, in part, "the general approaches and methods to be used in the solution of these problems and outline the means for measuring the impact of such assistance on the State or regional economy." 15 U.S.C. 1354 (a) (2).

IX. 10

Title : Inspector General Act of 1978
Pub. L. 95-452, 92 Stat. 1101
5 U.S.C. appendix

Summary : Establishes within certain Executive branch agencies and departments an office of Inspector General.

Obligation : It is the duty of the Inspector General with respect to the establishment within which his office is established to "review existing and proposed legislation and regulations relating to programs and operations of such establishment and to make recommendations in the semi-annual reports required by section 5(a) concerning the impact of such legislation or regulations on the economy and efficiency in the administration of programs and operations administered or financed by such establishment or the prevention and detection of fraud and abuse in such programs and operations."

X. 1

Title : Defense Production Act of 1950
50 USC App. 2061 et seq.

Summary : 50 USC App. 2168 establishes the Cost Accounting Standards Board. The Board is directed to promulgate cost-accounting standards designed to achieve uniformity and consistency in the cost accounting principles followed by defense contractors and subcontractors.

Obligation : "In promulgating such standards and major rules and regulations for the implementation of such standards, the Board shall take into account, and shall report to Congress...the probable costs of implementation, including inflationary effects, if any, compared to the probable benefits, including advantages and improvements in the pricing, administration, and settlement of contracts." 50 USC App. 2168(g).

X. 2

Title : DOD Supplemental Appropriation Authorization Act, 1979
Pub. L. 96-29, 93 Stat. 78

Summary : An Act to authorize supplemental appropriations for FY 1979 for procurement of aircraft, missiles and naval vessels, and for other purposes.

Obligation: Under section 202(c), Congress directs the Secretary of Defense to proceed with full scale development of the missile basing mode known as the Multiple Protective Structure (MPS) system concurrently with full scale development of the MX missile, "unless and until the Secretary of Defense certifies to Congress that an alternative basing mode is militarily or technologically superior to, and is more cost-effective than, the MPS system..."

X. 3

Title : Military Construction Authorization Act, 1980
Pub. L. 96-125, 93 Stat. 928

Summary : An Act to authorize certain construction at military installations for fiscal year, 1980, and for other purposes.

Section 804 of the Act amends 10 U.S.C. 2688, entitled "Use of Solar Energy Systems in New Construction."

Obligation: Under 10 U.S.C. 2688, as amended, the Secretary of Defense is required to consider solar energy systems for all new facilities placed under design after the date of enactment (Nov. 26,1979). "All contracts for construction resulting from such design shall include the requirement to furnish and install solar energy systems if such systems can be shown to be cost effective . . . [A] solar energy system shall be considered to be cost effective if the original investment cost differential can be recovered over the expected life of the facility."

X. 4

Title : Department of Defense Authorization Act, 1981
Pub. L. 96-342; 94 Stat. 1077.

Summary : An Act to authorize appropriations for fiscal year 1981 for procurement of weapons, for research, development, test and evaluation for the Armed Forces, and for many other activities falling within the jurisdiction of the Department of Defense (DOD).

Obligation : Section 502 of the Act provides that no commercial or industrial type function of the DOD which is performed by DOD personnel as of Oct. 1, 1980, may be converted to performance by a private contractor unless the Secretary of Defense provides the following to Congress:

> (A) notification of any decision to study such commercial or industrial type function for possible performance by a private contractor;
> (B) a detailed summary of a comparison of the cost of performance of such function by Department of Defense personnel and by private contractor which demonstrates that the performance of such function by a private contractor will result in a cost savings to the Government over the life of the contract and a certification that the entire cost comparison is available;
> (C) a certification that the Government calculation for the cost of performance of such function by Department of Defense personnel is based on an estimate of the most efficient and cost effective organization for performance of such function by Department of Defense personnel; and
> (D) a report, to be submitted with the certification required by subparagraph (C), showing—
>> (i) the potential economic effect on employees affected, and the potential economic effect on the local community and Federal Government if more than 50 employees are involved, of contracting for performance of such function;
>> (ii) the effect of contracting for performance of such function on the military mission of such function; and
>> (iii) the amount of the bid accepted for the performance of such function by the private contractor whose bid is accepted and the cost of performance of such function by Department of Defense personnel, together with costs and expenditures which the Government will incur because of the contract.

X. 5

Title : Department of Defense Authorization Act, 1981,
Pub. L. 96-342, 94 Stat. 1077.

Summary : Appropriations, etc. for 1981. Section 901 of the Act amends Subtitle A of title 10 of the U.S. Code by inserting provisions for educational assistance for persons enlisting for active duty.

Obligation : Pursuant to section 905 of the Act, the Secretary of Defense is directed to submit reports to designated committees of Congress on the implementation and operation of the educational assistance program. The reports should include "an analysis of the costs and benefits of various educational assistance incentive programs designed to encourage persons to enter and remain in the Armed Forces."

X. 6

Title : Defense Appropriation Authorization, 1979
Pub. L. 95-485, 92 Stat. 1611

Summary : Outlines Navy Shipbuilding Policy on programs for construction and deployment of weapon systems.

Obligation: The President shall include in all requests made to Congress for the authorization of any ship for combatant forces, his conclusions with respect to the survivalability, cost effectiveness and combat effectiveness of such ship.

X. 7

Title : Veterans Housing Benefits Act of 1978
38 U.S.C. 906.

Summray : Provides for furnishing headstones or markers to certain veterans.

Obligation: A headstone or marker furnished may be of any material requested by the person entitled to request such headstone if the material requested is determined by the Administrator to be cost effective.

X. 8

Title : Department of Defense Appropriation Authorization Act of 1979
10 U.S.C. 2662 note.

Summary : Prescribes military training student loads for each component of the Armed Forces and provisions for reduction and realignment.

Obligation: No action may be taken with respect to reduction or realignment of the training base unless the Secretary of Defense or the Secretary of the military department concerned certifies that such reduction or realignment is in the best interest of the national security and provides for the most cost effective and efficient management of the training base both in time of peace and inability to meet mobilization requirements.

XI. 1

Title : Housing and Community Development Amendments of 1978. Pub. L. 95-557, 92 Stat. 2080.

Summary : An Act to amend and extend laws relating to housing, community, and neighborhood development and preservation, and related programs. Section 908 of the Act amends section 7 of the Department of Housing and Urban Development Act, 42 U.S.C. 3535.

Obligation : 42 U.S.C. 3535 (p) requires that a cost-benefit analysis be published in the Federal Register prior to the reorganization of any of HUD's field offices:

> "(p) A plan for the reorganization of any regional, area, insuring, or other field office of the Department of Housing and Urban Development may take effect only upon the expiration of 90 days after publication in the Federal Register of a cost-benefit analysis of the effect of the plan on each office involved. Such cost-benefit analysis shall include, but not be limited to—
>
> "(1) an estimate of cost savings supported by background information detailing the source and substantiating the amount of the savings;
>
> "(2) an estimate of the additional cost which will result from the reorganization;
>
> "(3) a study of the impact on the local economy; and
>
> "(4) an estimate of the effect of the reorganization on the availability, accessibility, and quality of services provided for recipients of those services.
>
> where any of the above factors cannot be quantified, the Secretary shall provide a statement on the nature and extent of those factors in the cost-benefit analysis.".

XI. 2

Title : The National Housing Act
12 U.S.C. §17152-3, as amended.

Summary : 12 U.S.C. §17152-3 establishes a "Special Risk Insurance Fund" which may be used by the Secretary of Housing and Urban Development to provide mortgage insurance to house military personnel, Federal Civilian employees, and Federal contractor employees assigned to duty or employed in connection with installations of the Armed Forces.

Obligation : 12 U.S.C. § 17152-3(c)(1)(A) requires the Secretary to HUD to determine, among other things,

Prior to insuring a mortgage under 17152-3(c)(1)(A), the Secretary must determine, among other things, that "the benefits to be derived from such use outweigh the risk of probable cost to the government."

XI. 3

Title: : National Insurance Development Program
12 U.S.C. § 1749bbb

Summary : The definitions for purposes of the National Insurance Development Program are set forth in 12 U.S.C. § 1749bbb-2

Obligation : "Affordable rate" is defined under § 1749bbb-2(a)(1) to mean:

Such premium rate as the Secretary [of Housing and Urban Development] determines would permit the purchase of a specific type of insurance coverage by a reasonably prudent person in similar circumstances with due regard to the costs and benefits involved.

XI. 4

Title : Demonstration Cities and Metropolitan Development Program 42 U.S.C. 3303.

Summary : Establishes guidelines for comprehensive city demonstration programs.

Obligation: "The preparation of demonstration city programs should include to the maximum extent feasible (1) the performance of analyses that provide explicit and systematic comparisons of the costs and benefits, financial and otherwise of alternative possible actions or courses of action designed to fulfill urban needs."

XI. 5

Title : National Housing Act
12 U.S.C. 1701z-7

Summary : Calls for studies to determine the extent of the need for counseling to mortgagors.

Obligation : The Secretary of HUD is required to conduct studies and demonstrations within at least three standard metropolitan statistical areas to determine the extent of, need for and cost effectiveness of providing counseling and related services to owners and purchasers of dwellings insured under the unsubsidized mortgage programs of the National Housing Act.

XI. 6

Title : Slum Clearance, Urban Renewal, and Farm Housing.
42 U.S.C. 1441 et seq.

Summary : The President is directed to submit an annual report to Congress assessing the progress of the housing rehabilitation and production program generally, under 42 U.S.C. 1441c.

Obligation: The Report shall, in relevant part:

"(5) provide an analysis of the monetary and fiscal policies of the Government for the coming calendar year required to achieve the objectives of the plan and the impact upon the domestic economy of achieving the plans objectives for such period."

XII. 1

Title : Federal Employees Part-Time Career Employment Act of 1978, Pub. L. 95-437, 92 Stat. 1055.

Summary : An Act to amend title 5 of the United States Code, to establish a program to increase part-time career employment within the civil service.

Obligation : 5 U.S.C. 3392 directs the Civil Service Commission to conduct a research and demonstration program with respect to part-time career employment within the Federal Government, and to direct the program to:

"(C) evaluating attitudes, benefits, costs, efficiency, and productivity associated with part-time career employment, as well as its various sociological effects as a mode of employment."

XII. 2

Title : Act of October 24, 1978, Pub. L. 95-507, 92 Stat. 1757.

Summary : This law amends the Small Business Act and the Small Business Investment Act of 1958. Section 233 amends section 15 of the Small Business Act, 15 U.S.C. § 644.

Obligation : 15 U.S.C. 644 (i) directs the President to transmit to designated committees of Congress, a report on the labor surplus area procurement program, which shall include:

> "(A) an analysis of the effectiveness of such labor surplus area procurement program, including its effectiveness in creating jobs in the areas of high unemployment and the method by which labor markets are classified and designated as labor surplus areas;
> "(B) its potential benefits to Federal, State and local governments, including tax benefits, reductions in Federal payments to labor surplus areas, and reductions in State unemployment costs where such information is available;
> "(C) its potential costs, including its impact on the efficient utilization of Federal resources, its effect on the local economy of non-labor surplus areas, its impact on small business concerns not in labor surplus areas to the extent such information is available, and its impact on contract costs to the Federal Government; and
> "(D) with respect to the implementation by the Department of Defense of Defense Manpower Policy Number 4A (32A CFR Chapter 1) or any successor policy, in addition to the matters required by subparagraphs (A), (B), and (C), information concerning the impact on such matters of the expenditure of any funds which were available for procurement and which were not obligated for expenditure on September 30, 1977.

XII. 3

Title : Job Corps
29 U.S.C. 923

Summary : Sets forth guidelines for evaluation of Job Corps programs.

Obligation: Secretary of Labor shall evaluate, or contract for independent evaluation with a view to measuring specific benefits, in particular to determine the costs and benefits resulting from the use of residential as opposed to non-residential facilities.

Results to be published and summarized in the annual report of the Secretary.

XII. 4

Title : Department of Labor Wage and Hour Division
29 USC 204

Summary : Creates a Wage and Hour Division within the Department of Labor

Obligation : The Secretary of Labor shall conduct studies on the justification of exemptions to minimum wage and maximum hour requirements, and the economic effect of such exemptions. The Secretary shall submit a report to Congress of his findings not later than Jan. 1, 1976.

XII. 5

Title : National Commission on Unemployment Compensation
26 USC 3304

Summary : Outlines duties of the Commission

Obligation : "The commission shall study and evaluate the present unemployment compensation programs in order to assess the long range needs of the programs, to develop alternatives and to recommend changes in the programs. Such study and evaluation shall include without being limited to
"(1) examination of the adequacy and economic and administrative impacts, of the changes made... in coverage, benefit provisions, and financing."

XII. 6

Title : Comprehensive Employment and Training Act Amendment of 1978
29 U.S.C. 881.

Summary : Requires continuing evaluation of all programs, activities, and research and demonstration projects conducted under CETA.

Obligation: The Secretary of Labor shall provide for continuing evaluation of all programs, including their cost effectiveness in achieving the purposes of the Comprehensive Employment and Training Act.

XIII. 1

Title : Foreign Assistance Act
22 U.S.C. 2361 (b)

Summary : Provides for grants for water or related land resources construction projects.

Obligation: "Plans for such projects shall include a computation of benefits and costs made insofar as practicable in accordance with the procedures set forth in the Memorandum of the President dated May 15, 1962."

XIII. 2

Title : Reports and certifications to Congress on military exports.
22 USC 2776

Summary : Details the contents of Presidential statement to Congress concerning offers to sell defense articles, services or major equipment.

Obligation : Upon request of the Committee on Foreign Relations of the Senate or the Committee on International Relations of the House of Representatives the President shall submit a statement setting forth a detailed description of any agreement proposed to be entered into for the purpose of acquisition by the United States of defense articles of a foreign country, "including an analysis of the impact of such proposed agreement upon United States business concerns which might otherwise have provided such articles."

XIII. 3

Title : Foreign Relations
22 U.S.C. 2399c

Summary : Directs the President to report to Congress annually on United States actions affecting the development of less developed countries.

Obligation : The report shall include, "(2) an assessment of the impact of such policies and programs on (A) national employment, wages, and working conditions in the United States, as well as other aspects of the United States economy. . ."

XIV. 1

Title : Public Telecommunications Financing Act of 1978, Pub.L. 95-567, 92 Stat. 2405.

Summary : An Act to amend the Communications Act of 1934. Section 104 of the Act amends 47 U.S.C. 393 which sets forth criteria for the Secretary of Commerce for making construction and planning grants.

Obligation : 43 U.S.C. 393 (c) directs the Secretary of Commerce, in choosing among applicants for grants, to "compare the advantages of alternate technologies on the basis of costs and benefits."

XIV. 2

Title : Refugee Act of 1980
Pub. L. 96-212, 94 Stat. 102

Summary : Amends Title 8 of the United States Code dealing with aliens and nationality.

Obligation: The Act, codified at 8 U.S.C. 1157, directs designated Cabinet-level representatives of the President to engage in consultations with members of the House and Senate Committees on the Judiciary to review refugee or emergency refugee situations and to provide such members with specified information, including, "an analysis of the anticipated social, economic and demographic impact of their [refugees] admission to the United States,"

XIV. 3

Title : Study of Metric System by the Secretary of Commerce
Pub. L. 90-472, 82 Stat. 693 (1968)

Summary : The Secretary of Commerce is directed to conduct a program of investigation, research, and survey to determine the impact of increasing worldwide use of the metric system on the United States. By its own terms, the Act expired 30 days after submission of the final report.

Obligation : In the course of the investigation, the Secretary is directed "to evaluate the costs and benefits of alternative courses of action which might be feasible for the United States."

XIV. 4

Title : Weather Modification Activities
15 USC 330

Summary : Describes the purposes of the National Weather Modification Policy Act of 1976.

Obligation : The Secretary of Commerce shall conduct a comprehensive study of the state of scientific knowledge concerning weather modification which shall include "a review and analysis of existing studies to establish the probable economic importance to the United States in terms of agricultural production, energy, and related economic factors if the present weather modification technology were to be effectively implemented."

XIV. 5

Title : Weights and Measures and Standard Time
15 USC 210 et seq.

Summary : The United States Metric Board is established by 15 USC 205d.

Obligation : The Board is directed to conduct and publish research, and make recommendations to Congress concerning issues associated with metric conversion, including "the impact on workers (such as costs of tools and training) and in different occupations and industries, possible increased costs to consumers, the impact on society and on the economy, effects on small business. ..."

XIV. 6

Title : National Climate Program Act, Pub. L. 95-367,
92 Stat. 601.

Summary : An Act to establish a comprehensive and coordinated national climate policy and program.

Obligation : In section 2 of the Act, 15 U.S.C. 2901, Congress finds and declares that "International cooperation for the purposes of sharing the benefits and costs of a global effort to understand climate is essential."

XIV. 7

Title : Copyright Royalty Tribunal
17 U.S.C. 801.

Summary : Establishes a Copyright Royalty Tribunal.

Obligation: In determining the reasonableness of rates proposed following an amendment of the Federal Communications Commission rules and regulations, the Copyright Royalty Tribunal shall consider among other factors, the economic impact on copyright owners and users.

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April 27, 1981

The Macroeconomic Impact Of Federal Pollution Control Programs 1981 Assessment

Submitted to Environmental Protection Agency
Data Resources, Inc.
July 14, 1981

INTRODUCTION

This study presents an analysis of the macroeconomic impacts of federal air and water pollution control regulations on the United States economy.[1] The study does not include the value of improvements in the quality of life which are not priced by the market system. The analysis uses Environmental Protection Agency (EPA) estimates of the incremental costs of federal pollution control regulations for the period 1970-1987. For each industry, estimates were made for the capital investment, annualized capital costs, and operating and maintenance costs by industry. Estimates were also made of the costs of state and local governments' pollution control activities, and the cost to consumers and business of mobile source regulations. The estimates reflect only the "incremental" costs, i.e. the additional costs incurred solely as a result of federal regulations. Those additional costs which would have been undertaken in the absence of federal regulations are included in the macroeconomic "without" scenario (described below).

The analysis used the Data Resources, Inc. (DRI) macroeconomic model of the U.S. economy and covered the period 1970-1987. The analysis compared what economic conditions would have been without the costs of federal regulations to what economic conditions would have been with the costs of federal regulations. A baseline simulation, representing the performance of the economy under current EPA regulations, was constructed using the actual data for 1970-1980 and the TRENDLONG0281 forecast for 1981-1987. This baseline simulation is called the "with" pollution control costs scenario. Appropriate adjustments were made to the "with" simulation to remove the incremental costs of federal pollution control. This simulation is called the "without" pollution control costs simulation. A comparison of the "with" and "without" simulations gives an assessment of the direct and indirect macroeconomic effects of federally induced pollution control costs on economic performance. Because the loss of benefits which results from removing regulations is not considered in this study, the results presented here cannot be taken as indicative of what would actually happen if regulations were to be removed.

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[1] This study updates a previous DRI study, "The Macroeconomic Impact of Federal Pollution Control Programs-1979 Assessment."

To supplement this "base-case" analysis, three other simulations were performed. The first additional simulation analyzed the macroeconomic effects of possible government efforts to offset the effects of federal incremental costs of pollution control by pursuing a non-accommodating monetary policy. The second and third simulations analyzed the effects of incremental costs being either higher or considerably lower respectively than estimated in the original "with" case.

PRINCIPAL CONCLUSIONS

The incremental costs from Federal pollution control regulations have had four major effects.

1. Price increases are moderately higher. The costs per unit of output are raised by the federal regulations and these higher costs are eventually translated into higher prices. For example, the average annual rate of increase in the consumer price index (CPI-U) is 0.4 percentage points higher over the period 1970-1987 than would be the case in the absence of environmental regulations. The average annual rates of increase in the Producer Price Index (PPI) and GNP deflator are 0.5 and 0.4 percentage points higher, respectively, over the same period.

2. Until 1977, the real level of economic activity, as measured by gross national product, is stimulated by the incremental investment required under federal regulations and the additional activity generated by industries producing pollution control plant and equipment. In 1972, real GNP increases $9.2 billion or 0.5%. After 1979, the real level of economic activity declines as the higher price level reduces aggregate real output. Over the period 1970-1987, the average annual rate of growth of real GNP is reduced by 0.1 percentage point. Real GNP in 1987 is $21.8 billion or 0.7% lower.[2]

3. Employment is stimulated throughout the 1970-1987 period. Jobs are created in the pollution control equipment industry and in all industries to operate and maintain pollution equipment and facilities. The unemployment rate is on average 0.3 percentage points lower over the period. By 1987, there is a net increase of 524,000 additional jobs as a result of pollution controls.

4. Real business fixed investment is stimulated by the incremental investment mandated under federal regulation and by the additional activity generated by industries producing pollution control plant and equipment. In 1973, real business fixed investment is up $6.0 billion or 2.6%. Eventually, the combined effects of higher prices, increased interest costs, and reduced aggregate

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[2]Unless otherwise noted, all figures in real terms are expressed in constant 1979 dollars. All price indexes are based as 1979=1.

demand dampen investment spending. By 1987, real business fixed investment is only $0.9 billion or 0.3% higher.

IMPACT ON PRICES

In reducing pollution, the incremental costs from Federal regulation impose higher costs on firms and are passed through as higher product prices. The higher costs stem from two sources: first, labor and materials costs per unit of output are raised, as the additional labor and material inputs needed to operate and maintain pollution control equipment generate no additional output in a form measurable by the national income accounts. Second, the investment needed to produce a given level of output is raised, as the incremental investment costs produce no additional "measured" output. By 1987, the GNP deflator is 7.4% higher, raising its average annual rate of increase by 0.4 percentage point per year. Consumer prices, as measured by the consumer price index, are 6.6% higher, raising their average annual rate of increase 0.4 percentage point per year. Wholesale prices, as measured by the PPI, are 9.0% higher, raising their average annual rate of increase 0.5 percentage point.

The effect on prices rises over time, as the incremental costs of federal regulations rise rapidly. From 1980 to 1987, real incremental costs from federal regulations rise 48%, while real GNP in the "with" case rises 21%.

IMPACT ON REAL OUTPUT

The impact on real output varies over time. Initially, the incremental costs from federal regulations stimulate the economy. Increased operating and maintenance costs require extra workers and materials, and increased costs for pollution control plant and equipment represent increased demands on the industries that build them. Eventually, given the assumptions that profit margins are not reduced, firms pass on the full amount of higher costs into higher product prices, which dampen aggregate demand and counteract the initial stimulus.

Until 1980, real GNP is higher in the "with" case. The positive gap peaks in 1972, with real GNP up $9.2 billion or 0.5%. During the 1973 boom period and the subsequent downturn, this positive gap narrows significantly. Higher prices due to incremental costs reduce consumption spending and exports and raise imports. Incremental costs drive up unit costs of output, reducing productivity and aggregate supply. This drag on economic growth caused by pollution control costs is magnified over time. By 1987, real GNP is $21.8 billion or 0.7% lower.

IMPACT ON EMPLOYMENT AND PRODUCTIVITY

The incremental costs from federal pollution control regulations stimulate employment. Production, installation, and maintenance of pollution control plant and equipment

creates jobs. However, this additional labor input does not generate additional measured output. In addition, productive capital per worker is lower, as the capital stock is diluted with the portion of capital required to control pollution. As a result, productivity growth declines on an average annual basis of 0.1 percentage point, as more resources are needed to produce the same amount of output. However, the employment required to comply with EPA's regulations is estimated to make the unemployment rate is 0.3 percentage point lower in the "with" case. By 1987, there are 524,000 additional jobs as a result of pollution control requirements.

BUSINESS FIXED INVESTMENT

Initially, incremental costs from federal pollution control regulations stimulate real business fixed investment. Firms require additional pollution control plant and equipment to meet federal standards. This boosts not only their own investment but also investment by firms that produce the pollution control plant and equipment. The stimulative effect peaks in 1973, with real business fixed investment up $6.0 billion, or 2.6% above what it would have been without federally required pollution controls. The stimulative effect tapers off as higher prices drive up interest rates and reduce aggregate demand. By 1987, real business fixed investment is $0.9 billion or 0.3% higher.

Investment for pollution control plant and equipment tends to reduce other kinds of investment, including housing. The degree of reduction varies with economic conditions and increases as the economy approaches full employment.[3] At full employment, mandated investment is assumed to replace other investment on a dollar-for-dollar basis. While total investment is higher, real "productive" business fixed investment (defined as total real business fixed investment minus real business fixed investment for pollution control) is lower in the "with" case. By 1987, real productive business fixed investment is $13.9 billion or 4.0% lower.

HOUSING

The slowdown in aggregate demand and incomes, combined with higher interest rates, reduces housing starts. The reduction, as measured by the differential between the two simulations, exhibits a very mild cyclical pattern. By 1987, housing starts are 115,000 units or 5.2% below the "without" case.

ESTIMATES OF INCREMENTAL POLLUTION CONTROL COSTS

The estimates of incremental pollution control costs from federal regulations were made by the EPA. The historical estimates are consistent with estimates

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[3]The critical assumptions of the basic analysis are described below, in the section entitled, "The Underlying Economic Path-The "With" Scenario."

collected and developed by the Census Bureau of the Department of Commerce. Incremental pollution control costs include only those costs as a result of federal air and water control requirements. They were broken down by 18 categories: 16 industrial categories, state and local municipal wastewater treatment facilities, and mobile source emissions.

The estimates were further broken down into incremental operating and maintenance costs, and incremental investment costs. Incremental operating and maintenance costs are the labor and material costs associated with operation and maintenance of pollution control plant and equipment. Incremental investment costs are the purchases of pollution control plant and equipment.

The EPA estimates of incremental costs are given in Tables 1 and 2. Total incremental costs rise from $6.4 billion (1979 dollars) in 1970 to $44.9 billion in 1987, an increase of 12.1% per year. Incremental operating and maintenance costs rise from $3.0 billion in 1970 to $24.8 billion in 1987, an increase of 13.2% per year. Incremental investment rises from $3.4 billion in 1970 to $20.0 billion in 1987, an increase of 11.0% per year. As a percent of total plant and equipment investment (in current dollars), incremental investment rises from 1.5% in 1970 to a peak of 3.9% in 1984 and falls to 3.4% in 1987.

THE UNDERLYING ECONOMIC PATH--THE "WITH" SCENARIO

The impact of pollution control costs depends upon the underlying state of the economy. The analysis covers the period 1970-1987, which contains many variations in the pace of economic activity and rate of inflation. The historical period (1970-1980) begins with the 1970 recession, in which real GNP dropped by 0.2%. The recovery began in late 1970. By 1973, the economy was booming and was operating at or near full employment. The recovery came to a halt due to a variety of factors--quadrupling of crude oil prices by OPEC, large increases in farm prices due to poor harvests worldwide, inflationary pressures emanating from the strong growth in the U.S. and elsewhere, the abandonment of wage and price controls, and a slowdown in monetary growth by the Federal Reserve, designed to reduce inflation. The economy began to recover in late 1975, and the recovery lasted until early 1980. Economic growth plunged in mid-1980 but recovered quickly in the latter half of the year. However, the rate of inflation remained very high by post-war standards.

The forecast period 1981-1987 is consistent with DRI's long-term trend simulation TRENDLONG0281. The recovery begun in 1980 continues, but is weak by historical standards. Continual increases in real oil prices, low growth in the labor force due to demographic factors, a monetary stance which remains tough on inflation, and general uncertainty about the economy contribute to slow growth. The forecast of a near full-employment economy in 1987 serves to maximize the effect of pollution controls on the price level. The rate of inflation unwinds slightly as

the economy is assumed not to suffer from external price shocks i.e., abrupt changes in food and fuel prices are not projected to occur. Both the historical and forecast periods incorporate the full costs of pollution control. As such, they define the "with" scenario.

The major assumptions in the basic analysis that define the "with" scenario in the period 1981-1987 are:

- Energy Prices--prices of foreign crude oil will increase about 3% per year in real terms relative to wholesale prices.
- Monetary Policy--the money supply (M1B) will increase about 6% per year.
- Tax Policy--legislation will be enacted that results in a one-time reduction of 40% in effective asset lifetimes; the Kemp-Roth proposal to reduce personal income tax rates will be phased in during the 1981-85 period.
- Federal Spending--federal spending will be very tight, increasing only about 2% per year in real terms.
- Demographics--there will be slowing in the rate of increase in the labor force, due to the maturation of the baby boom.

DIRECT CHANGES TO REMOVE INCREMENTAL POLLUTION CONTROL COSTS--THE "WITHOUT" SCENARIO

A number of changes were made to the "with" scenario to remove the incremental costs of federal pollution control regulation (thereby defining the "without" scenario). A brief list of these changes is given below.[4] A more detailed explanation of these changes is given in the technical appendix.

1. Plant and equipment investment by industry was decreased by the amount of the incremental investment costs estimated by EPA.

2. The cost of new investment was lowered as firms now need to invest less to produce a given amount of output.

3. Since many pollution control investments can be financed less expensively in municipal bond markets, financing costs were raised slightly.

4. Prices by industry were reduced to reflect decreased production costs, as less labor and material are needed to produce a given level of output. These reduced costs were passed through into lower product prices according to a simple model of industrial price determination constructed for this study.

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[4] These adjustments take no account of the loss of benefits which would occur if the regulations were removed.

5. Employment was reduced since the workers required to produce, install and maintain pollution control plant and equipment would no longer be needed.

6. As the federal government makes grants-in-aid to state and local governments to construct municipal waste water pollution control facilities, grants-in-aid were reduced by amounts estimated by the EPA.

7. Prices of new motor vehicles were reduced to incorporate the reduced costs of emission control devices.

8. Investment by firms to purchase new vehicles was reduced to reflect the reduced costs of emission control devices.

9. Consumer expenditures for vehicle maintenance were reduced to incorporate the lower costs for maintaining emission control devices.

10. Consumer expenditures for gasoline were reduced as vehicles would achieve higher mileage without emission control devices.

ECONOMIC IMPACTS—FURTHER DISCUSSION

The economic impacts of incremental pollution control costs from federal environmental regulations are discussed by sector. The economic impacts are drawn up by comparing the "without" scenario--a simulation without the incremental costs--to the "with" scenario--a simulation with the incremental costs.

PRICES

The incremental costs of federal pollution control raise the rate of price increase in three ways.

1. The operating and maintenance costs raise the unit cost of output. A firm now requires additional labor and materials to produce a given level of output. A firm is producing a joint product of its output and a cleaner environment, although the benefits from the cleanup are not incorporated in this analysis.

2. Incremental investment costs raise the capital cost per unit of output. A firm's capital is diluted by the portion required to control pollution rather than produce output.

3. Incremental investment needed to meet the federal regulations increases demand on the industries supplying those investment goods and their suppliers. The impact on prices depends on underlying economic conditions. The impact is accelerated in the 1972-1973 and 1977-1979 boom periods, when the economy was already experiencing price pressures.

Initially, incremental pollution costs reduce corporate profits, until firms can pass these added costs into higher product prices. The speed of this pass-through was determined on an industry-specific basis, using a simple model relating prices to unit costs, productivity, and capacity utilization. Labor productivity declines for two reasons. First, more workers are required to produce a given level of output, as some workers operate and maintain the pollution control equipment. Second, productive capital per worker is lower, as the capital stock is diluted with the portion of capital required to control pollution. Productivity is 0.3% lower in 1980 and 0.9% lower in 1987. Productivity growth falls 0.1 percentage point per year on average over the entire period.

The impact on the rate of price increase is noticeable, given the increases in unit costs, reduced productivity, and added demand pressures. The producer price index is 4.1% higher in 1980 and 9.0% higher in 1987. The average annual rate of change in producer prices is raised 0.5 percentage point over the period 1970-1987. The effect on consumer prices is smaller, with their average annual rate of change increased 0.4 percentage points per year.

BUSINESS FIXED INVESTMENT

The incremental investment costs to industry (excluding state and local costs and mobile source costs) rise from $2.9 billion in 1970 to $7.6 billion in 1980. The costs peak at $11.9 billion in 1986 and fall slightly to $11.6 billion in 1987. Over the historical period 1970-1980, incremental investment costs average 2.4% of total plant and equipment investment. Over the forecast period 1981-1987, this ratio averages 3.6%.

Incremental investment costs increase total business fixed investment. Incremental investment represents increased demands on industries that produce pollution control plant and equipment. These increased demands generate additonal output and employment which in turn increased investment. Business fixed investment rises, with the peak stimulative effect occurring in 1973, up $6.0 billion or 2.6% from those levels that would otherwise have occurred. Eventually, higher rates of price increase drive up interest rates and reduce demand so that in 1987, investment is up only $0.9 billion or 0.3%.

The effect on "productive" (excluding pollution control) investment is more pronounced. Incremental investment costs raise the effective cost of investment. More investment is now required to produce a given level of output, causing firms to require a higher rate of return from productive investment. This increased rate of return depresses investment. The negative impact of a higher required rate of return (as well as reduced aggregate demand and higher interest rates) is greater than the positive stimulus to investment from the incremental costs. By 1987, productive investment is $13.9 billion or 4.0% lower.

INTEREST RATES

Incremental pollution control costs raise interest rates significantly, as investors require higher nominal interest rates to compensate them for the costs of lending that stem from higher price increases. Interest rates increase steadily as prices rise. Higher prices also generate an eventual reduction in real activity, which reduces pressures on interest rates as loan demands subside. For example, the increase in the federal funds rate peaks at 1.87 percentage points in 1982 and declines to 0.80 percentage point in 1987. Interest rates do rise more than enough to cover the price increases so that, in general, real interest rates are higher.

HOUSING

Higher interest rates drive down business fixed investment and reduce housing activity. Housing starts are lower in every year, but the decline varies over time. In 1979, near the end of the economic expansion, housing starts are 88,000 units or 4.3% lower. In 1987 when the economy is approaching full employment, so that competing investment demands dry up traditional mortgage funds, housing starts are lower by 115,000 units or 5.2%.

CONSUMER SPENDING

Initially, real consumer spending rises because of incremental costs of emission controls to meet federal regulations. Vehicle emission controls increase maintenance expenditures and, (because fuel consumption is increased), gasoline purchases rise; they also increase car prices, which tends to drive down vehicle purchases. Secondary effects from increased activity in firms producing pollution control plant and equipment and their suppliers also tend to raise consumer spending initially . However, by 1977, consumer spending falls in response to higher prices and interest rates. By 1987, consumer spending is $18.7 billion or 1.0% lower. Purchases of motor vehicles and parts are particularly hard hit, down $7.0 billion or 5.8%. The only consumer spending categories still higher in 1987 are gasoline and transportation services (maintenance expenses).

GOVERNMENT

FEDERAL

In this analysis, federal expenditures are assumed to be constant in real terms. This means that the federal government maintains a specific level of services and adjusts the dollar level of spending in response to changing price levels. For this reason, nominal expenditures are higher because prices are higher. Receipts are also higher, but by a smaller amount, as the higher price level boosts nominal incomes and taxes. Initially, real incomes are also higher, due to the increased

economic activity which further boosts tax receipts. However, the net effect on the federal deficit is negative after 1974. By 1987, the deficit is $10.2 billion larger in current dollars.

STATE AND LOCAL GOVERNMENTS

Federal regulations require state and local governments to construct waste water treatment facilities. Seventy-five percent of construction costs are funded from federal grants-in-aid. However, the state and local governments are responsible for the higher operating and maintenance costs associated with these facilities and for municipal air pollution control costs. The net effect of pollution control requirements is a slight increase in real spending. In 1987, real purchases are $1.2 billion, or 0.4% higher.

FOREIGN TRADE

Higher pollution control costs increase domestic prices, which reduce real exports and raise real imports. The initial stimulus to aggregate activity drives up imports, but, eventually, as economic activity declines, imports also decline. In 1973, real imports are $2.4 billion (or 1.2%) higher, but by 1987, they are $3.7 billion or 1.1% lower. The stimulative effect on real exports is mild, with real exports down by $0.4 billion or 0.2% in 1974. After that, exports are higher as foreign economy activity does not decline as much as in the U.S. In 1979, real exports are $1.3 billion, or 0.4% higher. The situation reverses again in 1986, as the greater domestic price increases drive down exports. By 1987, real exports are $2.0 billion, or 0.5% lower. The net effect on the current dollar trade balance is mildly negative until 1982; after 1982, the effect is positive but becomes negative in 1986. By 1987, the current dollar trade balance is $1.9 billion lower.

CONCLUSION

The principal results of this analysis are given below and are summarized in Table 3.

1. The average annual rate of increase in consumer prices rises 0.4 percentage points in the period 1970-1987 as firms pass on the higher costs of pollution control.

2. Until 1980, the real level of GNP is higher, stimulated by the federally mandated incremental investment and operating and maintenance costs and by the additional activity in industries supplying pollution control plant and equipment. In 1972, real GNP is $9.2 billion or 0.5% higher. After 1979, real GNP declines in response to the higher price level. By 1987, real GNP is $21.8 billion or 0.7% lower. The average annual rate of growth of GNP is reduced 0.1 percentage point.

3. Employment is stimulated throughout the 1970-1987 period as jobs are created in industries to operate and maintain pollution control plant and equipment and in the pollution control plant and equipment (supplier) industry. In general, the unemployment rate is 0.3 percentage points lower, and by 1987 there are 524,000 net additional jobs as a result of pollution controls.

4. Business fixed investment is stimulated by the incremental investment mandated by federal regulations and the additional activity generated in industries that produce that pollution control plant and equipment. In 1973, real business fixed investment rises by $6.0 billion, or 2.6%. Eventually, the combined effects of higher prices, increased interest costs and reduced aggregate demand dampen investment spending. By 1987, real business fixed investment is only $0.9 billion or 0.3% higher.

SENSITIVITY ANALYSIS

Three alternative simulations were performed. The first two simulations analyze the effects of slightly higher or considerably lower mandated pollution costs. The third simulation analyzes the effects of a monetary policy that attempts to neutralize the money supply increases induced by pollution control costs.

Case 1: Higher Pollution Control Costs

The base case "with" simulation included certain recently announced reductions in municipal wastewater treatment construction grants and mobile source emissions control costs. The "with high" pollution control cost simulation includes those costs. In 1981, these higher costs add $861 million (or 2.5%) to the mandated incremental costs. By 1987, they add $2659 million (or 5.9%) (Tables 4 and 5). The total increase in incremental costs from 1979 to 1987 is $12.6 billion or 2.6%. The results from the "with high" simulation are very similar to the "with" base case results, and are shown in Table 7.

Case 2: Lower Pollution Control Costs

A second simulation was constructed to examine the macroeconomic effects of future incremental pollution control costs being much lower than those used in the "with" base case simulation. This was called the "with low" simulation, in which a gradual tapering off of incremental costs by 10% per year beginning in 1981 was assumed. By 1987, total incremental costs had fallen to $13.5 billion or 30% of the base case analysis estimates (Tables 4 and 5). The total reduction in incremental costs is $117.0 billion, or 23.8%. The results are compared to the "with" base case simulation in Table 8.

A decline in future real incremental costs reduces the effects of pollution control on prices. By 1987, the level of the implicit price deflator has fallen 0.9% relative

to the "with" base case, and its annual rate of change has fallen to 7.7% per year. This decline in incremental costs removes only 15% of the price effects of pollution control costs.

The effects on real GNP are less pronounced. Initially, reduced incremental costs reduce real GNP. Reduced operating and maintenance costs require fewer workers and materials and decreased investment costs represent a decrease in demand on those industries that produce pollution control capital. Eventually, firms pass on the full amount of these lower costs as lower product prices, which stimulate aggregate demand and counteract the initial output reduction. By 1987, real GNP is $1.6 billion higher, while the unemployment rate remains 0.3 percentage points higher. Business fixed investment is down $5.6 billion or 1.6% in 1987, while productive investment is $4.5 billion, or 1.4% higher.

Case 3: Non-Accommodating Monetary Policy

The increase in nominal GNP due to pollution control costs implies an increased transactions demand for money. The money supply in the base case analysis increases to accommodate this higher transactions demand. A simulation was constructed in which the money supply does not accommodate this increased demand. Rather, nonborrowed reserves, the main policy lever of the Federal Reserve Board, are reduced in order to hold the money supply (as defined as M1-B) to its level in the "without" simulation (Table 6). This simulation is called "offset" and is compared to the base case simulation in Table 9.

Non-accommodating monetary policy dampens aggregate demand by raising interest rates and depressing interest sensitive sectors of the economy such as housing. By 1987, real GNP falls $9.3 billion or 0.3%, and the unemployment rate is 0.1 percentage point higher. Business fixed investment is down $0.8 billion or 0.2% by 1987, while productive investment falls $0.4 billion or 0.1%. Reduced aggregate demand also reduces prices. By 1987, the level of the implicit price deflator is down 1.9%, and its average annual rate of change falls to 7.6%. This means that about one-fourth of the inflationary effect of pollution control costs on prices can be attributed to the money supply assumptions in the base case.

SUMMARY

A comparison of the alternative simulations is shown in Table 10.

Table 1
Estimated Incremental Operating and Maintenance Costs
For Pollution Control, 1970-1987
(Millions of 1979 dollars)

	1970	1971	1972	1973	1974	1975	1976	1977	1978	1979	1980	1981	1982	1983	1984	1985	1986	1987
TOTAL	3823	4395	6236	8672	9531	9965	10544	11375	12299	13579	14587	15936	17300	18329	20140	21625	23093	24830
All Indus.	959	1349	1864	2612	3306	4134	4944	5729	6489	7440	8409	9492	10812	12204	13768	15440	17114	18799
Mfg. Indus.	486	762	986	1403	1836	2302	2841	3311	3753	4270	4788	5385	6144	6931	7831	8805	9791	10770
Primary Metals	169	210	265	349	438	539	674	789	898	996	1101	1232	1379	1524	1694	1836	1988	2119
Elec. Machinery	3	6	10	18	25	32	37	42	47	71	91	114	146	181	224	275	334	398
Non-elec. Mach.	4	6	9	15	22	29	34	40	45	62	75	90	107	122	140	165	186	207
Transp. Equip.	4	16	31	51	72	91	102	113	123	162	206	265	343	436	545	670	794	917
Stone, Clay, Glass	1	12	26	48	71	101	123	134	144	163	181	202	231	270	315	368	424	484
Oth. Durables	7	18	35	62	92	130	160	181	200	237	270	310	357	413	476	547	615	682
Food incl. Beverage	9	24	43	68	94	117	135	156	177	196	212	229	249	272	300	335	371	412
Textiles	6	8	10	14	17	20	24	29	34	37	40	43	49	57	65	76	88	98
Paper	6	35	72	122	173	242	322	372	420	448	484	520	566	604	651	698	745	791
Chemical	177	213	257	315	374	450	552	671	785	852	905	963	1116	1270	1478	1726	1990	2249
Petroleum	96	148	220	328	441	527	648	747	837	993	1159	1343	1526	1681	1833	1969	2102	2237
Rubber	2	3	3	5	6	9	11	13	15	21	27	33	40	47	56	66	78	89
Oth. Nondurables	2	3	5	8	11	15	19	24	28	32	37	41	45	54	64	74	84	92
Nonmanufacturing	473	674	878	1209	1550	1832	2103	2418	2736	3170	3638	4107	4668	5273	5937	6635	7323	8029
Mining	54	60	69	81	92	95	102	111	116	132	148	165	184	203	224	245	268	290
Public Utilities	400	540	727	997	1276	1537	1780	2066	2359	2755	3109	3615	4119	4667	5271	5910	6537	7172
Commercial	19	47	82	131	182	200	221	241	261	283	302	327	365	403	442	480	518	557
State and Local Govt.	0	27	61	100	175	294	398	537	692	832	983	1134	1768	1380	1486	1583	1672	1752
Mobile Source Controls	2064	3019	4311	5910	5970	5547	5202	5109	5118	5307	5195	5310	5220	4745	4886	4602	4307	4289

Table 2
Estimated Incremental Investment
For Pollution Control, 1970-1987
(Millions of 1979 dollars)

	1970	1971	1972	1973	1974	1975	1976	1977	1978	1979	1980	1981	1982	1983	1984	1985	1986	1987
TOTAL	3375	5006	6558	7524	8418	10308	11745	11631	13036	13536	15641	19142	18787	20131	20366	20409	20369	20029
All Indus.	2872	3807	5480	5665	5422	6054	5779	5574	6760	7019	7573	9404	9098	11087	11811	11905	11908	11627
Mfg. Indus.	1694	2256	3272	3385	3613	4290	3733	3571	3951	3977	4541	5747	5960	6785	7332	7440	7402	7169
Primary Metals	314	427	650	696	772	1042	800	840	752	811	1010	1131	1110	1235	1168	1108	1066	1010
Elec. Machinery	16	26	41	42	40	27	29	26	130	114	126	177	194	240	285	328	354	309
Non-elec. Mach.	12	22	41	43	46	35	40	36	111	88	97	114	100	125	161	145	140	142
Transp. Equip.	69	88	120	124	110	63	65	62	224	261	350	455	546	644	734	728	728	760
Stone, Clay, Glass	89	118	183	195	249	183	88	82	164	145	176	245	327	369	442	470	499	459
Oth. Durables	55	84	139	146	190	152	106	96	181	166	199	235	281	317	355	338	336	343
Food incl. Beverage	137	174	230	234	206	142	196	188	172	148	150	188	209	251	321	323	375	386
Textiles	19	25	32	32	30	42	50	48	79	31	36	51	81	84	112	113	108	105
Paper	243	310	416	424	569	668	419	396	239	297	300	300	397	394	393	390	388	395
Chemicals	293	372	485	491	626	857	990	945	565	440	476	1281	1284	1732	2066	2196	2162	2274
Petroleum	436	598	903	935	720	1010	820	757	1294	1385	1536	1521	1293	1267	1134	1110	1081	921
Rubber	2	6	13	14	32	18	21	20	58	62	58	68	78	88	96	76	56	55
Oth. Nondurables	11	13	19	20	26	30	28	27	32	29	27	31	60	64	65	65	59	50
Nonmanufacturing	1178	1551	2207	2280	1809	1764	2046	2053	2809	3042	3032	3157	3138	4099	4529	4465	4506	4458
Mining	69	88	115	115	78	74	83	57	152	167	171	186	194	203	215	224	220	216
Public Utilities	876	1167	1687	1743	1634	1516	1790	1833	2472	2715	2658	3151	3426	3776	3994	3921	3964	3920
Commercial	234	296	407	422	147	175	172	164	185	160	203	320	318	320	320	320	322	322
State and Local Govt.	-32	573	362	167	1610	1809	3079	2699	2844	2831	2838	2530	2024	1961	1340	1252	1160	1044
Mobile Source Controls	535	706	716	1692	1396	2445	2887	3360	3432	3686	5230	7208	6865	7083	7215	7252	7301	7358

Table 3
Estimated Impact of Incremental Pollution Control Costs, 1970-1987

	1970	1971	1972	1973	1974	1975	1976	1977	1978	1979	1980	1981	1982	1983	1984	1985	1986	1987
Gross National Product																		
WITHBASE	992.8	1077.6	1166.3	1327.2	1405.3	1549.9	1710.7	1970.7	2159.6	2417.9	2637.7	2924.7	3310.0	3737.5	4180.7	4737.2	5268.7	5847.0
WITHOUT	989.5	1070.8	1176.2	1312.7	1417.7	1577.7	1688.7	1883.3	2114.5	2359.0	2558.4	2832.3	3207.5	3587.2	4083.7	4584.0	4978.2	5484.5
DIFF	3.3	6.8	10.1	14.5	17.6	22.6	30.0	36.9	45.0	58.8	74.3	92.4	115.5	145.3	180.0	229.1	290.5	362.5
XDIFF	0.3	0.6	0.9	1.1	1.2	1.5	1.8	2.0	2.1	2.5	2.9	3.3	3.6	4.1	4.5	5.1	5.8	6.6
Real GNP (79$)																		
WITHBASE	1770.5	1830.6	1934.0	2047.2	2034.8	2011.9	2119.9	2237.3	2344.5	2417.9	2414.6	2478.6	2510.3	2587.5	2669.9	2748.0	2849.8	2927.3
WITHOUT	1766.1	1827.9	1925.6	2038.3	2028.5	2007.3	2115.2	2234.8	2341.9	2417.7	2415.9	2432.6	2517.3	2591.8	2682.6	2755.6	2857.2	2949.1
DIFF	4.4	7.7	9.2	8.9	6.3	4.7	4.7	2.5	0.6	0.2	-1.3	-6.0	-6.9	-9.3	-12.7	-15.6	-17.9	-21.8
XDIFF	0.2	0.4	0.5	0.4	0.3	0.2	0.2	0.1	0.0	0.0	-0.1	-0.2	-0.3	-0.4	-0.5	-0.6	-0.6	-0.7
Annual Rate of Change																		
WITHBASE	-0.2	3.4	5.7	5.8	-0.6	-1.1	5.4	5.5	4.8	3.1	-0.1	0.6	3.4	2.9	3.4	4.1	2.5	2.7
WITHOUT	-0.4	3.2	5.6	5.9	-0.5	-1.0	5.4	5.7	4.9	3.1	-0.1	0.7	3.5	3.0	3.5	4.2	2.6	2.9
DIFF	0.2	0.2	0.1	0.0	-0.1	-0.1	0.0	-0.1	-0.1	0.0	-0.1	-0.1	-0.1	-0.1	-0.1	-0.1	-0.1	-0.1
XDIFF	-57.9	5.6	1.0	-0.7	25.8	7.5	-0.2	-2.0	-1.9	-0.5	81.0	-16.1	-3.3	-7.9	-3.4	-2.1	-2.5	-4.3
Prices																		
Implicit Price Deflator (79=1.000)																		
WITHBASE	0.561	0.589	0.613	0.648	0.705	0.770	0.811	0.880	0.921	1.000	1.090	1.204	1.322	1.445	1.566	1.724	1.849	1.997
WITHOUT	0.560	0.587	0.611	0.646	0.699	0.761	0.798	0.843	0.902	0.976	1.059	1.164	1.272	1.384	1.491	1.613	1.736	1.860
DIFF	0.000	0.001	0.002	0.004	0.006	0.009	0.012	0.016	0.019	0.024	0.031	0.040	0.050	0.061	0.075	0.091	0.113	0.138
XDIFF	0.001	0.216	0.382	0.665	0.923	1.247	1.553	1.843	2.106	2.487	2.959	3.434	3.893	4.426	4.997	5.674	6.499	7.486
Wholesale Price Index (79=1.000)																		
WITHBASE	0.467	0.483	0.504	0.571	0.678	0.741	0.776	0.873	0.890	1.000	1.141	1.290	1.451	1.624	1.775	1.949	2.147	2.367
WITHOUT	0.467	0.481	0.501	0.565	0.669	0.729	0.760	0.804	0.865	0.971	1.102	1.240	1.387	1.543	1.677	1.827	1.992	2.152
DIFF	0.000	0.001	0.003	0.005	0.009	0.013	0.015	0.019	0.023	0.029	0.039	0.050	0.063	0.080	0.098	0.122	0.156	0.195
XDIFF	0.106	0.303	0.549	0.961	1.381	1.710	2.028	2.342	2.619	3.000	3.548	4.060	4.571	5.202	5.854	6.690	7.810	9.044
Consumer Price Index (79=1.000)																		
WITHBASE	0.534	0.556	0.575	0.611	0.678	0.740	0.783	0.834	0.898	1.000	1.126	1.265	1.394	1.527	1.654	1.796	1.949	2.107
WITHOUT	0.533	0.555	0.573	0.607	0.672	0.731	0.771	0.819	0.880	0.976	1.101	1.235	1.366	1.468	1.582	1.709	1.842	1.971
DIFF	0.000	0.001	0.002	0.004	0.006	0.009	0.012	0.015	0.019	0.024	0.031	0.040	0.048	0.058	0.071	0.087	0.107	0.136
XDIFF	0.073	0.196	0.357	0.634	0.939	1.264	1.569	1.841	2.112	2.471	2.818	3.261	3.568	3.980	4.494	5.115	5.875	6.580
Annual Rate of Change																		
WITHBASE	5.9	4.2	3.3	6.3	11.1	9.1	5.7	6.5	7.8	11.3	13.4	11.5	10.2	9.5	8.4	8.6	8.5	8.1
WITHOUT	5.8	4.1	3.2	6.0	10.7	8.8	5.4	6.2	7.5	11.0	13.0	11.0	9.8	9.0	7.8	7.9	7.8	7.4
DIFF	0.1	0.1	0.2	0.3	0.3	0.4	0.3	0.3	0.3	0.3	0.4	0.5	0.3	0.5	0.5	0.6	0.7	0.8
XDIFF	1.3	3.1	5.3	4.9	3.1	4.0	5.7	4.8	3.8	3.1	3.4	4.3	3.8	5.1	4.8	8.1	9.3	10.4
Investment																		
Real Business Fixed Investment (79$)																		
WITHBASE	195.5	197.6	207.9	214.2	233.1	206.7	215.7	241.1	263.5	288.4	270.5	262.9	276.8	291.4	305.0	321.9	339.5	364.9
WITHOUT	193.0	190.5	202.4	211.2	226.5	200.9	212.8	238.6	261.0	278.2	268.4	260.1	274.6	289.0	303.4	322.0	338.8	349.0
DIFF	2.5	4.1	5.5	6.0	6.6	5.9	3.7	2.5	2.5	2.2	2.1	2.9	2.3	2.3	2.4	1.9	1.6	0.9
XDIFF	1.3	2.2	2.7	2.6	2.8	1.9	1.5	1.0	1.0	0.8	0.8	1.1	0.8	0.8	0.8	0.6	0.5	0.3

Table 3 (Continued)

	1970	1971	1972	1973	1974	1975	1976	1977	1978	1979	1980	1981	1982	1983	1984	1985	1986	1987
Producers' Durable Equipment																		
WITHBASE	111.9	111.0	123.1	145.3	147.5	129.7	137.6	160.0	174.3	181.8	175.2	171.0	179.9	190.0	199.4	211.3	222.1	229.9
WITHOUT	109.7	107.8	118.6	140.5	143.5	125.9	134.4	157.1	171.1	181.0	177.8	166.8	176.2	186.1	195.5	207.9	219.1	227.5
DIFF	2.2	3.3	4.5	4.8	4.0	3.9	3.2	2.9	3.2	2.9	3.3	4.2	3.7	3.9	3.9	3.4	3.1	2.5
%DIFF	2.0	3.0	3.8	3.4	2.8	3.1	2.4	1.8	1.9	1.6	1.9	2.5	2.1	2.1	2.0	1.7	1.4	1.1
Nonresidential Construction																		
WITHBASE	87.4	85.2	88.1	94.3	86.9	76.1	78.4	88.6	88.8	96.5	95.8	92.3	97.3	101.5	106.8	117.8	117.5	119.8
WITHOUT	87.3	84.5	87.2	93.3	86.5	76.4	78.8	81.3	89.9	97.6	97.4	94.2	99.3	103.7	108.7	114.8	119.5	121.8
DIFF	0.1	0.7	0.7	1.0	0.4	-0.3	-0.3	-0.7	-1.1	-1.1	-1.6	-2.0	-2.0	-2.1	-2.1	-2.1	-2.0	-2.0
%DIFF	0.1	0.8	0.8	1.0	0.4	-0.4	-0.4	-0.9	-1.2	-1.1	-1.7	-2.1	-2.0	-2.1	-2.0	-1.8	-1.7	-1.7
Housing Starts (mil. units)																		
WITHBASE	1.44	2.04	2.36	2.05	1.33	1.16	1.53	1.97	2.01	1.72	1.32	1.40	1.04	1.77	1.82	2.06	2.06	2.09
WITHOUT	1.44	2.05	2.39	2.08	1.37	1.19	1.59	2.05	2.10	1.80	1.38	1.47	1.93	1.88	1.96	2.19	2.17	2.21
DIFF	0.00	-0.01	-0.02	-0.03	-0.04	-0.03	-0.06	-0.08	-0.09	-0.08	-0.05	-0.07	-0.08	-0.11	-0.14	-0.13	-0.11	-0.11
%DIFF	-0.75	-0.66	-0.94	-1.67	-2.68	-2.87	-3.68	-4.14	-4.21	-4.34	-3.78	-4.86	-4.35	-5.62	-6.91	-5.97	-5.11	-5.19
Trade																		
Real Imports (79$)																		
WITHBASE	163.6	170.4	188.6	201.0	198.3	175.3	207.8	224.2	253.2	248.4	246.5	246.4	283.9	297.9	307.0	323.4	336.0	344.7
WITHOUT	162.7	168.7	186.4	198.7	196.7	174.5	208.1	224.9	254.0	249.3	246.9	247.0	285.9	300.6	310.8	327.5	339.8	348.4
DIFF	1.0	1.7	2.2	2.4	1.6	0.7	-0.3	-0.7	-0.8	-1.0	-0.4	-0.6	-2.0	-2.7	-3.8	-4.1	-3.8	-3.7
%DIFF	0.6	1.0	1.2	1.2	0.8	0.4	-0.1	-0.3	-0.3	-0.4	-0.2	-0.2	-0.7	-0.9	-1.2	-1.3	-1.1	-1.1
Real Exports (79$)																		
WITHBASE	135.3	136.2	148.7	186.7	208.2	198.7	211.3	217.2	244.7	281.8	309.9	308.8	323.1	338.1	348.5	356.3	360.1	371.7
WITHOUT	135.4	136.4	149.0	187.1	208.6	198.7	210.7	216.2	243.6	280.6	308.9	307.8	321.9	337.0	347.7	356.3	361.3	373.8
DIFF	-0.0	-0.2	-0.3	-0.4	-0.4	0.1	0.6	1.0	1.1	1.3	1.0	1.0	1.2	1.2	0.8	0.0	-1.2	-2.0
%DIFF	0.0	-0.1	-0.2	-0.2	-0.2	0.0	0.3	0.5	0.5	0.4	0.3	0.3	0.4	0.3	0.2	0.0	-0.3	-0.5
Real Consumption (79$)																		
Motor Vehicles & Parts																		
WITHBASE	59.2	70.6	81.3	87.6	72.9	73.4	88.7	98.4	101.9	95.6	83.1	86.9	96.5	95.8	103.2	109.6	111.4	114.2
WITHOUT	59.1	70.3	81.1	87.8	73.5	74.8	90.5	100.6	104.2	98.2	86.8	91.9	102.0	101.6	109.5	116.2	118.0	121.2
DIFF	0.0	0.2	0.2	-0.2	-0.7	-1.4	-1.8	-2.2	-2.8	-3.1	-3.6	-4.9	-5.5	-5.9	-6.3	-6.6	-6.6	-7.0
%DIFF	0.1	0.4	0.2	-0.2	-0.9	-1.9	-2.0	-2.2	-2.7	-3.1	-4.2	-5.4	-5.4	-5.8	-5.8	-5.6	-5.6	-5.8
Other Durables																		
WITHBASE	70.2	72.6	80.9	89.4	90.1	89.8	95.4	103.3	111.3	117.0	117.8	114.6	119.0	123.6	131.1	139.0	143.3	148.3
WITHOUT	70.1	72.3	80.7	89.4	90.3	90.4	95.8	104.0	112.1	118.0	118.6	115.7	120.4	125.4	133.2	141.2	145.5	150.6
DIFF	0.1	0.3	0.2	0.0	-0.2	-0.6	-0.5	-0.7	-0.8	-0.9	-0.9	-1.1	-1.4	-1.7	-2.1	-2.2	-2.2	-2.3
%DIFF	0.2	0.4	0.3	0.0	-0.2	-0.6	-0.5	-0.7	-0.7	-0.8	-0.8	-0.9	-1.2	-1.4	-1.6	-1.6	-1.5	-1.5
Nondurables																		
WITHBASE	482.8	491.2	511.6	524.1	516.1	524.4	548.5	568.2	588.3	603.2	608.2	605.4	630.6	620.4	633.0	648.1	660.1	672.4
WITHOUT	481.6	489.1	508.6	520.4	512.9	521.7	546.1	566.0	586.5	601.7	607.7	604.8	630.6	621.2	634.7	650.5	663.1	676.5
DIFF	1.3	2.2	3.0	3.7	3.1	2.6	2.4	2.2	1.8	1.5	1.0	0.6	0.0	-0.8	-1.7	-2.4	-3.1	-4.1
%DIFF	0.3	0.4	0.6	0.7	0.6	0.5	0.4	0.4	0.3	0.2	0.2	0.1	0.0	-0.1	-0.3	-0.4	-0.5	-0.6
Services																		
WITHBASE	485.7	503.0	527.9	550.5	564.2	583.8	607.9	635.4	670.0	697.2	715.4	735.1	754.5	777.3	806.2	837.9	867.1	896.5
WITHOUT	484.7	501.4	526.0	548.3	563.0	581.7	606.7	634.5	669.7	697.3	716.3	736.5	756.6	781.7	809.6	842.1	871.7	901.9
DIFF	1.0	1.6	2.0	2.1	1.7	1.4	1.2	0.9	0.3	-0.1	-0.9	-1.4	-2.7	-2.9	-3.4	-4.1	-4.7	-5.3
%DIFF	0.2	0.3	0.4	0.4	0.3	0.2	0.2	0.1	0.0	0.0	-0.1	-0.2	-0.3	-0.4	-0.4	-0.5	-0.5	-0.6

Table 3 (Continued)

	1970	1971	1972	1973	1974	1975	1976	1977	1978	1979	1980	1981	1982	1983	1984	1985	1986	1987
Income																		
Disposable Income																		
WITHBASE	695.3	751.8	810.4	914.9	999.0	1096.7	1195.1	1317.8	1464.8	1644.2	1824.9	2038.4	2303.8	2588.6	2888.4	3239.9	3599.4	3987.1
WITHOUT	694.0	748.6	805.5	907.2	988.1	1081.9	1175.2	1287.9	1431.6	1603.7	1772.8	1972.5	2220.6	2476.3	2760.0	3079.1	3398.2	3739.2
DIFF	1.3	3.1	4.9	7.7	10.7	14.9	19.9	24.9	31.1	40.5	52.1	65.9	83.3	104.3	128.4	160.7	201.2	247.9
%DIFF	0.2	0.4	0.6	0.8	1.1	1.4	1.7	1.9	2.2	2.5	2.9	3.3	3.7	4.2	4.7	5.2	5.9	6.6
Real Disposable Income (79$)																		
WITHBASE	1271.7	1266.0	1317.3	1406.9	1395.5	1473.4	1474.6	1527.6	1595.5	1643.9	1654.9	1672.2	1723.4	1746.6	1826.4	1898.4	1946.4	1998.8
WITHOUT	1270.3	1264.0	1310.0	1404.7	1394.6	1473.5	1474.8	1579.1	1587.7	1647.0	1659.7	1679.4	1731.3	1775.3	1837.3	1906.2	1950.8	2013.7
DIFF	1.4	2.0	3.3	2.0	0.9	-0.1	-0.2	-1.4	-2.1	-3.1	-4.8	-7.2	-7.9	-8.6	-10.9	-11.8	-12.4	-14.9
%DIFF	0.1	0.2	0.2	0.2	0.1	0.0	0.0	-0.1	-0.1	-0.2	-0.3	-0.4	-0.5	-0.5	-0.6	-0.6	-0.6	-0.7
Before-tax Corporate Profits																		
WITHBASE	75.5	86.5	100.8	126.0	136.9	132.1	166.7	193.1	224.3	256.2	245.6	230.7	265.4	295.3	313.2	391.4	403.6	433.2
WITHOUT	74.5	84.8	98.8	123.4	135.2	130.6	164.4	191.1	222.5	252.2	240.4	226.1	259.4	286.6	301.5	372.0	377.6	400.4
DIFF	1.0	1.7	2.0	2.5	1.7	1.5	1.7	2.0	1.8	4.0	5.3	4.7	6.0	8.7	11.7	19.4	26.0	32.8
%DIFF	1.3	2.0	2.0	2.1	1.3	1.1	1.1	1.0	0.8	1.6	2.2	2.1	2.3	3.0	3.9	5.2	6.9	8.2
After-tax Corporate Profits																		
WITHBASE	41.3	49.0	59.1	76.8	85.3	81.5	107.4	129.3	140.9	160.3	164.3	152.1	173.3	193.2	206.0	254.4	260.8	285.1
WITHOUT	40.7	48.0	57.8	75.1	84.0	80.3	101.0	118.7	139.3	165.7	160.3	148.3	168.6	186.6	197.3	240.9	247.0	262.9
DIFF	0.5	1.0	1.2	1.7	1.2	1.2	1.4	1.6	1.6	3.1	4.0	3.8	4.7	6.6	8.7	13.5	17.8	22.2
%DIFF	1.3	2.1	2.2	2.2	1.4	1.5	1.4	1.3	1.7	1.9	2.5	2.6	2.8	3.5	4.4	5.6	7.2	8.5
Real After-tax Profits (79$)																		
WITHBASE	76.5	86.7	100.6	125.2	125.5	105.8	127.1	140.8	153.0	160.3	150.7	128.5	133.5	136.4	134.3	152.7	146.9	146.7
WITHOUT	75.6	85.1	99.0	123.5	123.1	105.7	127.6	141.8	154.8	169.7	151.8	129.9	135.3	138.1	135.7	153.7	147.0	146.6
DIFF	1.0	1.5	1.7	1.7	0.4	0.1	-0.5	-1.0	-1.8	-1.4	-1.0	-1.4	-1.9	-1.7	-1.4	-1.0	-0.1	0.1
%DIFF	1.3	1.8	1.7	1.4	0.3	0.1	-0.4	-0.7	-1.1	-0.8	-0.7	-1.1	-1.4	-1.2	-1.0	-0.7	-0.1	0.1
Other Indicators																		
State & Local Gov't Bond Rate (%)																		
WITHBASE	6.12	5.72	5.04	5.00	5.90	6.43	5.66	5.20	5.92	5.93	7.86	8.76	9.80	8.42	8.00	8.42	8.36	8.00
WITHBASE	6.12	5.72	5.04	5.00	5.90	6.43	5.66	5.20	5.92	5.93	7.86	8.76	9.80	8.42	8.00	8.42	8.36	8.00
WITHOUT	6.10	5.16	4.95	4.86	5.71	6.21	5.44	4.97	5.72	5.64	7.51	8.39	8.60	7.99	7.63	7.95	7.86	7.54
DIFF	0.02	0.05	0.09	0.14	0.19	0.21	0.23	0.24	0.20	0.29	0.34	0.37	0.40	0.43	0.45	0.47	0.51	0.54
%DIFF	0.32	1.06	1.81	2.79	3.39	3.46	4.17	4.79	4.92	5.22	4.57	4.40	4.70	5.39	5.83	5.90	6.43	7.22
Unemployment Rate (%)																		
WITHBASE	5.0	6.0	5.6	4.8	5.6	8.5	7.7	7.0	6.0	5.8	7.2	7.8	7.1	7.0	7.0	6.5	6.3	6.2
WITHBASE	5.0	6.0	5.6	4.8	5.6	8.5	7.7	7.0	6.0	5.8	7.2	7.8	7.1	7.0	7.0	6.5	6.3	6.2
WITHOUT	5.1	6.1	5.8	5.1	5.8	8.7	7.9	7.3	6.2	6.0	7.5	8.1	7.4	7.4	7.4	6.9	6.7	6.7
DIFF	-0.1	-0.2	-0.2	-0.3	-0.2	-0.2	-0.2	-0.2	-0.2	-0.3	-0.3	-0.3	-0.3	-0.3	-0.3	-0.4	-0.4	-0.4
%DIFF	-1.9	-3.1	-4.0	-4.6	-3.6	-2.7	-2.7	-3.7	-3.6	-4.2	-3.8	-3.7	-4.1	-4.4	-4.6	-5.3	-5.9	-6.2
Industrial Production Index (79=1.000)																		
WITHBASE	0.787	0.718	0.765	0.841	0.868	0.772	0.854	0.904	0.959	1.000	0.963	0.977	1.059	1.105	1.153	1.279	1.298	1.292
WITHBASE	0.787	0.718	0.765	0.841	0.868	0.772	0.854	0.904	0.959	1.000	0.963	0.977	1.059	1.105	1.153	1.279	1.298	1.292
WITHOUT	0.785	0.715	0.763	0.840	0.869	0.775	0.857	0.910	0.966	1.006	0.970	0.987	1.070	1.117	1.169	1.296	1.314	1.310
DIFF	0.001	0.003	0.001	0.002	-0.001	-0.003	-0.003	-0.005	-0.007	-0.006	-0.007	-0.010	-0.012	-0.013	-0.015	-0.016	-0.016	-0.018
%DIFF	0.209	0.438	0.340	0.216	-0.092	-0.391	-0.393	-0.495	-0.707	-0.639	-0.734	-0.991	-1.083	-1.150	-1.308	-1.248	-1.240	-1.385

Table 4
Incremental Pollution Control Costs
Used In Each Simulation
(Millions of 1979 dollars)

	1970	1971	1972	1973	1974	1975	1976	1977	1978	1979	1980	1981	1982	1983	1984	1985	1986	1987
BASE CASE:																		
Incremental Investment	3375	5006	6558	7524	8418	10308	11745	11633	13036	13536	15641	19142	18787	20131	20366	20409	20369	20079
Incremental O&M	3023	4395	6236	8622	9531	9965	10544	11375	12299	13579	14587	15936	17300	18329	20140	21625	23093	24830
HIGH COST:																		
Incremental Investment	3375	5006	6558	7524	8418	10308	11745	11633	13036	14164	16531	20003	19816	20476	21028	21449	21587	21188
Incremental O&M	3023	4395	6236	8622	9531	9965	10544	11375	12299	13579	14587	15936	17300	18829	20640	22625	24593	26330
LOW COST:																		
Incremental Investment	3375	5006	6558	7524	8418	10308	11745	11633	13036	13536	15641	17228	15030	14092	12220	10205	8148	6509
Incremental O&M	3023	4395	6236	8622	9531	9965	10544	11375	12299	13579	14587	14342	13840	12830	12084	10817	9237	7449
CONSTANT MONEY SUPPLY:																		
Incremental Investment									Same as Base Case									
Incremental O&M									Same as Base Case									
WITHOUT:																		
Incremental Investment										-0-								
Incremental O&M										-0-								

Table 5
Assumptions in the High and Low
Pollution Control Cost Alternatives
(Millions of 1979 dollars)

HIGH COST CASE

	STATE AND LOCAL		MOBILE SOURCE CONTROLS					
	INCREMENTAL INVESTMENT	DIFFERENCE FROM WITH CASE	INCREMENTAL INVESTMENT	DIFFERENCE FROM WITH CASE	OPERATING AND MAINTENANCE COSTS	DIFFERENCE FROM WITH CASE	TOTAL DIFFERENCE FROM WITH CASE	PERCENT OF WITH CASE
1979	3459	628	3686	---	5307	---	628	2.3
1980	3728	890	5230	---	5195	---	890	2.9
1981	3391	861	7200	---	5310	---	861	2.5
1982	2853	829	6065	---	5270	---	829	2.3
1983	2206	245	7103	100	5245	500	845	2.2
1984	1802	462	7415	200	5306	500	1162	2.9
1985	1992	740	7552	300	5602	1000	2040	4.9
1986	2078	918	7601	300	5807	1500	2718	6.3
1987	1903	859	7658	300	5709	1500	2659	5.9

LOW COST CASE

	TOTAL INCREMENTAL COSTS	PERCENT OF WITH CASE
1981	31570	90
1982	28870	80
1983	26922	70
1984	24304	60
1985	21017	50
1986	17385	40
1987	13458	30

Table 6
Assumptions in the Constant Money Supply Case

	DESIRED REDUCTION IN MONEY SUPPLY (BILLIONS)	REQUIRED DECREASE IN NONBORROWED RESERVES (IN BILLIONS)
1970	0.2	0.00
1971	0.4	0.06
1972	0.6	0.12
1973	0.8	0.09
1974	0.9	0.23
1975	1.2	0.11
1976	1.4	0.17
1977	1.7	0.20
1978	2.0	0.26
1979	2.6	0.42
1980	3.1	0.30
1981	3.8	0.57
1982	4.6	0.51
1983	5.7	0.56
1984	7.2	0.62
1985	9.1	0.67
1986	11.5	0.78
1987	14.3	0.78

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Table 7
Estimated Impact of Incremental
Pollution Control Costs, 1970-1987
Higher Pollution Control Costs

	1970	1971	1972	1973	1974	1975	1976	1977	1978	1979	1980	1981	1982	1983	1984	1985	1986	1987
Gross National Product																		
WITHBASE	992.8	1077.6	1186.3	1327.2	1435.3	1549.9	1718.7	1920.2	2159.6	2417.9	2632.7	2924.7	3318.0	3732.5	4180.7	4737.2	5268.7	5847.0
WITHHIGH	992.8	1077.6	1186.3	1327.2	1435.3	1549.9	1718.7	1920.2	2159.6	2418.3	2633.7	2926.1	3319.7	3734.7	4184.3	4743.9	5279.8	5862.1
DIFF	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	-0.4	-1.0	-1.4	-1.7	-2.2	-3.6	-6.8	-11.2	-15.1
%DIFF	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	-0.1	-0.1	-0.1	-0.1	-0.2	-0.3
Real GNP (79$)																		
WITHBASE	1770.5	1830.6	1934.8	2047.2	2034.8	2011.9	2119.9	2237.3	2344.5	2417.9	2414.6	2428.6	2510.3	2582.5	2669.9	2780.0	2849.4	2927.3
WITHHIGH	1770.5	1830.6	1934.8	2047.2	2034.8	2011.9	2119.9	2237.3	2344.5	2418.3	2415.3	2429.5	2511.2	2583.3	2671.0	2782.1	2852.4	2930.5
DIFF	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	-0.4	-0.8	-0.9	-0.9	-0.8	-1.2	-2.1	-3.0	-3.2
%DIFF	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	-0.1	-0.1	-0.1
Annual Rate of Change																		
WITHBASE	-0.2	3.4	5.7	5.8	-0.6	-1.1	5.4	5.5	4.8	3.1	-0.1	0.6	3.4	2.9	3.4	4.1	2.5	2.7
WITHHIGH	-0.2	3.4	5.7	5.8	-0.6	-1.1	5.4	5.5	4.8	3.1	-0.1	0.6	3.4	2.9	3.4	4.2	2.5	2.7
DIFF	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0
%DIFF	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	-0.5	13.7	-0.7	0.1	0.0	-0.4	-0.8	-1.3	-0.1
Prices																		
Implicit Price Deflator (79=1.000)																		
WITHBASE	0.561	0.589	0.613	0.648	0.705	0.770	0.811	0.858	0.921	1.000	1.090	1.204	1.322	1.445	1.566	1.704	1.849	1.997
WITHHIGH	0.561	0.589	0.613	0.648	0.705	0.770	0.811	0.858	0.921	1.000	1.090	1.204	1.322	1.446	1.567	1.705	1.851	2.000
DIFF	0.000	0.000	0.000	0.000	0.000	0.000	0.000	0.000	0.000	0.000	0.000	0.000	0.000	0.000	-0.001	-0.001	-0.002	-0.003
%DIFF	0.000	0.000	0.000	0.000	0.000	0.000	0.000	0.000	0.000	-0.003	-0.008	-0.012	-0.017	-0.025	-0.041	-0.068	-0.105	-0.150
Wholesale Price Index (79=1.000)																		
WITHBASE	0.467	0.483	0.504	0.571	0.678	0.741	0.776	0.823	0.888	1.000	1.141	1.290	1.451	1.624	1.775	1.949	2.147	2.347
WITHHIGH	0.467	0.483	0.504	0.571	0.678	0.741	0.776	0.823	0.888	1.000	1.141	1.290	1.451	1.624	1.775	1.951	2.150	2.352
DIFF	0.000	0.000	0.000	0.000	0.000	0.000	0.000	0.000	0.000	0.000	0.000	0.000	0.000	0.000	-0.001	-0.002	-0.003	-0.005
%DIFF	0.000	0.000	0.000	0.000	0.000	0.000	0.000	0.000	0.000	-0.003	-0.007	-0.012	-0.018	-0.027	-0.046	-0.080	-0.135	-0.190
Consumer Price Index (79=1.000)																		
WITHBASE	0.534	0.556	0.575	0.611	0.678	0.740	0.783	0.834	0.898	1.000	1.134	1.265	1.394	1.527	1.654	1.796	1.949	2.107
WITHHIGH	0.534	0.556	0.575	0.611	0.678	0.740	0.783	0.834	0.898	1.000	1.135	1.265	1.394	1.527	1.655	1.797	1.951	2.110
DIFF	0.000	0.000	0.000	0.000	0.000	0.000	0.000	0.000	0.000	0.000	0.000	0.000	0.000	0.000	-0.001	-0.001	-0.002	-0.003
%DIFF	0.000	0.000	0.000	0.000	0.000	0.000	0.000	0.000	0.000	-0.002	-0.008	-0.014	-0.020	-0.029	-0.042	-0.063	-0.094	-0.136
Annual Rate of Change																		
WITHBASE	5.9	4.2	3.3	6.3	11.1	9.1	5.7	6.5	7.8	11.3	13.4	11.5	10.2	9.5	8.4	8.6	8.5	8.1
WITHHIGH	5.9	4.2	3.3	6.3	11.1	9.1	5.7	6.5	7.8	11.3	13.5	11.5	10.2	9.5	8.4	8.6	8.6	8.2
DIFF	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0
%DIFF	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	-0.1	-0.1	-0.1	-0.2	-0.3	-0.4	-0.6
Investment																		
Real Business Fixed Investment (79$)																		
WITHBASE	195.5	192.6	207.9	237.2	233.1	204.7	215.2	241.1	263.5	280.4	270.5	262.9	276.8	291.4	305.0	323.9	339.5	349.9
WITHHIGH	195.5	192.6	207.9	237.2	233.1	204.7	215.2	241.1	263.5	280.4	270.5	263.0	276.9	291.5	306.0	324.3	340.1	350.5
DIFF	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	-0.1	-0.1	-0.1	-0.1	-0.2	-0.4	-0.5	-0.6
%DIFF	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	-0.1	-0.1	-0.2	-0.2

Table 7 (Continued)

	1970	1971	1972	1973	1974	1975	1976	1977	1978	1979	1980	1981	1982	1983	1984	1985	1986	1987
Producers' Durable Equipment																		
WITHBASE	111.9	111.0	123.1	145.3	147.5	129.7	137.6	160.0	174.3	183.8	175.2	171.0	179.9	190.0	199.4	211.3	222.1	229.9
WITHHIGH	111.9	111.0	123.1	145.3	147.5	129.7	137.6	160.0	174.3	183.5	175.3	171.1	180.0	190.2	199.6	211.6	222.6	230.4
DIFF	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	-0.1	-0.1	-0.1	-0.1	-0.2	-0.3	-0.4	-0.5
%DIFF	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	-0.1	-0.1	-0.2	-0.2	-0.2
Nonresidential Construction																		
WITHBASE	87.4	85.2	88.0	94.3	86.9	76.1	78.4	80.6	88.8	96.5	95.8	92.3	97.3	101.5	106.6	112.8	117.5	119.8
WITHHIGH	87.4	85.2	88.0	94.3	86.9	76.1	78.4	80.6	88.8	96.5	95.8	92.3	97.3	101.5	106.6	112.8	117.6	119.9
DIFF	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	-0.1	-0.1	-0.1
%DIFF	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	-0.1	-0.1	-0.1
Housing Starts (mil. units)																		
WITHBASE	1.44	2.04	2.36	2.05	1.33	1.16	1.53	1.97	2.01	1.72	1.32	1.40	1.84	1.77	1.82	2.06	2.06	2.09
WITHHIGH	1.44	2.04	2.36	2.05	1.33	1.16	1.53	1.97	2.01	1.72	1.32	1.40	1.84	1.77	1.82	2.06	2.06	2.09
DIFF	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
%DIFF	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.03	0.09	0.14	0.14	0.13	0.09	0.13	0.19	0.24
Trade																		
Real Imports (79$)																		
WITHBASE	163.6	170.4	188.6	201.0	198.3	175.3	207.8	224.2	253.2	268.4	266.5	266.4	283.9	297.9	307.0	323.4	336.0	344.7
WITHHIGH	163.6	170.4	188.6	201.0	198.3	175.3	207.8	224.2	253.2	268.4	266.6	266.5	284.0	298.1	307.2	323.6	336.3	344.9
DIFF	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	-0.1	-0.1	-0.1	-0.1	-0.1	-0.2	-0.3	-0.2
%DIFF	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	-0.1	-0.1	-0.1
Real Exports (79$)																		
WITHBASE	135.3	136.2	148.7	185.7	208.2	198.7	211.3	217.2	244.7	281.8	309.9	308.8	323.1	338.1	348.5	356.3	360.1	371.7
WITHHIGH	135.3	136.2	148.7	185.7	208.2	198.7	211.3	217.2	244.7	281.8	309.9	308.8	323.2	338.2	348.6	356.4	360.2	372.0
DIFF	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	-0.1	-0.1	-0.2	-0.2
%DIFF	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	-0.1
Real Consumption (79$)																		
Motor Vehicles & Parts																		
WITHBASE	59.2	70.6	81.3	87.6	72.9	73.4	88.7	98.4	101.9	95.6	83.1	86.9	96.5	95.8	103.2	109.6	111.4	114.2
WITHHIGH	59.2	70.6	81.3	87.6	72.9	73.4	88.7	98.4	101.9	95.6	83.2	87.0	96.5	95.8	103.2	109.6	111.4	114.2
DIFF	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0
%DIFF	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0
Other Durables																		
WITHBASE	70.2	72.6	80.9	89.4	90.1	89.8	95.4	103.3	111.3	117.0	112.8	114.6	119.0	123.6	131.1	139.0	143.3	148.3
WITHHIGH	70.2	72.6	80.9	89.4	90.1	89.8	95.4	103.3	111.3	117.1	112.8	114.6	119.1	123.7	131.1	139.0	143.4	148.4
DIFF	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	-0.1	-0.1	-0.1
%DIFF	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	-0.1	-0.1
Nondurables																		
WITHBASE	482.8	491.2	511.6	524.1	516.1	524.4	548.5	568.2	588.3	603.2	608.2	605.4	610.6	620.4	633.0	648.1	660.1	670.4
WITHHIGH	482.8	491.2	511.6	524.1	516.1	524.4	548.5	568.2	588.3	603.2	608.3	605.5	610.7	620.7	633.3	648.7	661.0	671.3
DIFF	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	-0.1	-0.1	-0.1	-0.3	-0.3	-0.6	-0.9	-0.9
%DIFF	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	-0.1	-0.1	-0.1	-0.1
Services																		
WITHBASE	485.7	503.0	527.9	550.5	564.7	583.0	607.9	635.4	670.0	697.2	715.4	735.1	754.5	777.3	806.2	837.9	867.1	898.5
WITHHIGH	485.7	503.0	527.9	550.5	564.7	583.0	607.9	635.4	670.0	697.2	715.5	735.1	754.6	777.6	806.5	838.5	867.9	897.4
DIFF	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	-0.1	-0.1	-0.1	-0.3	-0.3	-0.6	-0.9	-0.9
%DIFF	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	-0.1	-0.1	-0.1

Table 7 (Continued)

	1970	1971	1972	1973	1974	1975	1976	1977	1978	1979	1980	1981	1982	1983	1984	1985	1986	1987
Incomes																		
Disposable Income																		
WITHBASE	695.3	751.8	810.4	914.9	999.0	1096.7	1195.1	1312.8	1464.8	1644.2	1824.9	2038.4	2303.8	2580.6	2888.4	3239.9	3599.4	3987.1
WITHHIGH	695.3	751.8	810.4	914.9	999.0	1096.7	1195.1	1312.8	1464.8	1644.4	1825.5	2039.2	2304.9	2581.9	2890.5	3243.9	3606.0	3996.4
DIFF	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	-0.2	-0.6	-0.8	-1.0	-1.3	-2.2	-4.0	-6.7	-9.3
%DIFF	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	-0.1	-0.1	-0.1	-0.2	-0.2
Real Disposable Income (79$)																		
WITHBASE	1221.7	1266.8	1317.3	1406.9	1395.5	1423.4	1474.6	1527.6	1595.5	1643.9	1654.9	1672.2	1723.4	1766.8	1826.4	1894.4	1946.4	1998.8
WITHHIGH	1221.7	1266.8	1317.3	1406.9	1395.5	1423.4	1474.6	1527.6	1595.5	1644.1	1655.3	1672.6	1723.9	1766.7	1826.6	1894.8	1947.0	1999.5
DIFF	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	-0.2	-0.4	-0.4	-0.5	-0.1	-0.2	-0.4	-0.6	-0.7
%DIFF	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0
Before-tax Corporate Profits																		
WITHBASE	75.5	86.5	100.8	126.0	134.9	132.1	166.2	193.1	224.3	256.2	245.6	230.7	265.4	295.3	313.2	391.4	403.6	433.2
WITHHIGH	75.5	86.5	100.8	126.0	134.9	132.1	166.2	193.1	224.3	256.3	245.8	230.9	265.5	295.7	313.9	392.7	405.6	435.4
DIFF	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	-0.1	-0.2	-0.2	-0.1	-0.3	-0.6	-1.3	-2.0	-2.2
%DIFF	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	-0.1	-0.1	0.0	-0.1	-0.2	-0.3	-0.5	-0.5
Aftertax Corporate Profits																		
WITHBASE	41.3	49.0	59.1	76.8	85.3	81.5	102.4	120.3	140.9	160.3	164.3	152.1	173.3	193.2	206.0	234.4	244.8	285.1
WITHHIGH	41.3	49.0	59.1	76.8	85.3	81.5	102.4	120.3	140.9	160.4	164.4	152.2	173.4	193.4	206.4	235.2	246.0	286.5
DIFF	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	-0.1	-0.1	-0.1	-0.1	-0.2	-0.4	-0.8	-1.2	-1.4
%DIFF	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	-0.1	-0.1	0.0	-0.1	-0.2	-0.3	-0.5	-0.5
Real Aftertax Profits (79$)																		
WITHBASE	76.5	86.7	100.6	125.2	125.5	105.8	127.1	140.8	153.0	160.3	150.7	128.5	133.5	136.4	134.2	152.7	146.9	146.7
WITHHIGH	76.5	86.7	100.6	125.2	125.5	105.8	127.1	140.8	153.0	160.4	159.8	128.5	133.5	136.5	134.5	153.0	147.4	147.1
DIFF	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	-0.1	-0.1	0.0	-0.1	-0.1	-0.2	-0.5	-0.4
%DIFF	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	-0.1	-0.1	0.0	-0.1	-0.1	-0.2	-0.3	-0.3
Other Indicators																		
State & Local Gov't Bond Rate (%)																		
WITHBASE	6.12	5.22	5.04	5.00	5.90	6.43	5.66	5.20	5.52	5.93	7.86	8.76	9.00	8.42	8.08	8.42	8.36	8.08
WITHHIGH	6.12	5.22	5.04	5.00	5.90	6.43	5.66	5.20	5.52	5.93	7.86	8.77	9.01	8.43	8.09	8.43	8.38	8.11
DIFF	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	-0.01	-0.01	-0.01	-0.01	-0.01	-0.02	-0.03
%DIFF	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	-0.02	-0.06	-0.09	-0.10	-0.10	-0.12	-0.16	-0.25	-0.33
Unemployment Rate (%)																		
WITHBASE	5.0	6.0	5.6	4.8	5.6	8.5	7.7	7.0	6.0	5.8	7.2	7.8	7.1	7.0	7.0	6.5	6.3	6.2
WITHHIGH	5.0	6.0	5.6	4.8	5.6	8.5	7.7	7.0	6.0	5.8	7.2	7.8	7.1	7.0	7.0	6.5	6.3	6.2
DIFF	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0
%DIFF	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.1	0.1	0.2	0.2	0.2	0.2	0.3	0.4	0.5
Industrial Production Index (79=1.000)																		
WITHBASE	0.707	0.718	0.785	0.851	0.848	0.772	0.854	0.906	0.959	1.000	0.963	0.977	1.059	1.105	1.151	1.229	1.258	1.292
WITHHIGH	0.707	0.718	0.785	0.851	0.848	0.772	0.854	0.906	0.959	1.000	0.963	0.978	1.059	1.105	1.154	1.230	1.259	1.293
DIFF	0.000	0.000	0.000	0.000	0.000	0.000	0.000	0.000	0.000	0.000	0.000	0.000	0.000	0.000	0.000	-0.001	-0.001	-0.000
%DIFF	0.000	0.000	0.000	0.000	0.000	0.000	0.000	0.000	0.000	-0.011	-0.025	-0.074	-0.017	-0.074	-0.043	-0.073	-0.107	-0.104

Table 8
Estimated Impact of Incremental Control Costs, 1970-1987
Lower Pollution Control Costs

	1970	1971	1972	1973	1974	1975	1976	1977	1978	1979	1980	1981	1982	1983	1984	1985	1986	1987
Gross National Product																		
WITHBASE	992.8	1077.6	1186.3	1327.2	1435.3	1549.9	1718.7	1920.7	2159.6	2417.9	2632.7	2924.7	3318.0	3737.5	4180.7	4737.2	5268.7	5867.0
WITHLOW	992.8	1077.6	1186.3	1327.2	1435.3	1549.9	1718.7	1920.7	2159.6	2417.9	2632.7	2922.6	3312.0	3721.9	4164.9	4714.7	5235.4	5799.9
DIFF	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	2.1	6.0	10.7	15.8	22.5	33.3	47.1
%DIFF	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.1	0.2	0.3	0.4	0.5	0.6	0.8
Real GNP (79$)																		
WITHBASE	1770.5	1830.6	1934.8	2047.2	2034.8	2011.9	2119.9	2237.1	2344.5	2417.9	2414.6	2478.6	2510.1	2582.5	2669.9	2780.0	2849.4	2927.1
WITHLOW	1770.5	1830.6	1934.8	2047.2	2034.8	2011.9	2119.9	2237.1	2344.5	2417.9	2414.6	2477.5	2508.1	2580.3	2668.4	2779.4	2849.3	2928.9
DIFF	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	1.1	2.2	2.2	1.5	0.6	0.1	-1.6
%DIFF	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.1	0.1	0.1	0.0	0.0	-0.1
Annual Rate of Change																		
WITHBASE	-0.2	3.4	5.7	5.8	-0.6	-1.1	5.4	5.5	4.8	3.1	-0.1	0.6	3.4	2.9	3.4	4.1	2.5	2.7
WITHLOW	-0.2	3.4	5.7	5.8	-0.6	-1.1	5.4	5.5	4.8	3.1	-0.1	0.5	3.3	2.9	3.4	4.2	2.5	2.8
DIFF	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	-0.1
%DIFF	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.1	1.4	0.0	-0.9	-0.9	-0.7	-2.1
Prices																		
Implicit Price Deflator (79=1.000)																		
WITHBASE	0.561	0.589	0.613	0.648	0.705	0.770	0.811	0.858	0.921	1.000	1.090	1.204	1.322	1.445	1.566	1.704	1.849	1.997
WITHLOW	0.561	0.589	0.613	0.648	0.705	0.770	0.811	0.858	0.921	1.000	1.090	1.204	1.321	1.442	1.561	1.696	1.837	1.980
DIFF	0.000	0.000	0.000	0.000	0.000	0.000	0.000	0.000	0.000	0.000	0.000	0.000	0.001	0.003	0.005	0.008	0.012	0.017
%DIFF	0.000	0.000	0.000	0.000	0.000	0.000	0.000	0.000	0.000	0.000	0.000	0.028	0.094	0.200	0.324	0.456	0.633	0.866
Wholesale Price Index (79=1.000)																		
WITHBASE	0.467	0.483	0.504	0.571	0.678	0.741	0.776	0.823	0.898	1.000	1.141	1.290	1.451	1.624	1.775	1.949	2.147	2.347
WITHLOW	0.467	0.483	0.504	0.571	0.678	0.741	0.776	0.823	0.898	1.000	1.141	1.289	1.448	1.618	1.765	1.936	2.128	2.318
DIFF	0.000	0.000	0.000	0.000	0.000	0.000	0.000	0.000	0.000	0.000	0.000	0.001	0.002	0.006	0.009	0.014	0.020	0.029
%DIFF	0.000	0.000	0.000	0.000	0.000	0.000	0.000	0.000	0.000	0.000	0.000	0.049	0.164	0.345	0.529	0.699	0.925	1.248
Consumer Price Index (79=1.000)																		
WITHBASE	0.534	0.556	0.575	0.611	0.678	0.740	0.783	0.834	0.898	1.000	1.134	1.265	1.394	1.527	1.654	1.796	1.949	2.107
WITHLOW	0.534	0.556	0.575	0.611	0.678	0.740	0.783	0.834	0.898	1.000	1.134	1.264	1.393	1.523	1.648	1.787	1.936	2.088
DIFF	0.000	0.000	0.000	0.000	0.000	0.000	0.000	0.000	0.000	0.000	0.000	0.000	0.002	0.003	0.006	0.009	0.014	0.019
%DIFF	0.000	0.000	0.000	0.000	0.000	0.000	0.000	0.000	0.000	0.000	0.000	0.037	0.108	0.225	0.358	0.510	0.698	0.926
Annual Rate of Change																		
WITHBASE	5.9	4.2	3.3	6.3	11.1	9.1	5.7	6.5	7.8	11.3	13.4	11.5	10.2	9.5	8.4	8.6	8.5	8.1
WITHLOW	5.9	4.2	3.3	6.3	11.1	9.1	5.7	6.5	7.8	11.3	13.4	11.4	10.2	9.4	8.2	8.4	8.3	7.9
DIFF	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.1	0.1	0.1	0.2	0.2	0.2
%DIFF	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.4	0.8	1.4	1.7	2.0	2.4	3.1
Investment																		
Real Business Fixed Investment (79$)																		
WITHBASE	195.5	192.6	207.9	237.2	233.1	204.7	215.2	241.1	263.5	280.4	270.5	262.9	276.8	291.4	305.8	323.9	339.5	349.9
WITHLOW	195.5	192.6	207.9	237.2	233.1	204.7	215.2	241.1	263.5	280.4	270.5	262.0	274.6	288.1	301.7	319.3	334.4	344.3
DIFF	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.9	2.2	3.3	4.1	4.6	5.2	5.6
%DIFF	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.4	0.8	1.1	1.4	1.4	1.6	1.6

Table 8 (Continued)

	1970	1971	1972	1973	1974	1975	1976	1977	1978	1979	1980	1981	1982	1983	1984	1985	1986	1987
Producers' Durable Equipment																		
WITHBASE	111.9	111.0	123.1	145.3	147.5	129.7	137.6	160.0	174.3	183.8	175.2	171.0	179.9	190.8	199.4	211.3	227.1	239.9
WITHLOW	111.9	111.0	123.1	145.3	147.5	129.7	137.6	160.0	174.3	183.8	175.2	170.2	178.0	187.1	195.6	206.9	217.0	224.7
DIFF	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.8	2.0	3.8	3.9	4.5	5.2	5.7
%DIFF	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.5	1.1	1.6	2.0	2.2	2.4	2.5
Nonresidential Construction																		
WITHBASE	87.4	85.2	88.0	94.3	86.9	76.1	78.4	88.6	88.8	96.5	95.8	92.3	97.3	101.5	105.6	112.8	117.5	119.8
WITHLOW	87.4	85.2	88.0	94.3	86.9	76.1	78.4	88.6	88.8	96.5	95.8	92.2	97.1	101.4	104.6	112.9	117.9	120.4
DIFF	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0*	0.0	0.0	0.0	0.0	0.1	0.1	0.0	-0.2	-0.4	-0.6
%DIFF	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.1	0.1	0.0	-0.2	-0.3	-0.5
Housing Starts (mil. units)																		
WITHBASE	1.44	2.04	2.36	2.05	1.33	1.16	1.53	1.97	2.01	1.72	1.32	1.40	1.84	1.77	1.82	2.06	2.06	2.09
WITHLOW	1.44	2.04	2.36	2.05	1.33	1.16	1.53	1.97	2.01	1.72	1.32	1.40	1.85	1.80	1.87	2.13	2.14	2.18
DIFF	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	-0.01	-0.03	-0.05	-0.07	-0.08	-0.09
%DIFF	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	-0.22	-0.65	-1.49	-2.74	-3.35	-3.85	-4.14
Trade																		
Real Imports (79$)																		
WITHBASE	163.6	170.4	188.6	201.0	198.3	175.3	207.8	224.2	253.2	268.4	266.5	266.4	283.9	297.9	307.8	323.4	336.0	344.7
WITHLOW	163.6	170.4	188.6	201.0	198.3	175.3	207.8	224.2	253.2	268.4	266.5	265.9	282.9	296.8	306.2	323.1	335.9	344.6
DIFF	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.5	1.0	1.2	0.8	0.3	0.1	0.0
%DIFF	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.2	0.4	0.4	0.3	0.1	0.0	0.0
Real Exports (79$)																		
WITHBASE	135.3	136.2	148.7	186.7	208.2	198.7	211.3	217.2	244.7	281.8	309.9	306.8	323.1	338.1	348.5	356.3	360.1	371.7
WITHLOW	135.3	136.2	148.7	186.7	208.2	198.7	211.3	217.2	244.7	281.8	309.9	308.9	323.1	338.0	348.2	355.5	358.8	370.1
DIFF	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.1	0.3	0.8	1.3	1.7
%DIFF	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.1	0.2	0.4	0.4
Real Consumption (79$)																		
Motor Vehicles & Parts																		
WITHBASE	59.2	70.6	81.3	87.6	72.9	73.4	88.7	98.4	101.9	95.6	83.1	86.9	96.5	95.8	103.2	109.6	111.4	114.2
WITHLOW	59.2	70.6	81.3	87.6	72.9	73.4	88.7	98.4	101.9	95.6	83.1	87.1	96.8	96.5	104.4	111.3	113.4	116.7
DIFF	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	-0.1	-0.3	-0.7	-1.2	-1.6	-2.0	-2.6
%DIFF	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	-0.2	-0.3	-0.7	-1.1	-1.5	-1.8	-2.2
Other Durables																		
WITHBASE	70.2	72.6	80.9	89.4	90.1	89.8	95.4	103.3	111.3	117.0	112.8	114.6	119.0	123.6	131.1	139.0	143.3	148.3
WITHLOW	70.2	72.6	80.9	89.4	90.1	89.8	95.4	103.3	111.3	117.0	112.8	114.6	119.1	123.9	131.6	139.9	144.7	150.7
DIFF	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	-0.2	-0.6	-1.0	-1.4	-2.0
%DIFF	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	-0.2	-0.4	-0.7	-1.0	-1.3
Nondurables																		
WITHBASE	482.8	491.2	511.6	524.1	516.1	524.4	548.5	568.2	588.3	601.2	608.2	605.4	610.6	620.4	633.0	648.1	660.1	672.4
WITHLOW	482.8	491.2	511.6	524.1	516.1	524.4	548.5	568.2	588.3	601.2	608.2	605.1	610.0	619.6	632.2	647.3	659.2	671.7
DIFF	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.3	0.6	0.7	0.8	0.8	0.8	0.7
%DIFF	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.1	0.1	0.1	0.1	0.1	0.1	0.1
Services																		
WITHBASE	485.7	503.0	527.9	550.5	564.7	583.0	604.9	635.4	670.0	697.2	715.4	735.1	754.5	777.3	810.2	837.9	867.1	896.5
WITHLOW	485.7	503.0	527.9	550.5	564.7	583.0	604.9	635.4	670.0	697.2	715.4	734.9	754.0	776.9	809.8	837.8	867.3	897.3
DIFF	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.2	0.4	0.4	0.4	0.1	-0.3	-0.7
%DIFF	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.1	0.1	0.0	0.0	0.0	-0.1

Table 8 (Continued)

	1970	1971	1972	1973	1974	1975	1976	1977	1978	1979	1980	1981	1982	1983	1984	1985	1986	1987
Incomes																		
Disposable Income																		
WITHBASE	695.3	751.8	810.4	914.9	999.0	1096.7	1195.1	1317.8	1464.8	1644.2	1824.9	2038.4	2303.8	2580.6	2888.4	3239.9	3599.4	3987.1
WITHLOW	695.3	751.8	810.4	9[illegible]	999.0	1096.7	1195.1	1317.8	1464.8	1644.2	1824.9	2037.4	2300.4	2573.6	2876.9	3222.7	3574.2	3951.4
DIFF	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	1.0	3.4	7.0	11.5	17.2	25.1	35.7
%DIFF	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.1	0.1	0.3	0.4	0.5	0.7	0.9
Real Disposable Income (79$)																		
WITHBASE	1271.7	1266.8	1317.3	1406.9	1395.5	1423.4	1474.6	1527.6	1595.5	1641.9	1654.9	1672.2	1773.4	1766.6	1826.4	1894.4	1946.4	1998.8
WITHLOW	1271.7	1266.8	1317.3	1406.9	1395.5	1423.4	1474.6	1527.6	1595.5	1641.9	1654.9	1672.3	1771.5	1762.1	1827.8	1896.8	1949.8	2003.5
DIFF	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	-0.1	-0.1	-0.5	-1.4	-2.4	-3.4	-4.7
%DIFF	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	-0.1	-0.1	-0.2	-0.2
Before-tax Corporate Profits																		
WITHBASE	75.5	86.5	100.8	126.0	136.9	132.1	166.2	193.1	224.3	256.2	245.6	230.7	265.4	295.3	313.2	391.4	403.6	431.2
WITHLOW	75.5	86.5	100.8	126.0	136.9	132.1	166.2	193.1	224.3	256.2	245.6	230.7	264.3	294.7	313.9	393.6	405.7	435.8
DIFF	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	[illegible]	1.1	0.6	-0.7	-2.2	-2.1	-2.6
%DIFF	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.2	0.4	0.2	-0.2	-0.5	-0.5	-0.6
Aftertax Corporate Profits																		
WITHBASE	41.3	49.0	59.1	76.8	85.3	81.5	102.4	120.3	140.9	160.3	164.3	152.1	173.3	193.7	206.0	254.4	264.8	285.1
WITHLOW	41.3	49.0	59.1	76.8	85.3	81.5	102.4	120.3	140.9	160.3	164.3	151.7	172.4	192.4	205.8	254.9	265.0	285.3
DIFF	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.4	0.8	0.8	0.2	-0.5	-0.2	-0.2
%DIFF	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.3	0.5	0.4	0.1	-0.2	-0.1	-0.1
Real Aftertax Profits (79$)																		
WITHBASE	76.5	86.7	100.8	125.2	125.5	105.8	127.1	140.8	151.0	160.3	150.7	128.5	133.5	138.4	134.3	152.7	148.9	148.7
WITHLOW	76.5	86.7	100.8	125.2	125.5	105.8	127.1	140.8	151.0	160.3	150.7	128.2	132.9	138.1	134.6	153.6	149.9	148.1
DIFF	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.3	0.5	0.3	-0.3	-1.0	-1.0	-1.4
%DIFF	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.2	0.4	0.2	-0.2	-0.6	-0.7	-0.9
Other Indicators																		
State & Local Gov't Bond Rate (%)																		
WITHBASE	6.12	5.22	5.04	5.00	5.90	6.43	5.66	5.20	5.52	5.93	7.86	8.76	9.00	8.42	8.08	8.42	8.36	8.08
WITHLOW	6.12	5.22	5.04	5.00	5.90	6.43	5.66	5.20	5.52	5.93	7.86	8.75	8.95	8.34	7.96	8.27	8.19	7.87
DIFF	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.05	0.09	0.12	0.15	0.18	0.21
%DIFF	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.15	0.51	1.03	1.48	1.76	2.16	2.68
Unemployment Rate (%)																		
WITHBASE	5.0	6.0	5.6	4.8	5.6	8.5	7.7	7.0	6.0	5.8	7.2	7.8	7.1	7.0	7.0	6.5	6.3	6.2
WITHLOW	5.0	6.0	5.6	4.8	5.6	8.5	7.7	7.0	6.0	5.8	7.2	7.8	7.2	7.2	7.2	6.7	6.5	6.5
DIFF	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	-0.1	-0.1	-0.2	-0.2	-0.3
%DIFF	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	-0.5	-1.2	-1.7	-2.1	-2.7	-3.4	-4.1
Industrial Production Index (79=1.000)																		
WITHBASE	0.707	0.718	0.785	0.851	0.848	0.772	0.854	0.906	0.959	1.000	0.963	0.977	1.059	1.105	1.153	1.229	1.258	1.292
WITHLOW	0.707	0.718	0.785	0.851	0.848	0.772	0.854	0.906	0.959	1.000	0.963	0.977	1.058	1.105	1.155	1.233	1.262	1.296
DIFF	0.000	0.000	0.000	0.000	0.000	0.000	0.000	0.000	0.000	0.000	0.000	0.000	0.001	0.000	-0.002	-0.004	-0.004	-0.004
%DIFF	0.000	0.000	0.000	0.000	0.000	0.000	0.000	0.000	0.000	0.000	0.000	0.036	0.061	-0.021	-0.177	-0.298	-0.346	-0.444

Table 9
Estimated Impact of Incremental Pollution Control Costs, 1970-1987
Constant Money Supply

	1970	1971	1972	1973	1974	1975	1976	1977	1978	1979	1980	1981	1982	1983	1984	1985	1986	1987
Gross National Product																		
WITHBASE	992.8	1077.6	1186.3	1327.2	1435.3	1549.9	1718.7	1920.2	2159.6	2417.9	2632.7	2924.7	3318.0	3732.5	4180.7	4737.2	5268.7	5847.0
OFFSET	992.8	1076.6	1184.3	1323.9	1430.8	1544.7	1712.0	1911.5	2148.9	2401.3	2617.1	2897.9	3278.2	3679.6	4113.0	4653.6	5167.3	5722.3
DIFF	0.0	1.0	2.0	3.3	4.4	5.2	6.7	8.6	10.7	16.6	20.6	26.8	39.8	53.0	67.7	83.5	101.3	124.7
%DIFF	0.0	0.1	0.2	0.2	0.3	0.3	0.4	0.5	0.5	0.7	0.8	0.9	1.2	1.4	1.6	1.8	2.0	2.2
Real GNP (79$)																		
WITHBASE	1770.5	1830.6	1934.8	2047.2	2034.8	2011.9	2119.9	2237.3	2344.5	2417.9	2414.6	2428.6	2510.3	2582.5	2669.9	2780.0	2849.4	2927.3
OFFSET	1770.5	1829.3	1932.8	2045.2	2033.4	2011.2	2118.9	2236.0	2343.0	2414.4	2411.2	2424.2	2502.7	2573.6	2660.6	2771.9	2841.2	2918.0
DIFF	0.0	1.3	2.0	2.0	1.4	0.7	0.9	1.4	1.5	3.4	3.4	4.3	7.6	8.9	9.3	8.0	8.2	9.3
%DIFF	0.0	0.1	0.1	0.1	0.1	0.0	0.0	0.1	0.1	0.1	0.1	0.2	0.3	0.3	0.3	0.3	0.3	0.3
Annual Rate of Change																		
WITHBASE	-0.2	3.4	5.7	5.8	-0.6	-1.1	5.4	5.5	4.8	3.1	-0.1	0.6	3.4	2.9	3.4	4.1	2.5	2.7
OFFSET	-0.2	3.3	5.7	5.8	-0.6	-1.1	5.4	5.5	4.8	3.0	-0.1	0.5	3.2	2.8	3.4	4.2	2.5	2.7
DIFF	0.0	0.1	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.1	0.0	0.0	0.1	0.0	0.0	-0.1	0.0	0.0
%DIFF	0.0	2.2	0.6	-0.1	5.2	2.8	0.1	0.3	0.1	2.6	0.4	6.8	4.0	1.5	0.2	-1.5	-0.1	1.1
Prices																		
Implicit Price Deflator (79=1.000)																		
WITHBASE	0.561	0.589	0.613	0.648	0.705	0.770	0.811	0.858	0.921	1.000	1.090	1.204	1.322	1.445	1.566	1.704	1.849	1.997
OFFSET	0.561	0.589	0.613	0.647	0.704	0.768	0.808	0.855	0.917	0.995	1.083	1.195	1.310	1.430	1.546	1.679	1.819	1.961
DIFF	0.000	0.000	0.000	0.001	0.002	0.002	0.003	0.003	0.004	0.005	0.007	0.009	0.012	0.016	0.020	0.025	0.030	0.036
%DIFF	0.000	0.020	0.066	0.151	0.241	0.296	0.347	0.391	0.432	0.550	0.645	0.745	0.908	1.091	1.292	1.500	1.668	1.854
Wholesale Price Index (79=1.000)																		
WITHBASE	0.467	0.483	0.504	0.571	0.678	0.741	0.776	0.823	0.888	1.000	1.141	1.290	1.451	1.624	1.775	1.949	2.147	2.347
OFFSET	0.467	0.482	0.503	0.569	0.675	0.737	0.771	0.819	0.882	0.992	1.130	1.276	1.432	1.598	1.741	1.907	2.097	2.287
DIFF	0.000	0.000	0.001	0.001	0.003	0.004	0.004	0.004	0.005	0.008	0.011	0.014	0.019	0.026	0.033	0.042	0.050	0.060
%DIFF	0.000	0.033	0.110	0.256	0.427	0.502	0.534	0.481	0.637	0.786	0.956	1.073	1.310	1.536	1.854	2.105	2.305	2.611
Consumer Price Index (79=1.000)																		
WITHBASE	0.534	0.556	0.575	0.611	0.678	0.740	0.783	0.834	0.898	1.000	1.134	1.265	1.394	1.527	1.654	1.796	1.949	2.107
OFFSET	0.534	0.556	0.575	0.610	0.677	0.739	0.781	0.831	0.895	0.996	1.129	1.257	1.384	1.513	1.637	1.774	1.923	2.076
DIFF	0.000	0.000	0.000	0.001	0.001	0.002	0.002	0.002	0.003	0.004	0.006	0.007	0.010	0.013	0.018	0.022	0.026	0.032
%DIFF	0.000	0.001	0.042	0.100	0.181	0.239	0.274	0.313	0.348	0.414	0.495	0.583	0.736	0.891	1.075	1.239	1.374	1.526
Annual Rate of Change																		
WITHBASE	5.9	4.2	3.3	6.3	11.1	9.1	5.7	6.5	7.8	11.3	13.4	11.5	10.2	9.5	8.4	8.6	8.5	8.1
OFFSET	5.9	4.2	3.3	6.2	11.0	9.1	5.7	6.5	7.7	11.2	13.4	11.4	10.1	9.3	8.2	8.4	8.4	8.0
DIFF	0.0	0.0	0.0	0.1	0.1	0.0	0.0	0.0	0.1	0.1	0.1	0.1	0.2	0.2	0.2	0.2	0.1	0.2
%DIFF	0.0	0.0	1.3	1.0	0.8	0.7	0.7	0.6	0.5	0.7	0.7	0.9	1.7	1.8	2.4	2.0	1.8	2.0
Investment																		
Real Business Fixed Investment (79$)																		
WITHBASE	195.5	192.6	207.9	237.2	233.1	204.7	215.7	241.1	263.5	280.4	270.5	267.9	276.8	291.6	305.8	323.9	339.5	349.9
OFFSET	195.5	192.4	207.5	236.7	232.7	204.4	215.0	241.0	263.3	279.9	269.7	267.1	275.3	289.3	303.6	322.2	338.5	349.1
DIFF	0.0	0.2	0.4	0.5	0.4	0.3	0.2	0.1	0.1	0.5	0.7	0.8	1.5	2.0	2.2	1.7	1.1	0.8
%DIFF	0.0	0.1	0.2	0.2	0.2	0.1	0.1	0.0	0.1	0.2	0.3	0.3	0.6	0.7	0.7	0.5	0.3	0.2

Table 9 (Continued)

	1970	1971	1972	1973	1974	1975	1976	1977	1978	1979	1980	1981	1982	1983	1984	1985	1986	1987
Producers' Durable Equipment																		
WITHBASE	111.9	111.0	123.1	145.3	147.5	129.7	137.6	160.0	174.3	183.8	175.2	171.0	179.9	190.0	199.4	211.3	222.1	229.9
OFFSET	111.9	110.9	122.8	145.0	147.2	129.6	137.6	160.0	174.2	183.6	174.8	170.5	179.0	188.8	198.2	210.5	221.7	229.8
DIFF	0.0	0.1	0.3	0.3	0.2	0.1	0.0	0.0	0.0	0.3	0.4	0.5	0.9	1.2	1.2	0.9	0.4	0.2
%DIFF	0.0	0.1	0.2	0.2	0.2	0.1	0.0	0.0	0.0	0.1	0.3	0.3	0.5	0.6	0.6	0.4	0.2	0.1
Nonresidential Construction																		
WITHBASE	87.4	85.2	88.0	94.3	86.9	76.1	78.4	80.6	80.8	96.5	95.8	92.3	97.3	101.5	106.6	112.8	117.5	119.8
OFFSET	87.4	85.2	87.8	94.1	86.7	76.0	78.3	80.5	80.7	96.3	95.5	91.9	96.6	100.7	105.6	111.9	116.8	119.1
DIFF	0.0	0.0	0.1	0.2	0.2	0.2	0.1	0.1	0.1	0.2	0.3	0.4	0.7	0.8	1.0	0.9	0.7	0.7
%DIFF	0.0	0.1	0.2	0.2	0.2	0.2	0.2	0.1	0.1	0.2	0.3	0.4	0.7	0.8	0.9	0.8	0.6	0.6
Housing Starts (mil. units)																		
WITHBASE	1.44	2.04	2.36	2.05	1.33	1.16	1.53	1.97	2.01	1.72	1.32	1.40	1.84	1.77	1.82	2.06	2.06	2.09
OFFSET	1.44	2.02	2.34	2.02	1.31	1.15	1.53	1.96	1.99	1.69	1.30	1.35	1.77	1.70	1.75	2.00	2.01	2.04
DIFF	0.00	0.02	0.03	0.03	0.02	0.01	0.01	0.01	0.02	0.04	0.01	0.05	0.08	0.07	0.08	0.06	0.06	0.05
%DIFF	0.00	1.06	1.08	1.29	1.62	0.58	0.35	0.49	0.87	2.11	2.14	3.85	4.30	4.40	4.45	2.98	2.75	2.69
Trade																		
Real Imports (79$)																		
WITHBASE	163.6	170.4	188.6	201.0	198.3	175.3	207.8	224.2	251.2	266.4	266.5	266.4	283.9	297.9	307.0	323.4	336.0	344.7
OFFSET	163.6	170.2	188.2	200.6	198.1	175.2	208.0	224.3	251.2	266.2	265.8	266.1	287.6	296.1	305.0	327.1	335.5	344.4
DIFF	0.0	0.2	0.4	0.5	0.2	0.0	-0.2	-0.1	0.0	0.1	0.7	0.3	1.3	1.9	2.0	1.3	0.5	0.3
%DIFF	0.0	0.1	0.2	0.2	0.1	0.0	-0.1	-0.1	0.0	0.0	0.2	0.1	0.5	0.6	0.7	0.4	0.2	0.1
Real Exports (79$)																		
WITHBASE	135.3	136.2	140.7	186.7	200.2	198.7	211.3	217.2	244.7	281.8	309.9	308.8	323.1	338.1	340.5	356.3	360.1	371.7
OFFSET	135.3	136.2	140.7	186.8	200.3	198.8	211.3	217.2	244.7	281.9	310.2	309.1	323.3	338.3	340.6	356.1	359.4	370.6
DIFF	0.0	0.0	0.0	0.0	-0.1	0.0	0.0	0.0	0.0	-0.1	-0.3	-0.2	-0.1	-0.1	0.0	0.2	0.7	1.1
%DIFF	0.0	0.0	0.0	0.0	-0.1	0.0	0.0	0.0	0.0	0.0	-0.1	-0.1	0.0	0.0	0.0	0.1	0.2	0.3
Real Consumption (79$)																		
Motor Vehicles & Parts																		
WITHBASE	59.2	70.6	81.3	87.6	72.9	73.4	88.7	98.4	101.9	95.6	81.1	86.9	96.5	95.8	103.2	109.6	111.4	114.2
OFFSET	59.2	70.4	81.1	87.4	72.8	73.3	88.6	98.2	101.7	95.3	82.6	86.6	95.7	94.8	102.2	109.1	110.7	113.3
DIFF	0.0	0.2	0.2	0.2	0.1	0.1	0.1	0.2	0.2	0.2	0.6	0.4	0.8	1.0	1.0	0.5	0.7	0.8
%DIFF	0.0	0.2	0.2	0.3	0.1	0.2	0.1	0.2	0.2	0.2	0.7	0.4	0.9	1.1	1.0	0.5	0.6	0.7
Other Durables																		
WITHBASE	70.2	72.6	80.9	89.4	90.1	89.8	95.4	103.3	111.3	117.0	112.8	114.6	119.0	123.6	131.1	139.0	143.3	148.3
OFFSET	70.2	72.5	80.8	89.3	89.9	89.7	95.2	103.0	110.9	116.5	112.2	113.0	117.8	122.1	129.2	137.1	141.2	146.0
DIFF	0.0	0.1	0.1	0.2	0.2	0.1	0.2	0.3	0.4	0.6	0.6	0.8	1.2	1.6	1.8	1.9	2.1	2.4
%DIFF	0.0	0.1	0.2	0.2	0.2	0.1	0.2	0.3	0.4	0.5	0.6	0.7	1.0	1.3	1.4	1.4	1.5	1.6
Nondurables																		
WITHBASE	482.8	491.2	511.6	574.1	516.1	524.4	548.5	568.2	580.3	601.2	608.2	605.4	610.6	620.4	633.0	648.3	660.1	672.4
OFFSET	482.8	491.1	511.5	574.4	516.3	524.7	548.8	568.5	580.5	601.4	608.5	606.0	610.9	620.7	633.5	648.9	661.2	673.8
DIFF	0.0	0.1	0.1	0.0	-0.2	-0.3	-0.3	-0.3	-0.2	-0.2	-0.3	-0.6	-0.3	-0.4	-0.5	-0.8	-1.2	-1.4
%DIFF	0.0	0.0	0.0	0.0	0.0	-0.1	-0.1	0.0	0.0	0.0	-0.1	-0.1	-0.1	-0.1	-0.1	-0.1	-0.2	-0.2
Services																		
WITHBASE	485.7	503.0	527.9	550.5	564.7	583.0	607.9	635.4	670.0	697.2	715.4	736.1	754.5	777.3	806.2	837.9	867.1	896.5
OFFSET	485.7	502.8	527.7	550.1	564.3	582.7	607.5	634.9	669.5	696.4	714.4	733.9	752.7	775.0	803.5	835.1	864.0	893.1
DIFF	0.0	0.1	0.3	0.4	0.4	0.4	0.4	0.5	0.5	0.8	1.1	1.3	1.8	2.3	2.7	2.8	3.1	3.4
%DIFF	0.0	0.0	0.0	0.1	0.1	0.1	0.1	0.1	0.1	0.1	0.1	0.2	0.2	0.3	0.3	0.3	0.4	0.4

Table 9 (Continued)

	1970	1971	1972	1973	1974	1975	1976	1977	1978	1979	1980	1981	1982	1983	1984	1985	1986	1987
Incomes																		
Disposable Income																		
WITHBASE	695.3	751.8	810.4	914.9	999.0	1096.7	1195.1	1317.8	1464.8	1644.2	1824.9	2038.4	2303.8	2580.6	2908.4	3239.9	3599.4	3987.1
OFFSET	695.3	751.4	809.7	913.5	996.8	1094.0	1191.5	1308.3	1459.3	1635.8	1814.4	2025.1	2284.7	2554.9	2854.8	3196.6	3546.3	3922.0
DIFF	0.0	0.3	0.7	1.4	2.2	2.7	3.5	9.5	5.5	8.4	10.5	13.3	19.1	25.7	33.6	43.3	53.0	65.1
%DIFF	0.0	0.0	0.1	0.2	0.2	0.2	0.3	0.3	0.4	0.5	0.6	0.7	0.8	1.0	1.2	1.4	1.5	1.7
Real Disposable Income (79$)																		
WITHBASE	1221.7	1266.8	1317.3	1406.9	1395.5	1423.4	1474.6	1527.6	1599.5	1641.9	1654.9	1672.2	1723.4	1766.5	1826.4	1894.4	1946.4	1998.8
OFFSET	1221.7	1266.4	1316.7	1406.4	1395.4	1423.6	1475.0	1528.0	1599.8	1641.4	1654.8	1672.3	1722.6	1765.7	1825.7	1894.4	1947.1	1999.8
DIFF	0.0	0.4	0.5	0.4	0.1	-0.4	-0.3	-0.4	0.3	0.4	0.1	-0.2	0.8	0.9	0.7	0.0	-0.7	-1.0
%DIFF	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.1	0.0	0.0	0.0	0.0
Before-tax Corporate Profits																		
WITHBASE	75.5	86.5	100.8	126.0	136.9	132.1	166.2	193.1	224.3	256.2	245.6	230.7	265.4	295.3	313.2	391.4	403.6	433.2
OFFSET	75.5	86.1	100.0	124.7	135.6	131.0	165.0	191.5	222.4	252.5	241.7	226.0	257.3	285.8	302.5	380.6	392.4	419.4
DIFF	0.0	0.4	0.8	1.3	1.3	1.1	1.2	1.5	1.9	3.8	3.9	4.7	8.0	9.5	10.7	10.8	11.2	13.8
%DIFF	0.0	0.5	0.8	1.0	1.0	0.8	0.7	0.8	0.9	1.5	1.6	2.1	3.1	3.3	3.5	2.8	2.9	3.3
After-tax Corporate Profits																		
WITHBASE	41.3	49.0	59.1	76.8	85.3	81.5	102.4	120.3	140.9	160.3	164.3	152.1	173.3	193.2	206.0	254.4	264.8	285.1
OFFSET	41.3	48.8	58.6	76.0	84.5	80.9	101.7	119.4	139.8	158.9	161.8	149.1	168.3	187.2	199.3	247.5	257.6	276.2
DIFF	0.0	0.2	0.5	0.8	0.8	0.6	0.7	0.9	1.2	2.4	2.5	3.0	5.0	5.9	6.7	6.9	7.2	8.8
%DIFF	0.0	0.5	0.8	1.0	0.9	0.8	0.7	0.8	0.8	1.4	1.5	2.0	3.0	3.2	3.4	2.8	2.8	3.2
Real After-tax Profits (79$)																		
WITHBASE	76.5	86.7	100.6	125.2	125.5	105.8	127.1	140.8	153.0	160.3	150.7	128.5	133.5	136.4	134.3	152.7	146.9	146.7
OFFSET	76.5	86.3	99.9	124.2	124.8	105.4	126.8	140.4	152.5	159.0	149.6	127.1	131.1	134.0	132.0	151.4	145.9	145.5
DIFF	0.0	0.4	0.7	1.0	0.8	0.4	0.3	0.4	0.5	1.3	1.1	1.3	2.4	2.4	2.3	1.3	1.0	1.2
%DIFF	0.0	0.5	0.7	0.8	0.6	0.4	0.3	0.3	0.3	0.8	0.8	1.1	1.8	1.8	1.7	0.9	0.7	0.8
Other Indicators																		
State & Local Gov't Bond Rate (%)																		
WITHBASE	6.12	5.22	5.04	5.00	5.90	6.43	5.66	5.20	5.52	5.93	7.06	8.76	9.00	8.42	8.08	8.42	8.36	8.08
OFFSET	6.12	5.22	5.04	4.99	5.90	6.41	5.65	5.19	5.52	5.93	7.04	8.76	8.98	8.38	8.02	8.35	8.30	8.02
DIFF	0.00	-0.01	0.00	0.01	0.01	0.02	0.01	0.01	0.01	0.00	0.01	0.01	0.02	0.04	0.06	0.07	0.06	0.06
%DIFF	0.00	-0.11	-0.09	0.11	0.13	0.27	0.25	0.21	0.11	-0.06	0.13	0.09	0.27	0.48	0.69	0.78	0.73	0.73
Unemployment Rate (%)																		
WITHBASE	5.0	6.0	5.6	4.8	5.6	8.5	7.7	7.0	6.0	5.8	7.2	7.8	7.1	7.0	7.0	6.5	6.3	6.2
OFFSET	5.0	6.0	5.6	4.9	5.6	8.5	7.7	7.0	6.0	5.8	7.2	7.8	7.2	7.1	7.1	6.6	6.3	6.3
DIFF	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	-0.1	-0.1	-0.1	-0.1	-0.1	-0.1
%DIFF	0.0	-0.2	-0.6	-0.6	-0.4	-0.1	-0.1	-0.2	-0.2	-0.5	-0.6	-0.5	-1.1	-1.4	-1.4	-1.2	-1.0	-1.1
Industrial Production Index (79=1.000)																		
WITHBASE	0.707	0.718	0.785	0.851	0.848	0.772	0.854	0.906	0.959	1.000	0.963	0.937	1.059	1.105	1.153	1.229	1.250	1.292
OFFSET	0.707	0.717	0.784	0.850	0.847	0.771	0.854	0.905	0.958	0.997	0.960	0.934	1.053	1.097	1.146	1.224	1.252	1.286
DIFF	0.000	0.001	0.002	0.002	0.001	0.001	0.001	0.001	0.001	0.003	0.003	0.003	0.006	0.007	0.007	0.006	0.005	0.006
%DIFF	0.000	0.148	0.211	0.193	0.117	0.066	0.064	0.103	0.110	0.268	0.319	0.320	0.604	0.662	0.648	0.459	0.419	0.488

Table 10
Comparison of Alternative Simulations

	With Base Case	With Holding Money Supply Constant	With High Cost	With Low Cost	Without
Real GNP (Billions 79$)					
Level in 1980	2414.6	2411.2	2415.3	2414.6	2415.9
Level in 1987	2927.3	2918.0	2930.5	2928.9	2949.1
Growth Rate 1970-1987	3.0	3.0	3.0	3.0	3.1
Implicit Price Deflator (1979=1)					
Level in 1980	1.090	1.083	1.090	1.090	1.059
Level in 1987	1.997	1.961	2.000	1.980	1.860
Growth Rate 1970-1987	7.8	7.6	7.8	7.7	7.3
Unemployment Rate (%)					
Level in 1980	7.2	7.2	7.2	7.2	7.5
Level in 1987	6.2	6.3	6.2	6.5	6.7
Business Fixed Investment (Billions 79$)					
Level in 1980	270.5	269.7	270.5	270.5	268.4
Level in 1987	349.9	349.1	350.5	344.3	349.0

ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS
WASHINGTON, D.C. 20544

WILLIAM E. FOLEY
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July 20, 1981

Honorable George E. Danielson
Chairman, Subcommittee on Administrative
Law and Governmental Relations
2265 Rayburn House Office Building
Washington, D.C. 20515

Dear Mr. Chairman:

In your letter of May 11, 1981, you requested the views of the Judicial Conference of the United States on H.R. 746. As I indicated to you at that time, the Judicial Conference was then in the process of considering H.R. 746 and other regulatory reform bills of the 97th Congress. In order to expedite the development and transmission of Judicial Conference views to Congress, the Judicial Conference in March of this year created a special ad hoc committee to consider the regulatory reform bills pending in Congress. That committee sent its report and recommendations to the Executive Committee of the Judicial Conference last week. Because the Judicial Conference meets only twice a year in March and September, the Conference has an Executive Committee authorized to act on behalf of the Judicial Conference on matters requiring action prior to a regularly scheduled session of the Judicial Conference. Due to the priority attention that H.R. 746 and S. 1080 are receiving in Congress, the Executive Committee has acted on behalf of the Judicial Conference in an effort to be responsive to congressional requests for Judicial Conference views.

The Judicial Conference addressed three distinct areas of concern:

I. The scope of judicial review of the administrative agency actions and the standards for such review;

II. The level of judicial review in the first instance in the federal court system; and

III. The proposed solution to eliminating the unseemly "race to the courthouse" in administrative agency cases

I. Scope of Judicial Review

The Conference first addressed its attention to the addition of the word "independently" (italicized) to Section 706(a) and to the language in the new Section 706(c) which precludes a "presumption in favor or against agency action." These sections are quoted below. The language of the existing section of the Administrative Procedure Act is in regular type; the additions made by S. 1080 are italicized. (The additions made by H.R. 746 to 706(c) are similar but presented in a different order.)

S. 1080

§ 706. Scope of Review.

(a) To the extent necessary to decision and when presented, the reviewing court shall *independently* decide all relevant questions of

law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action.

text deleted

706(c) In making determinations under clause (2)(C) of subsection (a) of this section, the court shall require that action by the agency is within the scope of the agency jurisdiction or authority on the basis of the language of the statute or, in the event of ambiguity, other evidence of legislative intent. In making determinations on other questions of law, the court shall not accord any presumption in favor or against agency action.

The Conference does not object to the use of the word "independently" in §706(a) nor to the use of the phrase "[no] presumption in favor or against agency action" in §706(c). The Conference recognizes the importance of preserving the judiciary's traditionally independent approach to questions of law. The Judicial Conference is concerned that the language employed in S. 1080 and in H.R. 746 will generate new cases and will require more extensive judicial analyses than Congress intends or is practicable for the federal courts to undertake. Without appropriate qualifying language in the bill itself or in its legislative history, the modifications to the Administrative Procedure Act will have an effect beyond that intended by Congress and risks imposing unmanageable burdens upon the judiciary. The bills, S. 1080 and H.R. 746, appear to apply with equal force to all questions that might technically be termed matters of law, including the thousands of minor, interstitial matters which Congress appears to have intended as appropriate subjects of agency expertise. Additionally, there will be cases in which issues of law and fact will be so intermixed as to defy any federal court's efforts to separate them. To apply literally this proposed language concerning the scope of review to all issues in all agency cases before the courts might require duplication of the agencies' decisions by the reviewing court. The committee questions whether Congress intended that in all agency actions the federal courts be required to undertake such a difficult and time-consuming, if not impossible, task. It appears inappropriate that the judicial review function become equated with complete oversight and redetermination of administrative agency decisions including factual decisions. Not only would such review be complex and technical in nature, but the scope of reveiw contemplated in these two bills would significantly increase the incentive to litigate agency decisons. The impact on the courts would be an increase in the number of administrative agency cases and a qualitative increase in the courts' workloads, given the breadth of matters before the courts, the depth of the reveiws, and the complexity of the matters subject to judicial review.

Position I.A.

> The Judicial Conference is concerned with preserving the independent review of questions of law in agency actions by the federal courts. However, the language used in S. 1080 and H.R. 746 to accomplish that objective overreaches that goal and creates an unmanageable burden for the federal courts. Without appropriate qualifying language, the Judicial Conference opposes the modifications proposed to ensure independent judicial review because the effect of the proposed language would exceed the objective intended by Congess.

If Congress believes as a matter of policy that judicial review is necessary, Congress could create a specialized Article I court or a group of such executive branch tribunals to perform such judicial review. The existence of such a court would avert the overburdening of the Article III courts with the many, routine appeals from agency decisions and rules. Appeal by certiorari from that court to an Article III court could, of course, be created for meritious cases. The Judicial Conference supported

the creation of such a court for Veterans Appeals in the 96th Congress. The Judicial Conference Subcommittee on Federal Jurisdiction which met in June of 1981 recommends reaffirmation of that position. The subcommittee also recommends supporting a similar Article I court for the appeals of Social Security claims. The reason is clear, the federal courts cannot absorb the workload. The federal courts today, given their existing backlogged dockets and their limited resources, could not hear and decide in any reasonable period of time the cases which the judicial review provisions contained in S. 1080 and H.R. 746 would generate.

Position I.B.

> The Judicial Conference supports, as an alternative to direct review of administrative agency cases, the creation of an Article I executive branch court or courts with certiorari review by Article III courts.

The second major issue which the Conference addressed under the scope of judicial review was the modification of the Administrative Procedure Act to set a standard for judicial review of an agency's informal rulemaking under section 553. The Administrative Procedure Act currently provides no specialized standard of review for agency proceedings subject to section 553 of title 5. The proposed standards are as follows:

S. 1080

> (F) *without substantial support in the rulemaking file, viewed as a whole, for the asserted or necessary factual basis, as distinguished from the policy or legal basis, of a rule adopted in a proceeding subject to section 553 of this title; and*

H.R. 746

> (F) *without substantial support in the rulemaking file, viewed as a whole, for the asserted or necessary factual basis subject to section 553 of this tile; or*

The Conference is concerned that the proposed language may blur the distinction between informal rulemaking (section 553) and formal rulemaking (section 554). The use of the phrase "substantial support" in S. 1080 and H.R. 746 is an improvement over the phrase "substantial evidence" which had been debated in the 96th Congress, but "substantial support" still tends to evoke an adjudicatory standard. Such a standard for informal rulemaking negates the Congressional purpose in establishing an informal process for creating, modifying, and repealing certain types of agency regulations. The Conference noted that there is an enormous number of minor regulations which are subject to the informal process and that there are comparatively few cases involving important rules with significant impact which are subject to this process.

A reviewing court needs the flexibility to address each case in a manner appropriate to the nature of the regulation considered, including assessing the suitability of the particular file in light of the particular regulation involved. The Conference reasoned that the Congressional intent in adding section 706(a)(2)(F) is to require support sufficient under the circumstances for the operation of the rulemaking process in a particular instance. The Conference believes that the phrase "adequate support" or the phrase "sufficient support" would better effectuate that intent than the phrase "substantial support" which appears in S. 1080 and H.R. 746. The Conference recognizes that the decision

whether to add a separate standard for reviewing informal rulemaking is a matter of policy for Congress to address. Given the fact that Congress has inserted such a standard in S. 1080 and H.R. 746, the Conference feels that it is appropriate for the Judiciary to comment on the means by which Congress seeks to codify the requirement for support in an agency rulemaking file.

Position I.C.

> The Judicial Conference proposes alternatives to the phrase "substantial support" in section 706(a)(2)(F) such as "adequate support" or "sufficient support" because the use of the term "substantial support" blurs the necessary distinction between the informal rulemaking process and the formal adjudicatory process which requires "substantial evidence" on the record.

A third concern considered was the pending amendments to permit judicial review of agency decisions and agency regulatory analyses supporting those decisions. Such judicial review would be a review of the entire informal rulemaking file, a review of the analyses and data supporting the agency's decisions, and a review of the non-documented processes of decision-making in informal rulemaking (§553). Such matters are not the equivalent of a record in the sense that courts now review the records of adjudicatory agency proceedings (§554). (For example, these amendments would put Article III courts in the position of re-determining an agency's factual decision whether the $100 million impact level has been reached. The bills would also require the courts to analyze the analysis that the agency used to reach their decision.) Not only will the number of cases increase by creating such judicial review, but the time and expertise to make the review required will also increase dramatically. The Conference questions the ability of the federal courts to perform such a task effectively and quickly.

Position I.D.

> The Judicial Conference opposes the creation of judicial review of such agency determinations and the supporting regulatory analyses.

The fourth and final issue that the Conference considered pertaining to the scope of judicial review was the potential for "interlocutory" judicial review of agency decisions (e.g., whether to classify a rule as a major or minor rule). H.R. 746 (as introduced and as printed on June 8, 1981) explicitly precludes judicial review of an agency decision such as cited above (Section 632(a) p. 10 of the June 8, 1981, committee print of H.R. 746). S. 1080 is silent on the subject. Because there is concern that an amendment to create such judicial review may be offered, the Conference decided to address the issue.

The Conference opposes judicial review of agency decisions during the rulemaking process for several reasons. First, such "interlocutory" review by the federal courts would add cases to already overburdened federal court dockets, cases which might again be before that court on the merits of the rulemaking process. Second, the agency's initial decisions may not be well suited for judicial review at an early point in time given a potential paucity of information in the file combined with the technical nature of the regulation. Many cases could require remand. It is the Conference's opinion that reversals of preliminary agency decisions would occur only rarely. Also, judicial review at an early stage of the rulemaking process would require more discretion by

the reviewing court than Congress may have intended. Third, due to the flood of civil cases coming to the courts and the existing backlog, these "interlocutory" reviews would not only overburden the federal courts, but they would also hinder the rulemaking process. Given that one objective of regulatory reform is to expedite agency rulemaking procedures, creating a certain delay by permitting premature judicial review of agency decisions conflicts with achieving that objective. Finally, this delay could be manipulated by either those making the rule or those challenging it. Furthermore, that same strategy could be applied not only to the creation of new regulations but also to the modification or repeal of existing regulations.

Position I.E.

The Judicial Conference opposes efforts in Congress to create a right of judicial review for preliminary administrative agency decisions in the course of rulemaking.

II. Level of Judicial Review

H.R. 746 as introduced included the amendments to 5 U.S.C. §704. The text of the current section 704 is as follows:

Ch. 7 JUDICIAL REVIEW 5 §704

§ 704. Actions reviewable

Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.
Pub. L. 89-554, Sept. 6, 1966, 80 Stat. 392.

The amendments proposed in the original version of H.R. 746 are as follows:

JUDICIAL REVIEW

Sec. 207. (a) Section 704 of title 5, United States Code, is amended--

(1) by inserting "(a)" immediately before "Agency"; and

(2) by adding at the end thereof the following new subsection:

"(b) If no special statutory review proceeding is applicable, an action for review of a rule defined in section 551(4) of this title shall be brought in the United States Court of Appeals, and venue of such action shall be determined in accordance with section 2343 of title 28, United States Code.".

The proposed addition to section 704(b) has been deleted from the June 8 committee print of the House bill. The Judicial Conference chose, however, to consider this issue and recommend a position because the proposed change may be offered as an amendment to the Senate bill or reappear during the House mark-up of its bill.

The effect of the proposed addition of 704(b) would be to direct all administrative agency cases absent special statutory provisions to the courts of appeals rather than to district courts. The Conference considered the comparative workloads of the district and the appeals courts as well as the nature of the administrative agency action reviewed (e.g., Social Security cases). The Conference believes that the status quo is preferable to the judiciary.

Position II.

The Judicial Conference opposes adding a section 704(b), as proposed in H.R. 746 as introduced.

III. Race to the Courthouse

The Conference directed its attention to the solution proposed in S. 1080 to the problem of the "race to the courthouse." The provisions in S. 1080 (pp.22-24) substantially embody the proposal recommended by the Administrative Conference of the United States. To avoid unseemly action on the part of attorneys and to avoid inconsistent and contested actions by the various courts in deciding such matters of venue, the provisions in S. 1080 would amend 28 U.S.C. §2112 to provide for random selection by the Administrative Office of the United States Courts when multiple proceedings have been instituted. The Judicial Conference supports this proposal with the caveat that the random selection is viewed as a ministerial function not as a judicial function. Were it viewed otherwise, the Administrative Office would not be an appropriate agent to perform the selection. The Conference is concerned that no judicial functions be imposed on the Administrative Office by Congress. However, the Conference believes that the selection function contemplated in this bill is ministerial and administrative in nature.

Position III.

As a matter of principle, the Conference opposes the imposition of any judicial function on the Administrative Office of the U.S. Courts. However, the Judicial Conference supports S. 1080's solution to the "race to the courthouse" problem with the qualification that the selection procedure is a purely ministerial duty. The Judicial Panel on Multidistrict Litigation with its staff may, however, be an alternative to the Administrative Office of the U.S. Courts as the agent administering the random selection process.

Sincerely yours,

William E. Foley
Director

August 20, 1981

MEMORANDUM

TO: Richard B. Smith, Chairman, American Bar Association Coordinating Group on Regulatory Reform

FROM: Clark Byse

SUBJECT: Analysis of Views of the Judicial Conference of the United States Concerning the Judicial Review Provisions of H.R. 746 and S. 1080.

This is in response to your request for an analysis of the views of the Judicial Conference of the United States concerning the judicial review provisions of H.R. 746 and S. 1080, particularly the sections of these bills that relate to the Bumpers' Amendment and review of regulatory analyses. The Conference's discussion and its positions and recommendations are set forth in a letter dated July 20, 1981, from William E. Foley, Director, Administrative Office of the United States Courts to the Honorable George E. Danielson, Chairman, Subcommittee on Administrative Law and Governmental Relations, Committee on the Judiciary, House of Representatives. In preparing my comments, I shall follow the plan of organization of Mr. Foley's letter.

The Conference first considered the addition of the word "independently" in section 706(a) and the addition of new section 706(c). The Conference stated that it "recognizes the importance of preserving the judiciary's traditionally independent approach to questions of law" and that it does not object to the use of the word "independently" in section 706(a) or to the phrase "(no) presumption in favor of or against agency action" in section 706(c). Nevertheless, the Conference opposes enactment of section 706(c). Its objections appear to be the following:

1. Enactment of the proposal very likely will generate new cases and will require more extensive judicial analyses than Congress intends or is practicable for federal courts to undertake. This "risks imposing unmanageable burdens upon the judiciary." (p.2 of the Foley letter.) The review contemplated by the bills would "significantly increase the incentive to litigate agency decisions." This would increase the number of judicial review cases

and also cause a "qualitative increase in the court's workloads given the breadth of matter before the courts, the depth of the reviews, and the complexity of the matters subject to judicial review." (p. 3).

2. The bills "appear to apply with equal force to all questions that might technically be termed matters of law, including thousands of minor, interstitial matters which Congress appears to have intended as appropriate subjects of agency expertise." (p.2).

3. "[T]here will be cases in which the issues of law and fact will be so intermixed as to defy any federal court's efforts to separate them." (p.2).

4. "To apply literally this proposed language concerning the scope of review to all issues in all agency cases before the courts might require duplication of the agencies' decisions." (pp. 2-3) "It appears inappropriate that the judicial review function become equated with complete . . . redetermination of agency . . . factual decisions." (p.3).

I turn to these concerns and make the following observations from the perspective of the Coordinating Group's continuing involvement with this legislation over the past three years.

I. Possible Additional Burdens on the Courts

The Conference's first argument -- that enactment of proposed section 706(c) would significantly increase both the quantity of judicial review cases and the qualitative character of the courts' review, thereby, in the Conference's words, "imposing unmanageable burdens on the federal judiciary" -- is, in my opinion, overstated. I agree with the Conference that resourceful advocates confronted with adverse administrative determinations would seek judicial review; and very likely they would rely on section 706(c) as requiring the court to exercise an independent judgment concerning the scope of the agency's jurisdiction or authority and prohibiting the court from presuming that the agency's determinations on other questions of law are correct or valid. But I disagree with the Conference's contention that to require federal reviewing courts to decide legal questions without benefit of a presumption would impose undue burdens on the judiciary, qualitatively or quantitatively.

First, as to the qualitative argument, I believe, and think that the Conference would agree, that determining the scope of an agency's jurisdiction or authority is a judicial responsibility and that most federal judges conscientiously discharge that responsibility. To the extent that this belief is correct, no new qualitative burden is imposed. But, it may be asked, if no new burden is imposed, why enact the provision? The answer is that in the opinion of the sponsors of the legislation and of others, some courts -- either in fact or, because of the phrasing of their opinions, in appearance -- do not exercise their reviewing function in an appropriately independent fashion. So viewed, section 706(c) is "sending a message" to a minority of judges to conform their practices in fact and in appearance to the standard adhered to by the vast majority of their colleagues.

To the extent that a minority of federal judges is not now adequately discharging its reviewing responsibility, in fact or in appearance, the Conference is correct in stating that a new qualitative duty would be imposed by section 706(c). I believe, however, that to the extent courts are not now properly performing their reviewing role, they are shirking the responsibility that our system of judicial review imposes on the judiciary, that it is entirely fitting that Congress issue corrective instructions, and that discharging that conventional judicial responsibility would not be unduly burdensome.

I thus conclude that the Conference's qualitative objection is applicable only to a minority of federal judges and, that as to them, whatever costs may be involved are outweighed by the benefits flowing from a faithful discharge of the reviewing court's independent responsibility and the public's perception that the judiciary is discharging that responsibility.

The Conference's quantitative objection that enactment of section 706(c) will generate new cases is more difficult to appraise, simply because there is not available data on

which to base reliable predictions. But here, as in so many other areas of the law, decisionmakers must act on the basis of inadequate data. In this light, I think it understandable that the Conference should express a concern that some lawyers and their clients may conclude that section 706(c) authorizes a more intrusive scope of review than is available under existing law and that, therefore, some indeterminate number of additional administrative decisions may be appealed to an already overburdened federal judicial system. I recognize that the lower federal courts are deluged with section 1983, social security and other litigation, that despite appointment of additional judges, backlogs have not vanished or in some instances even been diminished and that conscientious judges work long hours at their sisyphean task. It is entirely appropriate and understandable, therefore, for the Conference to be sensitive to any possible addition to the judicial caseload.

I interpret the Conference's quantitative objection in this light and I share its concern that the federal judiciary be adequately staffed. But I doubt that the number of additional review cases that section 706(c) might generate would significantly affect the backlog problem. In most cases, judicial review would be sought anyway. In addition, as Senator Bumpers stated when S. 1080 was introduced, the legislation should result in fewer regulations -- which, of course, would lessen any possible incremental judicial burden:

> The judicial review provisions in this bill, together with other long needed procedural reforms it includes, will have the effect of making agencies stop, look and listen before they act. Where they decide to act, they will have to be more careful about what we in Congress have or have not said in the substantive statutes. The agency will have to be more careful in assembling the facts. The agency will have to be more careful about what it decides and how it explains its decisions to the regulated, the courts, and the American people. As a result we can expect fewer but better agency actions, less but more reasonable and effective regulations.
>
> 127 Cong. Rec. S. 4240-4241 (April 30, 1981).

The subject of possible additional burdens on the courts was also discussed in the testimony of witnesses for the American Bar Association and others in the Senate hearings on May 14 and 15. The thrust of that testimony was that (a) the Bumpers Amendment must be viewed in the context of the other provisions of S. 1080, particularly those amending §553 and those requiring regulatory analyses; (b) overall, these provisions should result in fewer but better rules; (c) this in turn will lessen the perceived need for appeals and thus the number of appeals, (d) this is likely to offset any increase in appeals resulting from the enhanced hope of prevailing on an appeal of an agency rule because the "no presumption" clause puts the scales of justice back into equal balance.

I also submit that if, as its sponsors believe, section 706(c) would accomplish a desirable objective, a conjectural burden on the judiciary is not a valid reason for rejecting the proposal.

In sum, on this point I suggest that the Conference overstates any possible increase in judicial quantitative or qualitative workload and that to the extent courts now are not giving agency interpretation of statutory terms an independent review, whatever increase in workload may result is justified by achievement of the objective which is, to paraphrase Justice Reed in Social Security Board v. Nierotko, 327 U.S. 358, 369 (1946), that an agency shall "not finally determine the limits of its statutory power [because] [t]hat is a judicial function."

II. Minor and Interstitial Matters

The Conference's second objection is that section 706(c) would require the reviewing court to decide independently "thousands of minor, interstitial matters which Congress appears to have intended as appropriate subjects of agency expertise." This criticism, I believe, reflects a misunderstanding of the meaning and significance of the proposal. The simple command of

section 706(c) is that the judiciary -- not the agency -- shall independently determine the extent of the agency's power or discretion. Faithful discharge of this responsibility calls for discriminating analysis in order to identify the precise error that the complaining party alleges the agency has committed. In any difficult case, the precise error normally will not be identified if the petitioner in the first instance or the reviewing court in the second, perceives the issue only in conclusory terms. Thus, it is not helpful to limit analyses to the question: "Has the agency acted outside the scope of its jurisdiction, authority, discretion or expertise?" Instead, the more discrete and useful questions are those which relate to the agency's decisional process and rationale. In making administrative determinations, administrative officials usually take into account a variety of factors. In any judicial review case, a litigant may contend that the applicable statute does not permit the administrator (1) to consider a particular factor Gegicw v. Uhl, 239 U.S. 3 (1915), or (2) to give a particular factor controlling weight, NLRB v. United Steelworkers, 357 U.S. 357 (1958), or (3) to refuse to consider a possibly relevant factor, Shaffer Transportation Co. v. United States, 355 U.S. 583 (1957). When this kind of precise issue is tendered to the reviewing court, it becomes the responsibility of the court to resolve the issue. In doing so, of course, the court determines the extent of the agency's power, which is exactly the command of section 706(c).

Accordingly, if, in any particular case, the reviewing court holds, in the words of the Conference that Congress "intended" an "interstitial matter" to be an "appropriate subject of agency expertise" -- I would add, "or discretion" -- that is the end of the court's role as the independent arbiter of statutory interpretation. This is so because when Congress determines that a matter shall be committed to administrative discretion, a court cannot lawfully substitute its discretion for that of the agency.

This self-evident proposition is statutorily expressed in APA section 701(a)(2) which provides that the reviewing court's authority under section 706 is qualified "to the extent that . . . agency action is committed to agency discretion." Thus, insofar as the Conference argues that section 706(c) requires or authorizes independent judicial review of thousands of minor agency determinations which Congress has committed to the agencies' discretion, the argument is clearly wrong.

On the other hand, it may be that the Conference is objecting to the requirement imposed by section 706(c) that even in minor matters, the reviewing court shall determine whether the agency has acted within or without the bounds of the discretion delegated to it by Congress. If this in fact is the Conference's objection, my answer is that yes, in our system, it is the responsibility of the judiciary to determine the limits of governmental power in small matters as well as large matters.

I note also that Senator Bumpers addressed the subject of "interstitial" matters in his statement made when S. 1080 was introduced. In discussing the effect of his Amendment on judicial review of agency assertions of authority, the Senator stated:

> In making such determinations, the court will be influenced not only by the statute's legislative history but also by the nature of the asserted power. If, for example, the agency is asserting a basic or significant extension of authority, especially one which bears on personal liberties or heralds significant involvement of the agency in a new areas or imposes significant costs, the reviewing court should not uphold the extension unless it is convinced that the statute and relevant legal materials demonstrate that Congress specifically or generally addressed the issue, and that the statute does contain the authority asserted by the agency.
>
> On the other hand, if the asserted authority at issue relates to an interstitial or minor matter, the reviewing court might well conclude that although Congress had not really addressed the issue, the matter is of such a character that sensible administration necessarily requires exercise of such an implementing authority.
>
> 127 Cong. Rec. S. 4239 (April 30, 1981).

III. Intermixture of Issues of Law and Fact

The Conference's third objection is that in some cases "issues of law and fact will be so intermixed as to defy any federal court's efforts to separate them." I recognize that at times disentangling questions of law from questions of fact may be difficult. But I am confident that if reviewing courts will adhere to the analytical process discussed in the immediately preceding paragraphs -- i.e. precisely identify the question at issue -- there will be few if any cases which will defy the reviewing court's ability to discharge the responsibility assigned to it by section 706(c).

In this connection, I express my agreement with the statement of Senator Bumpers that "Performance of [the] duty [imposed by section 706(c)] often will be difficult, but I am confident that the good sense and resourcefulness of the Federal judiciary will be equal to the task." 127 Congressional Record, S. 4239 (April 30, 1981).

It should also be observed that under existing standards of judicial review, courts must disentangle questions of law from questions of fact. The Bumpers Amendment does not create the task of parsing legal, factual or policy issues.The Amendment merely changes, clarifies or retains the differing criteria applicable to these categories of issues. The fact that courts may occasionally have difficulty distinguishing factual from legal issues does not support rejection of the Bumpers Amendment. No standard of judicial review can ever be totally certain of application.

IV. Duplication and Redetermination of Decisions

The Conference's fourth argument is that section 706(c) "might require duplication of the agencies' decisions by the reviewing court." I note that the Conference does not contend the section would require duplication but only that it might

require duplication. It is my view that even this cautious statement is erroneous. As I have stated above, all that section 706(c) provides is that the reviewing court independently perform its judicial function of determining the scope of the agency's power. Once that has been determined in favor of the agency -- i.e. that it has acted within the scope of its delegated authority -- the court's role becomes the limited one of deciding whether the agency's exercise of the power was reasonable,i.e., not arbitrary or capricious or an abuse of discretion. There is nothing in the wording or legislative history of section 706(c) to suggest that the courts should "duplicate" the agency's decisional process. Moreover, to interpret section 706(c) to require or authorize federal Article III courts to re-do the administrator's decision could create constitutional problems, for Article III courts are not permitted to perform legislative or administrative functions.

Similarly, there is nothing in the wording or legislative history of section 706(c) to suggest that the judicial review function should become equated with "redetermination" of agencies' "factual decisions." The "substantial evidence" and "substantial support" requirements of paragraphs (E) and (F) of section 706(a)(2) demonstrate the contrary.

V. The Conference's Over-all Conclusion re Proposed Section 706(c)

The Conference's conclusion expressed in Position I.A. and accompanying commentary on page 3 of Mr. Foley's letter is that unless there is "appropriate qualifying language" the Conference opposes enactment of the proposed legislation because "the effect of the proposed language would exceed the objective intended by Congress . . . The federal courts today, given their existing backlogged dockets and their limited resources, could not hear and decide in any reasonable period of time the cases which the judicial review provisions contained in S. 1080 and H.R. 746 would generate."

As I have suggested above, it seems to me that the Conference, perceiving a possible increase in judicial workload, has overreacted and has mis-appraised the likely consequences of Congressional enactment of proposed section 706(c). Some of the Conference's objections are reminiscent of criticisms leveled against prior drafts of the legislation. But as those of us who have been involved in the process so well know, the language of the proposal has been significantly changed from that of earlier versions of the Bumpers Amendment.

My own judgment is that the present phrasing is well designed to achieve the objective of independent judicial determination of legal issues while leaving questions of fact, policy and discretion to the agency, and I think that Senator Bumpers' statement of April 30, 1981, to which I have referred above, demonstrates that the principal sponsor of the legislation agrees with this analysis. However, it seems to me that, as the Conference advocates on page 2 of Mr. Foley's letter, it would be entirely appropriate for the responsible congressional committees to make clear in their reports that the legislation does not contemplate judicial "duplication of the agencies' decisions," or "redetermination" of agencies' "factual" decisions or any of the other dire consequances predicted by the Conference. In Senator Bumpers' words, section 706(c) "does not seek to impose any new, strange or radical duty on the judiciary. Instead, it simply directs the reviewing court to take a hard look at the agency's assertion of regulatory jurisdiction or authority." 127 Congressional Record S.4239 (April 30, 1981).

Similarly, I think it is in order for the Judiciary Committees of the House and Senate to give respectful consideration to the Conference's recommendations concerning establishment of Article I courts to handle veterans' and social security appeals. But since I am convinced that the increase in qualitative and quantitative burdens that might result from the pro-

posed legislation would be minimal and since the legislation has been pending in one form or another for six years, I submit that action on this meritorious measure should not be postponed pending congressional consideration of and action on the Article I court proposals.

VI. Substantial Support for Factual Determinations

The Conference's second main point, discussed on pages 4 and 5 of Mr. Foley's letter, is that adoption of paragraph (F) of section 706(a)(2) would "blur the distinction between informal (section 553) rulemaking and formal rulemaking (section 554)." The Conference recognizes that the "use of the phrase 'substantial support' in S.1080 and H.R. 746 is an improvement over the phrase 'substantial evidence' which had been debated in the 96th Congress," but it argues that "'substantial support' still tends to evoke an adjudicatory standard."

I agree with the Conference that "substantial evidence" conceivably could be misinterpreted to impose on the agencies the requirement that in issuing informal rules they provide a formal, on-the-record adjudicatory type of hearing. Unlike the Conference, however, I believe that the "substantial support" standard -- especially in light of the express change to that standard from the "substantial evidence" standard employed in the predecessor bills in the 96th Congress -- makes it clear that an adjudicatory standard is not intended. I invite especial attention to the Report of the House Judiciary Committee, No. 96-1393, 96th Congress, 2d Session, p.55, concerning the substantial support standard employed in the Regulation Reform Act of 1980:

> New subsection (2)(F) of section 706 is consistent with recommendations of the Administrative Conference regarding the necessary factual basis for those rulemakings subject to section 553 of title 5, United States Code:
>
> 3. The appropriate standard for determining whether a rule of general applicability adopted after informal rulemaking rests on an adequate foundation is stated 5 U.S.C. section 706(2)(A) (redesignated by this Amendment as sec-

> tion 706(a)(2)(A)), which provides that a reviewing court must set aside action found to be "arbitrary, capricious (or) an abuse of discretion" where such a rule is attacked on the ground that an asserted factual basis does not support it or that a necessary factual foundation is lacking, this standard requires a reviewing court to decide, in light of the information before it . . . whether the agency's conclusions concerning the significance of factual information can be said to be rationally supported. Recommendation 74-4 of the Administrative Conference of the United States, 1 CFR 305.74.4, adopted May 30-31, 1974.
>
> By using the term "substantial support," the Committee does not intend that courts should adopt a "substantial evidence" test for informal rulemaking under 5 U.S.C. 553. Many, if not most, of the crucial determinations pertinent to informal rulemaking are of a general policy nature. They do not turn on the existence or nonexistence of specific "facts" so much as they turn on the evaluation of probabilities, the balancing of objectives and the selection of methods to achieve given ends within the statutory limits.
>
> This substantial support must be found in the rulemaking file, viewed as a whole. The words "substantial support", which are used in place of the Administrative Conference suggestion of "rationally supported", are intended to require that the materials on which an agency bases its factual determination are reliable and credible. The court shall review the file to see whether or not it contains sufficient facts and documentation so as to represent an adequate foundation for the rule.
>
> The Committee does not intend that agencies must adopt more formalized procedures in order to sustain their rules under this standard. In particular, the Committee does not intend, by adopting (2)(F), to impose any additional requirements on agencies involving the compilation of rulemaking files beyond those required in new section 553(f), which requires the establishment of such files.
>
> The Committee does not intend by any of the provisions of this section to shift existing burdens of proof.

In addition, this year Senator Bumpers pointed out upon introduction of S.1080:

> Earlier versions of this amendment used the words "substantial evidence" rather than "substantial support."
>
> The change in language is meant to negate any implication that the intent of the amendment is to require indirectly the use of trial type procedures in informal rulemaking. Procedural requirements for such rulemaking will be found in other provisions of the Administrative Procedure Act, as amended, and in constitutional and common law considerations of fairness.
>
> 127 Congressional Record S.4240 (April 30, 1981).

In light of the House Judiciary Committee Report and of Senator Bumpers' statement -- both of which explicitly disavow an adjudicatory procedure -- I confess my inability to understand how enactment of paragraph (F) would, in the words of the Conference, negate "the Congressional purpose in establishing an informal process for creating, modifying, and repeating certain types of agency regulations." All that paragraph (F)

requires is, in the words of the Recommendation 74-7 of the Administrative Conference, that when "a rule is attacked on the ground that an asserted factual basis does not support it or that a necessary factual foundation is lacking," the reviewing court shall examine the rulemaking file to ascertain if there is substantial support, i.e., -- as the House Report states -- that there are "credible and reliable materials" supporting the factual basis of the rule. This does not impose a formal, adjudicatory mold on the agencies' exercise of their informal rulemaking powers. Instead, it imposes two requirements neither of which involves adjudication or adjudicatory standards.

The first requirement -- which is declaratory of existing law -- is that judicial review of an informal rule shall be based on the administrative record that was before the agency when it promulgated the rule. This requirement, which was imposed by the courts, Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 420 (1971); Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc, 435 U.S. 519, 549 (1978), has become accepted doctrine, and there does not appear to be any judicial or legislative movement to change or abolish the doctrine. Thus, to the extent that this requirement "tends to evoke an adjudicatory standard", the blame, if such there be, must be attributed to the judiciary rather than to the drafters of paragraph (F).

The second requirement imposed by paragraph (F) is that there be "substantial support" for the factual basis of the rule. The Conference suggests that the phrases "adequate support" or "sufficient support" be substituted for "substantial support". The difficulty with this suggestion is twofold. First, in light of the legislative history, it implies that support for the rule's factual basis may be something less than "substantial". Second, to say that the support should be "adequate" or "sufficient" is to say that there should be "enough" support. I ask,

"Adequate" or "sufficient" or "enough" by what standard of adequacy, sufficiency or enoughness? In brief, the suggested changes, if enacted, would constitute a delegation of power to the courts to establish their own standard of review. As much as I respect the federal judiciary, I believe that in our governmental system of representative democracy, it is entirely appropriate for Congress, rather than the judiciary, to make this kind of decision. On the merits of the term "substantial", I believe it properly communicates the message that the materials on which the agency bases its rule shall be, as the House Judiciary Committee Report states, "reliable and credible." This is an appropriately flexible standard which would not in any way interfere with or hinder the issuance and review of informal rules including, as the Conference says, "the enormous number of minor regulations which are subject to the informal process." I note also that paragraph (F) of S.1080 explicitly excludes from its coverage a rule's "policy or legal basis" and that paragraph (F) does not prevent agencies from taking official notice of facts; cf. section 556(e) of the APA.

I think that during the last decade the scope of judicial review of informal rulemaking and the record on which that review is exercised have tended, mutatis mutandis, to move toward the model of judicial review of formal administrative action. Paragraph (F) merely codifies that movement. If, as appears to be the case, Congress believes that this movement is desirable and should be codified, enactment of paragraph (F) is an appropriate means of achieving the desideratum. On the other hand, substitution of the adjectives "significant" or "adequate" for "substantial" would, as I have said, be unsettling and might well reflect a change in the status quo that would be against the mainstream of congressional thinking that the factual underpinning of agency rules should be reliable and credible.

VII. Other Conference Recommendations

I am not sure that I fully understand the Conference's Recommendation A.3. on page 5 of Mr. Foley's letter that the Conference "opposes the creation of judicial review of such agency determinations and the supporting regulatory analyses." The Conference's supporting commentary does not identify the specific section or sections of the bills which it is addressing in Recommendation A.3. Apparently, however, it is referring to sections 623 of both H.R.746 and S.1080, prohibiting judicial review of regulatory analyses of major rules but allowing the reveiwing court to use regulatory analyses in determining the legality of the rule.

The position of the ABA (with which I fully agree) on the general subject of regulatory analyses, including the decision that a rule is or is not a major rule, is that the entire process is a management tool and should not be subject to review in any way. At the same time, we have recognized that regulatory analyses very likely would contain information concerning the rule that would be helpful to a reviewing court when it determined whether the rule was arbitrary or capricious or an abuse of discretion. Accordingly, during the last Congress and in this Congress we have consistently urged that a regulatory analysis in its entirety should not be subject to judicial review but that the analysis should be made available as a part of the rulemaking file to the reviewing court which would consider the information in the analysis insofar as the information was helpful to the court in determining the legality of the rule under the standards of section 706 of the APA. The point is that the court not review or determine the legality of the analysis. Instead, it examines or considers the contents of the analysis to assist it to review and determine the legality of the rule.

On this issue, then, which does not involve the proposed amendments to section 706, we are in substantial agreement with the Conference that regulatory analyses, including the determination that a rule is or is not a major rule, should not be subject to judicial review.

The Conference's final point, in part I of Mr. Foley's letter -- Position I.D. on page 6 -- is that the "Conference opposes efforts in Congress to create a right of judicial review for preliminary administrative agency decisions in the course of rulemaking."

I agree with the Conference's statement on page 6 of Mr. Foley's letter that there are many objections to interlocutory judicial review of administrative action. Therefore, it is very likely that I would oppose legislative proposals to create a right of judicial review for preliminary administrative determinations. But since I know of no such legislative proposals, at this point I can only express my general agreement with the Conference's general opposition to interlocutory review.

In parts II and III of Mr. Foley's letter, the Conference discusses two legislative proposals dealing with the subject of what court shall review administrative actions. The first provides that if "no special statutory review proceeding is applicable", review of administrative rulemaking shall be brought in the United States Courts of Appeals, not, as is the case today, in the federal district courts. The second proposal deals with the problem of the "race to the courthouse."

The American Bar Association has no formal position concerning these matters and therefore I do not analyze them here. For what it is worth, however, my personal opinion concerning these two proposals is that the Conference has correctly appraised their worth, namely that proposed section 704(b) should not be enacted and that the "race to the courthouse" proposal should be adopted.

○